

**THE BIG DISCONNECT:
WILL ANYONE ANSWER THE CALL TO LOWER
EXCESSIVE PRISONER TELEPHONE RATES?**

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As the American prison population has exploded in the last quarter century, the prison telephone industry has grown into a billion-dollar market. Telecommunications companies are granted statewide prison monopolies that subject prisoners' loved ones to grossly inequitable telephone charges. As a result, many families become saddled with outrageously high phone bills. Phone companies defend these rates as necessary to cover government required security-enhancing technology. However, evidence indicates that these excessive rates are a product of the generous commissions companies pay to states, in exchange for exclusive service contracts. This Comment analyzes current telephone policies in several state prison systems, discussing the relative strengths and shortcomings of each policy. This Comment will also discuss and critique potential legislative, regulatory, and judicial approaches to addressing the problem.

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*“We must not exaggerate the distance between ‘us,’ the lawful ones, the respectable ones, and the prison and jail population; for such exaggeration will make it too easy for us to deny that population the rudiments of humane consideration.”*²

—Chief Judge Richard Posner

I. INTRODUCTION

On Christmas Day Missouri resident Janet Logan talked to her husband on the phone for nearly two hours. MCI charged her \$49.80 for the call. Her entire phone bill that month was \$724.24.³ Rae Walton, who lives just outside New York City, has a grandson upstate serving a fifteen-year sentence on an assault charge. “When the phone bill comes, I look at it and weep . . . [a]nd then I pay the bill because I don’t want to jeopardize the line of communication.”⁴ Texas resident Janie Canino has a son incarcerated in Louisiana and is forced to “struggle to keep food on the table and pay the phone bill.”⁵ While on spring break, Karen Wilson’s eighteen-year-old son was convicted of felony tampering with evidence for swallowing a misdemeanor amount of marijuana. During her son’s first ten months in Panama City’s Bay

² Johnson v. Phelan, 69 F.3d 144, 152 (7th Cir. 1995) (Posner, C.J., dissenting).

³ C.D. Stelzer, *Communication Shakedown*, RIVERFRONT TIMES, July 21, 1999, http://www.riverfronttimes.com/Issues/1999-07-21/news/news_full.html (on file with the North Carolina Journal of Law & Technology). The 250-mile round trip visit to Algoa Correctional Center, where her husband is serving time, takes Janet Logan eleven hours. *Id.*

⁴ Zachary R. Dowdy, *Families Seek Cheaper Calls from Cells*, NEWSDAY, Aug. 26, 2005, at A40.

⁵ Brennan Center For Justice, FCC Urged To Lower Phone Rates for Prison Inmates (Mar. 10, 2004), http://www.brennancenter.org/presscenter/releases_2004/pressrelease_2004_0310.html (on file with the North Carolina Journal of Law & Technology). See also IMPLEMENTATION OF PAY TEL. RECLASSIFICATION & COMPENSATION PROVISIONS OF THE TELECOMM. ACT OF 1996, Comments of the Ad Hoc Coalition for the Right to Communicate Regarding Petition for Rulemaking or, in the alternative, *Petition to Address Referral Issues in Pending Rulemaking*, Appendix A, FCC Docket No. 96-128 (Mar. 10, 2004), available at http://www.brennancenter.org/programs/cj/coalition_fcc_comments.pdf (on file with the North Carolina Journal of Law & Technology).

County Jail,⁶ Ms. Wilson was billed \$7,000 for phone calls from her son.⁷

Inmates in many state prisons are only permitted to make expensive collect calls using the services of companies with exclusive contracts with their state's prison system.⁸ These monopolies have naturally resulted in exorbitant rates. A fifteen-minute collect call from a state prison to a different area of the

⁶ While this Comment focuses on excessive collect call rates from state prisons, similar problems exist in many county and local jails. *See, e.g.,* *Arsberry v. Illinois*, 244 F.3d 558, 565 (7th Cir. 2001) (“[T]he very high price charged anyone who wants to talk to an inmate over the phone is greatly in excess of any additional cost to the phone companies or the prisons and jails of allowing inmates to make collect calls.”). Bay County Jail is owned by Corrections Corporation of America (CCA), a private entity which operates a number of county jails and state prisons all over the country. *See* Corrections Corporation of America, Facility List, <http://www.correctionscorp.com/facilitylist.cfm> (last visited Oct. 12, 2006) (on file with the North Carolina Journal of Law & Technology). CCA has been subject to a number of challenges for excessive collect call rates. *See, e.g.,* *Wright v. Corr. Corp. of Am.*, No. 00-293 (D.D.C. Aug. 22, 2001) (dismissing plaintiffs’ claims and referring matter to the Federal Communications Commission).

⁷ New York Campaign for Telephone Justice, Family Stories, http://www.telephonejustice.org/family_stories (last visited Oct. 20, 2006) (on file with the North Carolina Journal of Law & Technology).

⁸ *See, e.g.,* Justin Carver, *An Efficiency Analysis of Contracts for the Provision of Telephone Services to Prisons*, 54 FED. COMM. L.J. 391, 392 (2002) (“One of the more lucrative segments of this industry is the telephone market. In the prison context, the state contracts with a private entity, and the private entity provides services to the prisoners and also to the state. To the extent that the services are provided to the prisoners, the relationship resembles a third party beneficiary contract. Due to the perverse financial incentives and the political climate surrounding prisons and prisoners, however, neither the state nor the private entity acts in the best interests of the consumers in particular or of society in general.”); *see also* John Sullivan, *New York State Earns Top Dollar From Collect Calls by Its Inmates*, N.Y. TIMES, Nov. 30, 1999, at A1 (“New York State is reaping financial bonanza from collect telephone calls from prison inmates to relatives [The] state made \$21 million from collect phone calls in 1998 . . . one of [the] highest totals in country.”); Celeste Fremon, *Crime Pays . . . The Phone Company and the State*, L.A. WEEKLY, June 20, 2001, at 32 (“Inmate calls operate on a collect-only basis, and are administered exclusively by the vendors who’ve won contracts with the state—currently, MCI WorldCom and Verizon. The collect calls they administer under their present contract are among the most expensive phone calls in the world.”).

same state can be as high as \$17.77.⁹ In effect, these collusive arrangements between private phone companies and state prison systems encourage price gouging. “In exchange for exclusive contracts guaranteeing a steady high volume of expensive collect calls, states receive commissions ranging from eighteen to sixty percent—i.e., kickbacks—from their prison phone service providers.”¹⁰

Over the course of the last two decades, a number of factors have combined to produce this exceptional species of legal inequity for which the traditional avenues of recourse to justice seem utterly ineffective. To date, little scholarship has been devoted to the unfair rates charged for collect calls made from prisons.¹¹ In fact, only three law journals have published articles

⁹ The Campaign to Promote Equitable Telephone Charges, Current Status by State, http://www.etccampaign.com/etc/current_status.php [hereinafter eTc—Current Status] (showing the rates for each state where Washington and Arizona both have the highest) (last visited Oct. 20, 2006) (on file with the North Carolina Journal of Law & Technology). See also Nicholas H. Weil, *Dialing While Incarcerated: Calling for Uniformity Among Prison Telephone Regulations*, 19 WASH. U. J.L. & POL’Y 427, 429 n.7 (2005) (“I may get two to three collect calls a week from inmates. One month, my collect calls from prisoners was [sic] over \$500 a month. . . . It’s cheaper to call Africa or Europe.”) (quoting JOINT COMM’N ON PRISON CONSTR. & OPERATIONS, CAL. LEGISLATURE, Pub. No. 1150-S, PAYPHONES IN PRISON FACILITIES 47 (2001–02) (statement of Pastor Andrew Robinson-Gaither, Faith United Methodist Community Church, L.A.)).

¹⁰ Madeleine Severin, *Is There a Winning Argument Against Excessive Rates For Collect Calls From Prisoners?*, 25 CARDOZO L. REV. 1469, 1469 (2004) (citing Justice Council, Comm. on Corr., Fla. H.R., *Maintaining Family Contact When a Family Member Goes to Prison: An Examination of State Policies on Mail, Visiting, and Telephone Access* 28 (1998), <http://www.fcc.state.fl.us/fcc/reports/family.pdf>). While there has been little legal scholarship written on this topic, Madeleine Severin’s article does a great job making up for that fact. In her comprehensive article on the subject, Severin examines all the legal arguments that have been used to attack high prison collect call rates, as well as the doctrines and counterarguments that judges have used in continuing to allow these high rates. This Comment builds heavily upon her exhaustive study.

¹¹ See, e.g., Steven J. Jackson, *Ex-Communication: Competition and Collusion in the U.S. Prison Telephone Industry*, 22 CRITICAL STUD. IN MEDIA COMM. 263, 263 (Oct. 2005) (“The prison communication industries occupy a large and significant blind spot within the literature of critical communication scholarship and the social sciences more generally.”).

on the subject.¹² The most comprehensive of these law journal articles, written by Madeleine Severin and published in a 2004 issue of the *Cardozo Law Review*, analyzes a number of recent challenges to excessive prison collect call rates.¹³ In examining the rulings of numerous courts, Severin correctly notes that challenges to prison phone rates face an uphill battle given current Supreme Court jurisprudence.¹⁴ However, Severin's conclusion that legislation is more effective than litigation in reducing rates¹⁵ is not supported by a thorough examination of the impact that recent state legislation—even well-intentioned state legislation—has had on telephone rates. Severin is justified in being doubtful about the chances of any court victories in the near future, but her conclusion that “legislation is a more appropriate way to provide relief to call recipients, and would almost certainly be more effective than further litigation,”¹⁶ does not take into account the “negative political leverage” of prisoners and their families, the widely

¹² See Carver, *supra* note 8; Severin, *supra* note 10; Weil, *supra* note 9.

¹³ See Severin, *supra* note 10, at 1469.

¹⁴ *Id.* at 1514–23. So far, courts have rejected all constitutional challenges to high inmate collect call rates. See Severin, *supra* note 10, at 1514 (relying on principles consistent with the Supreme Court's “legitimate penological interests” standard set forth in *Turner v. Safley*, 482 U.S. 78, 89 (1987), and used today to determine the constitutionality of prison regulations); see also Weil, *supra* note 9, at 442 (citing *Overton v. Bazzetta*, 539 U.S. 126 (2003); *Shaw v. Murphy*, 532 U.S. 223 (2001); Abigail E. Robinson, Comment, *Treating the Sex Offender at Any Cost: Fifth Amendment Privilege Against Compelled Self-Incrimination in the Prison Context*, 42 WASHBURN L.J. 725, 737–38 (2003)).

Courts are very deferential to decisions made by state correctional institutions. Under *Safley* and its progeny, “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.” *Safley*, 482 U.S. at 89. *Safley* delineates a four-part framework for analyzing the constitutionality of a particular prison regulation. See *id.* However, defendants usually win constitutional challenges to prison conditions based on the first “legitimate penological interests” prong of *Safley*. See, e.g., *Pargo v. Elliott*, 894 F. Supp. 1243, 1252 (S.D. Iowa 1995), *aff'd*, 69 F.3d 280 (8th Cir. 1995) (quoting *Klinger v. Dep’t of Corr.*, 31 F.3d 727, 733 (8th Cir. 1994)) (“[I]nter-prison program comparison ‘results in precisely the type of federal court interference with and ‘micro-management’ of prisons that *Turner* [v. *Safley*] condemned.’”).

¹⁵ Severin, *supra* note 10, at 1528.

¹⁶ *Id.* at 1532.

varied political climates in individual states, and the sheer enormity of state laws and institutional habits that must be altered in order to effect such change.¹⁷

This Comment will examine the various legal issues surrounding unjust prison phone rates and forecast possible avenues to change. Part II will give a brief background of the prison telephone industry. It will demonstrate how excessive phone rates harm the families of prisoners as well as society at large. Part III will explain how rapidly evolving technological tools have significantly altered the framework of the issue. This section will also include a discussion about how state kickbacks, rather than telephone system technology and maintenance costs, are largely to blame for the unjust rates. Part IV will highlight both the best and the worst prison phone policies in the nation and will also shed light on the unfortunate fact that state legislation is an ineffective means of lowering inmate phone rates. Part V will examine the efforts made to rectify the problem at the federal regulatory level, calling attention to an ongoing proceeding before the Federal Communications Commission and the overall effect these proceedings are likely to have on the problem. Finally, Part VI will weigh the likelihood of any future legal victories given the major obstacles that court challenges now face. It will also explore the indirect, yet important role that litigation can play in helping a reform movement gain favorable publicity and mobilize political support.

¹⁷ Alec C. Ewald, *An "Agenda for Demolition": The Fallacy and the Danger of the "Subversive Voting" Argument for Felony Disenfranchisement*, 36 COLUM. HUM. RTS. L. REV. 109, 141 (2004) (citing Alexander Keyssar, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 308 (2000)); see also Regina Austin, *"The Shame of It All": Stigma and the Political Disenfranchisement of Formerly Convicted and Incarcerated Persons*, 36 COLUM. HUM. RTS. L. REV. 173, 180 (2004) ("[T]he stigma of incarceration . . . [is] not reserved for offenders; as recent empirical and ethnographic research confirms, the families of convicted and incarcerated persons experience a significant stigma as well.").

II. BACKGROUND

A. *The Rise of the Prison Telephone Industry*

Beginning in the 1980s, the prisoner population in the United States expanded rapidly, ballooning from less than 320,000 in 1980 to nearly 1.47 million by 2003.¹⁸ “Expanded to include individuals serving time on parole or probation, the total population under state supervision by 2003 had reached 6.9 million, or approximately 3.2% of the adult U.S. population.”¹⁹ As the prison population has grown, incarceration of adult offenders has become big business in the United States.²⁰ The provision of telephone services to this expanding prison population represents a significant business opportunity. “By the 1990s, the prison telephone sector had grown into a billion-dollar market. Businesses—and states—wanted a piece of the action.”²¹

¹⁸ Jackson, *supra* note 11, at 266.

¹⁹ *Id.* (citation omitted).

²⁰ Eric Schlosser, *The Prison-Industrial Complex*, THE ATLANTIC MONTHLY, Dec. 1998, at 51, 63–64. In his *Atlantic Monthly* article, Eric Schlosser exposes the role of the profit motive in our nation’s recent prison boom:

One clear sign that corrections has become a big business as well as a form of government service is the emergence of a trade newspaper devoted to the latest trends in the prison and jail marketplace. *Correctional Building News* has become the *Variety* of the prison world, widely read by correctional officials, investors, and companies with something to sell. Eli Gage, its publisher, . . . believes that despite recent declines in violent crime, national spending on corrections will continue to grow at an annual rate of five to [ten] percent.

Id. at 64.

²¹ Jackson, *supra* note 11, at 267; *see also* Schlosser, *supra* note 20, at 63.

The black-and-white photograph shows an inmate leaning out of a prison cell, scowling at the camera, his face partially hidden in the shadows. ‘HOW HE GOT IN IS YOUR BUSINESS,’ the ad copy begins. ‘HOW HE GETS OUT IS OURS.’ The photo is on the cover of a glossy brochure promoting AT&T’s prison telephone service, which is called The Authority. Bell South has a similar service, called MAX, advertised with a photo of a heavy steel chain dangling from a telephone receiver in place of a cord. The ad promises ‘long distance service that lets inmates go only so far. . . .’ It is estimated that inmate calls generate a billion dollars or more in revenues each year. The

As many public law scholars have pointed out, there is “something fundamentally unjust about families of prisoners being charged outrageous prices solely because they accept collect calls from people in prison.”²² As early as 1996, the American Correctional Association (ACA), a group of leaders in the correctional profession, passed a resolution opposing high collect call rates in prisons, noting that “[c]orrectional agencies should discourage profiteering on tariffs placed on phone calls which are far in excess of the actual cost of the call, and which could discourage or hinder family or community contacts.”²³ Nine years later, the American Bar Association adopted recommendations urging that the “lowest possible rates” be made available for prisoners and their families.²⁴

In addition to being “deeply objectionable on both ethical and social policy grounds,”²⁵ excessive rates are inefficient, anticompetitive, and contrary to the principles of a free market economy.²⁶ University of Michigan School of Information Professor Stephen J. Jackson has noted that:

business has become so lucrative that MCI installed its inmate phone service, Maximum Security, throughout the California prison system at no charge. As part of the deal it also offered the California Department of Corrections a 32 percent share of all the revenues from inmates’ phone calls. MCI Maximum Security adds a \$3.00 surcharge to every call. When free enterprise intersects with a captive market, abuses are bound to occur. MCI Maximum Security and North American Intelcom have both been caught overcharging for calls made by inmates and in one state MCI was adding an additional minute to every call.

Schlosser, *supra* note 20, at 63.

²² Severin, *supra* note 10, at 1535.

²³ A.B.A., CRIM. JUST. SEC., REPORT WITH RECOMMENDATION TO THE A.B.A. HOUSE OF DELEGATES 3 n.6 (2005), <http://www.abanet.org/crimjust/policy/am05115b.pdf> (quoting AM. CORR. ASS’N, OCT. 1996 RESOLUTION ON EXCESSIVE PHONE TARIFFS, (1996)) (last visited Nov. 4, 2006) (on file with the North Carolina Journal of Law & Technology).

²⁴ *Id.* at 1.

²⁵ Jackson, *supra* note 11, at 276.

²⁶ See generally Carver, *supra* note 8.

Whatever their merits in the larger telecom world, incentives to competition within the prison telephone industry have proven fundamentally perverse. Armed with a uniquely effective monopoly sourcing power, county, state, and federal officials have entered into what amounts to profit-sharing agreements with telephone service providers, exchanging exclusive service rights for large commissions paid back into state funds. Under such conditions, the incentives of price competition have worked in precisely the opposite direction, with companies offering the highest bids (in terms of rates and commissions) routinely awarded contracts, the costs of which are passed on to the (literally) captive market.²⁷

However, courts have been reluctant to intervene,²⁸ and “legislators wanting to appear tough on crime” have been hesitant to be perceived as advocating for inmates and their families—a demographic of minimal political influence.²⁹ Few in government believe that these high rates make good policy, but only a small number of government officials—and, so far, no judges—have been willing to make concrete changes. Not only are courts reluctant to interfere with state prison policy and the setting of telephone rates,³⁰ but far too often state legislators and corrections officials have been unable and unwilling to give up the money they receive from commission kickbacks.³¹

²⁷ Jackson, *supra* note 11, at 269.

²⁸ See Severin, *supra* note 10, at 1471 n.10 (“Courts have not, to date, granted relief in any of the twenty-two cases challenging prison phone rates addressed in this Note.”).

²⁹ *Id.* at 1533.

³⁰ See, e.g., *Arsberry v. Illinois*, 244 F.3d 558, 562 (7th Cir. 2001) (noting that telephone rate-setting is “a task [courts] are inherently unsuited to perform.”).

³¹ Ryan McNeil, *Phone Costs for Inmates Examined*, THE OKLAHOMAN, Dec. 1, 2003, at 1A, 3A.

[Prison telephone] contracts are worth less than \$1 million to the state general fund but about \$2 million for the prison system.

‘I don’t know if the Legislature is willing to make up the difference,’ said state Corrections Department spokesman Jerry Massie, who said commissions from phone calls staved off three furlough days for 4,600 employees. ‘The income we got certainly helped us out with a tough fiscal year.’

Id.

B. *Whom Do Excessive Rates Harm?*

1. *Families*

The families of prisoners experience a great deal of strain and isolation as a result of incarceration. For many prisoners, particularly the illiterate,³² phone calls provide a vital link to the support structures of family and friends. Access to phones is even more necessary because prisons are “often located in remote, sparsely-populated towns” and that some “states save money by transferring their inmates to prisons in other states.”³³ In 2001, over 1.5 million children in the U.S. had at least one incarcerated parent.³⁴ One out of every forty American children has a parent in prison.³⁵ A majority of the 100,000 plus³⁶ women incarcerated in U.S. jails and prisons are mothers of minor children.³⁷ Sixty-five percent of women in state prisons are mothers of minor children

³² Illiteracy rates are especially high in our nation’s prisons. *See, e.g.*, Oregon Literacy, Inc., *The Lowdown on Literacy*, <http://www.oregonliteracy.org/about/literacy/stats.php> (“Seven in [ten] prisoners preformed [sic] in the lowest two literacy levels.”) (last visited Oct. 31, 2006) (on file with the North Carolina Journal of Law & Technology).

³³ Severin, *supra* note 10, at 1474 (“Currently, 500 Connecticut inmates are incarcerated in Virginia and 1,400 Hawaiian inmates are incarcerated in Oklahoma and Arizona prisons; in all, eleven states ‘export large numbers of their inmates—a total of about 8,700’ of them—to other states.”) (citing Associated Press, *11 States Export Inmates, Adding to Families’ Anguish*, NEW HAVEN REG., Jan. 18, 2004, at B10).

³⁴ Carolyn Kleiner, *Breaking the Cycle: Can the Children of Convicts Learn Not to Be Like Their Parents?*, U.S. NEWS & WORLD REP., Apr. 29, 2002, at 48, available at http://www.usnews.com/usnews/culture/articles/020429/archive_020689.htm.

³⁵ *See* Family and Corrections Network, *Children of Prisoners Library, Introduction to Children of Prisoners*, <http://www.fcnetwork.org/cpl/CPL101-Introduction.html> (last visited Oct. 31, 2006) (on file with the North Carolina Journal of Law & Technology).

³⁶ CORR. ASS’N OF N.Y., *WOMEN IN PRISON PROJECT, WOMEN IN PRISON FACT SHEET*, http://www.correctionalassociation.org/WIPP/publications/Women_in_Prison_Fact_Sheet_2006.pdf (last visited Nov. 4, 2005) (on file with the North Carolina Journal of Law & Technology).

³⁷ U.S. DEP’T OF JUSTICE, NCJ 182335, *BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: INCARCERATED PARENTS AND THEIR CHILDREN 2* (2000), <http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf> (last visited Oct. 27, 2006) (on file with the North Carolina Journal of Law & Technology).

and expect to resume their parenting role upon their release.³⁸ Reasonable and fair access to telephone services is vitally important to maintaining these familial connections.

2. *Society at Large*

However, families of the incarcerated are not the only parties with an interest in more affordable prison phone rates; society as a whole benefits when prisoners are granted open lines of communication with their loved ones.³⁹ A number of “recidivism and community impact studies, some of which were used to justify the introduction of prison calling in the first place[,] . . . have found that a powerful predictor of re-offending is the failure to maintain family and community contact while incarcerated.”⁴⁰ In allowing prison phone rates to remain prohibitively high, policymakers effectively ignore such important recidivism research. Every year, 680,000 prisoners are released back into the general population.⁴¹ The ability of prisoners to keep in touch with

³⁸ WOMEN’S PRISON ASSOCIATION (WPA), WPA FOCUS ON WOMEN AND JUSTICE (2003), http://www.wpaonline.org/pdf/Focus_October2003.pdf (last visited Oct. 30, 2006) (on file with the North Carolina Journal of Law & Technology).

³⁹ See, e.g., Jackson, *supra* note 11, at 272.

[A] reliable way of increasing the likelihood that prisoners will re-offend is to break all ties with the outside world and then place them back on the street years later, with little reentry support . . . [N]umerous scholars have pointed to the wider social costs associated with the disruption of family and community contact, in the form of weakened parent/child relations and more general damage to community social networks and authority structures. . . . [These costs are borne] in the long run by society as a whole, through downstream costs in policing, educational decline, and future costs passed through the juvenile and adult correctional systems. To support a policy and pricing regime that encourages precisely this outcome would seem to amount to a staggeringly short-sighted piece of public policy.

Id. (citations omitted).

⁴⁰ Jackson, *supra* note 11, at 272 (citations omitted). “Until the early 1970s, inmates of the state and federal prison systems were limited to one collect call every three months, granted at the discretion of correctional officials in response to a formal petition process.” *Id.* at 267.

⁴¹ U.S. DEP’T OF LABOR, MANAGEMENT THAT MAXIMIZES THE MISSION: U.S. DEP’T OF LABOR REPORT TO EMPLOYEES 16 (2006), <http://www.dol.gov/>

loved ones impacts their ability to find support and a sense of belonging while incarcerated. Research has shown that policies that “facilitate and strengthen family connections during incarceration” can “reduce the strain of parental separation, reduce recidivism rates, and increase the likelihood of successful re-entry.”⁴² The Federal Bureau of Prisons explicitly acknowledges this fact in their telephone policy for federal prisoners: “[t]elephone privileges are a supplemental means of maintaining community and family ties that will contribute to an inmate’s personal development . . . [and are] a valuable tool in the overall correctional process.”⁴³ Accordingly, reasonable prison phone rates benefit the larger society as well as prisoners and their families.⁴⁴

dol/pma/2006report.pdf (last visited Oct. 27, 2006) (on file with the North Carolina Journal of Law & Technology).

⁴² RE-ENTRY POLICY COUNCIL, REPORT OF THE RE-ENTRY POLICY COUNCIL 192 (2005), http://www.reentrypolicy.org/reentry/Download_the_Report_in_PDF_Format.aspx (follow “Part Two, Chapter B: Prison- and Jail-Based Programming” hyperlink) (citing Creasie Finney Hairston, *Family Ties During Imprisonment: Do They Influence Future Criminal Activity?*, 52 FED. PROBATION 48–52 (1998)) (last visited Oct. 27, 2006) (on file with the North Carolina Journal of Law & Technology).

⁴³ FED. BUREAU OF PRISONS, U.S. DEP’T OF JUSTICE, PROGRAM STATEMENT NO. 5264.07, TELEPHONE REGULATIONS FOR INMATES 1 (Feb. 2, 2002), <http://www.bop.gov/DataSource/execute/dsPolicyLoc> (follow “Browse Series” hyperlink beside “Inmate and Custody Management”; then follow “Telephone Regulations for Inmates” hyperlink) (on file with the North Carolina Journal of Law & Technology).

⁴⁴ See, e.g., *Federal Offender Reentry and Protecting Children from Criminal Recidivists: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 108th Cong. 7 (2004) (statement of Rep. Portman) (“First and foremost, offender reentry is about preventing crime and keeping our communities safe.”).

III. COSTS ASSOCIATED WITH PRISON TELEPHONE SYSTEMS

A. *Prison Telephone Technology*

States and telecommunications companies justify their rates based on the high costs of technology associated with the “extra security measures phone companies must provide.”⁴⁵ However, prison telephone systems and the related security measures have become less costly than—and are not considerably different from—other telephone technologies widely used by the general public.⁴⁶ A comparison of rates offered by different prison systems demonstrates that kickbacks, as opposed to the technological costs associated with the telephone systems themselves, are responsible for exorbitant long-distance rates. For instance, all federal

⁴⁵ Severin, *supra* note 10, at 1475–76 (citing Ordinary Tariff Filing of MCI WorldCom Communications to Change Maximum Sec. Rate Plan for N.Y. State Dep’t of Corr. from a Mileage-Sensitive Structure for IntraLATA and InterLATA to a Flat Rate Structure, No. 03-C-1058, 2003 N.Y. Pub. Util. Comm’n LEXIS 616, at 35 (N.Y. Pub. Serv. Comm’n, Oct. 30, 2003)).

⁴⁶ Severin, *supra* note 10, at 1476 (citing OFF. OF PERFORMANCE EVALUATIONS, IDAHO LEG., INMATE COLLECT CALL RATES AND TELEPHONE ACCESS: OPPORTUNITIES TO ADDRESS HIGH PHONE RATES 3 & n.6 (2001), <http://www.legislature.idaho.gov/ope/publications/reports/r0101.pdf> (noting that “officials with the Public Utilities Commission told us that phone carriers may apply a fully-assisted operator rate for all inmate phone calls because of the system’s added security features, even though all calls are processed with a highly automated operator system”)).

prisons,⁴⁷ and some state prisons,⁴⁸ offer “debit calling options as an alternative to more expensive collect calls.”⁴⁹

“Until 1984, the fledgling inmate telephone market remained the exclusive purview of AT&T, and rates for operator-assisted

⁴⁷ *Id.* at 1475 (citing FED. BUREAU OF PRISONS REPORT: STATE OF THE BUREAU (2001)).

⁴⁸ *Id.* (citing 28 VT. STAT. ANN. tit. 28, § 802a(c) (2003)). According to the Campaign to Promote Equitable Telephone Charges, thirteen states now offer the option of less expensive phone debit card calling: Colorado, Kansas, Maryland, Minnesota, Nebraska, New Mexico, North Dakota, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, and Vermont. See The Campaign to Promote Equitable Telephone Charges, A National Perspective on Prison Telephone Systems, <http://www.etccampaign.com/etc/national.php> [hereinafter eTc—National Perspective] (last visited Oct. 20, 2006) (on file with the North Carolina Journal of Law & Technology).

⁴⁹ Jackson, *supra* note 11, at 274. See also *Wright Petition*, *infra* note 54, at *75 (“In summary, a debit card system can meet all of the same penological requirements as a collect system.”).

In fact, when the Federal Bureau of Prisons first adopted their debit calling system, some prisoners found it more restrictive than the older collect-call system. See, e.g., *Washington v. Reno*, 35 F.3d 1093, 1095 (6th Cir. 1994).

The previous collect-call system used in the prisons allowed inmates to make unlimited calls within the disciplinary restrictions of the penal institution. By contrast, the new ITS system in effect at the time of the district court proceedings afforded the inmates the opportunity to purchase direct-dial phone credits at the prison commissary only once a week and limited calls to conversations with individuals named on a list of people approved by correction officials.

Id.

Furthermore, the Court of Appeals for the Sixth Circuit found that it was inappropriate for federal prisons to use prison commissary funds “to finance the purchase, installation, or operation of the [new debit phone] system *to the extent that those funds are primarily used to support the security function of the penal institutions.*” *Id.* at 1104.

Debit calls from prison are less costly to provide than collect calls. See, e.g., *Wright Petition*, *infra* note 54, at *26 (“[T]he cost of the long distance segment would be still lower if only debit card or debit account service were provided.”) (citing *Billed Party Preference for InterLATA 0+ Calls*, 13 F.C.C.R. 6122, 6156 (1998), modified, 16 F.C.C.R. 22314 (2001)). However, it is important to note that debit cards do not guarantee lower rates because prisons are still free to charge exorbitant rates for these services. See, e.g., eTc—Current Status, *supra* note 9 (showing that Virginia’s debit rates are just as expensive as their collect call rates).

collect calling—the only form of service available to inmates—kept pace with those for similar services.”⁵⁰ It was only after the 1984 break-up of AT&T and the subsequent opening of the market to other providers that companies started putting together service packages specifically designed for prisons.⁵¹ MCI and Sprint were on the forefront of this industry, but newcomers like Pay-Tel were able to get a foothold by advertising services that would “best take advantage of pending regulatory changes to enhance revenues and increase our clients’ commissions.”⁵²

Initially, the “special security requirements applicable to inmate calls”⁵³ generally involved live operators listening in on telephone conversations.⁵⁴ Today, technological advances allow prison phone systems to automatically monitor and record all calls without operator assistance; authorities are also able to later analyze conversations using a computer interface.⁵⁵ In addition, these technologies prevent prisoners from calling phone numbers that have not been pre-approved, thus minimizing opportunities for criminal activity.⁵⁶

⁵⁰ Jackson, *supra* note 11, at 268.

⁵¹ *See id.*

⁵² *Id.* at 268–69 (citation omitted).

⁵³ *Billed Party Preference for InterLATA 0+ Calls*, Second Report and Order and Order on Reconsideration, 13 F.C.C.R. 6122, 6156, CC Docket No. 92-77 (1998).

⁵⁴ *See, e.g., Petition for Rulemaking Filed Regarding Issues Related to Inmate Calling Services Pleading Cycle Established*, 2003 FCC LEXIS 7261 at *57–58, CC Docket No. 96-128, (Dec. 31, 2003) [hereinafter *Wright Petition*] (“For many years . . . only a live operator could satisfy the basic penological requirement. . . . Live operators are no longer needed to meet this requirement.”).

⁵⁵ *Id.* at *55.

⁵⁶ *Id.* at *56. Prison phone systems have four basic components: (1) a switching platform which allows other information to be sent through phone lines such as caller ID information; (2) a recording storage system; (3) a master control system, which allows authorities to access the switching platform to intervene in calls, calling patterns, etc.; and (4) software programming which allows prison officials to easily interface with master control systems (different software packages are available from different companies that meet different needs). *Id.* at *54–56.

Recently, technological advances have decreased the costs associated with providing such security systems. Currently, “[t]he technology and degree of human supervision . . . does not seem appreciably different from the technology that makes caller I.D. feasible, or the technology that makes it possible to block 900-numbers from residential phones.”⁵⁷

In today’s digital age, computer software and hardware have become more advanced and less expensive with each passing year.⁵⁸ For instance, many corporations, especially those in service-oriented industries, routinely make digital records of all customer service telephone calls.⁵⁹ In fact, there is an entire industry, Customer Relation Management (CRM), that delivers services technologically similar to that of a modern prison phone system.⁶⁰ Such technology appears to be capable of providing all the functions of a prison telephone system at a minimal cost.⁶¹

⁵⁷ Severin, *supra* note 10, at 1476 (citing OFF. OF PERFORMANCE EVALUATIONS, IDAHO LEG., INMATE COLLECT CALL RATES AND TELEPHONE ACCESS: OPPORTUNITIES TO ADDRESS HIGH PHONE RATES 3 & n.6 (2001), <http://www.legislature.idaho.gov/ope/publications/reports/r0101.pdf>).

⁵⁸ See *Wright Petition*, *supra* note 54, at *54 (“The size and cost of the storage devices that can be used for [prison telephone systems] have drastically decreased over time, and the cost continues to decline as digital storage techniques improve year after year, with a seeming doubling in storage capacity per dollar every 18 months or so.”).

⁵⁹ See, e.g., CRM Today, Witness Systems Strengthens Leadership Position in IP Recording (July 12, 2006), <http://www.crm2day.com/news/crm/119288.php> (on file with the North Carolina Journal of Law & Technology).

⁶⁰ See *id.* (“Witness Systems’ Impact 360 IP Recording solution allows customers to record, notify and store calls for both quality and compliance purposes. Further, the solution can scale down to single channel recording to meet the needs of individuals or smaller businesses, and scale up to [meet] the full-time recording requirements . . .”).

⁶¹ See *id.* (“As a fully scalable and cost-effective solution, Impact 360 IP Recording can meet the needs of organisations [sic] of all types and sizes.”). See also CRM Advocate, Witness Systems Delivers Enhancements, Drives Down Total Cost of Ownership for IP Recording (July 25, 2006), <http://www.realmarket.com/news/witness072506.html> (“Also new to Impact 360 IP Recording is tripled channel capacity, which results in fewer servers required and therefore a lower total cost of ownership.”) (on file with the North Carolina Journal of Law & Technology). AirGATE, AirGATE Develops VoIP System for Inmate Telephones (Dec. 8, 2005), <http://www.airgatetech.com/InTheNews/>

B. *Commissions Drive the Prices More Than Operation Costs*

Despite these technological advances,⁶² prison phone rates have remained high, even increasing in some instances.⁶³ MCI stated that their high rates are based on “the added expense of providing telephone service to prisons,”⁶⁴ but the evidence belies such an assertion.⁶⁵

Large commissions paid back to state governments often contribute to high phone rates.⁶⁶ For instance, the Federal Bureau of Prisons, which does not accept a commission from phone providers, provides direct-dial, out-of-state debit calls at \$0.17 per

PressReleases/Press_120805.DOC (“AirGATE Technologies, Inc., a wholly owned subsidiary of the X-Change Corporation (OTCBB:XCHC), has developed a VoIP add-on module for telephones in correctional facilities. Inmates make over 1,000,000 collect phone calls per day, and VoIP can provide greater efficiency and reduce costs.”) (on file with the North Carolina Journal of Law & Technology).

⁶² See A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461, 1463 (2000) (“[B]oth the state and the private sector now enjoy unprecedented abilities to collect personal data, and that technological developments suggest that costs of data collection and surveillance will decrease, while the quantity and quality of data will increase.”).

⁶³ See, e.g., *Excessive Telephone Fees*, NCPLS ACCESS (Newsletter of N.C. Prisoner Legal Services, Inc., Raleigh, N.C.), June 2006, at 9, available at <http://www.ncpls.org/Access/june06.pdf> (“[F]rom 1997 through 2000, AT&T raised its interstate long distance inmate service rates 57%.”) (last visited Oct. 20, 2006) (on file with the North Carolina Journal of Law & Technology).

⁶⁴ Stelzer, *supra* note 3 (“‘Rates are based on the cost of providing the service to the state,’ says Greg Blankenship, a spokesman for MCI in McLean, Va. ‘I might also point out that the rates charged for inmate calls are competitive with operator-assisted collect calls paid by consumers at the corner pay phone.’”).

⁶⁵ See *infra* Parts IV(A)–(C).

⁶⁶ See, e.g., JUSTICE COUNCIL, COMM. ON CORR., FLA. H.R., MAINTAINING FAMILY CONTACT WHEN A FAMILY MEMBER GOES TO PRISON: AN EXAMINATION OF STATE POLICIES ON MAIL, VISITING, AND TELEPHONE ACCESS 28 (1998), <http://www.fcc.state.fl.us/fcc/reports/family.pdf> (“In fact, 11 of the 12 states with the largest correctional populations receive a commission from telephone contracts, ranging from 18%–60%. Only one of these 12 states, Texas, reported receiving no commission money, predominately because inmates in Texas may only make one call every 90 days.”) (last visited Oct. 31, 2006) (on file with North Carolina Journal of Law & Technology).

minute.⁶⁷ Similarly, the Nebraska Department of Corrections, which also does not accept commissions, provides out-of-state debit calling at \$0.16 per minute.⁶⁸ By contrast, the contract that MCI has with Arkansas prisons sets the interstate long distance rate at \$0.89 per minute in addition to a \$3.95 connection fee.⁶⁹ Interestingly, MCI offers the same service to Missouri prisons for only \$0.45 per minute, plus a \$2.45 surcharge.⁷⁰ The reason for the disparities is clear: Missouri's Department of Corrections stopped accepting commissions on prison telephone charges in 1999.⁷¹

⁶⁷ See IMPLEMENTATION OF PAY TEL. RECLASSIFICATION & COMPENSATION PROVISIONS OF THE TELECOMM. ACT OF 1996, Comments of the Ad Hoc Coalition for the Right to Communicate Regarding Petition for Rulemaking or, in the alternative, *Petition to Address Referral Issues in Pending Rulemaking*, Appendix A, FCC Docket No. 96-128 at 11 (Mar. 10, 2004), available at http://www.brennancenter.org/programs/cj/coalition_fcc_comments.pdf (citing U.S. Dep't of Justice, Fed. Bureau of Prisons, Memorandum For All Inst. Controllers All Trust Fund Supervisors, from Michael A. Atwood, Chief, Trust Fund Branch, Trust Fund Message Number 18-02 (Feb. 8, 2002) at 2) (on file with North Carolina Journal of Law & Technology).

⁶⁸ The Campaign to Promote Equitable Telephone Charges: More About eTc, <http://www.etccampaign.com/etc/more.php> [hereinafter eTc—More About] (last visited Oct. 27, 2006) (on file with the North Carolina Journal of Law & Technology).

⁶⁹ Doug Smith, *Government Finds New Ways to Provide Services: Private Enterprise Finds New Ways to Make a Profit*, ARK. TIMES, June 16, 2005, at A1, available at <http://www.arktimes.com/Articles/ArticleViewer.aspx?ArticleID=60808a91-3f4d-4884-aa2b-d094d2b6e266> (on file with the North Carolina Journal of Law & Technology).

⁷⁰ IOWA LEGISLATIVE FISCAL BUREAU, ISSUE REVIEW, DEP'T OF CORR.: TEL. REBATE FUND 4 (2001), <http://www.legis.state.ia.us/lsadocs/issreview/2001/ir218b.pdf> (last visited Oct. 30, 2006) (on file with the North Carolina Journal of Law & Technology).

⁷¹ *Id.*

IV. COMPARISON OF SELECTED STATES' PRISON PHONE RATES⁷²

A. States with Relatively Low Prison Telephone Rates

Prison phone legislation tends to be unpopular and very hard to pass.⁷³ Even when they do become law, they do not significantly reduce excessive rates.⁷⁴ The following examples demonstrate that most affordable rates have little to do with state legislatures.

1. Nebraska

Nebraska has the country's most inexpensive prisoner phone rates.⁷⁵ A fifteen-minute local collect call costs \$1.00 and a fifteen-minute out-of-state collect call costs \$3.75.⁷⁶ Prisoners also have the option to make calls through an even more inexpensive direct-dial debit account system.⁷⁷ These low rates result from administrative policy decisions regarding the role of family and community contact play in the rehabilitation process.⁷⁸ The Nebraska Department of Corrections has chosen not to accept commissions in order to make prison telephone calls as affordable as possible.⁷⁹

⁷² Statistics provided by the Campaign to Promote Equitable Telephone Charges. See eTc—National Perspective, *supra* note 48. Because rates were last updated in August 2005, precise rankings may be slightly different at present. See eTc—More About, *supra* note 68. Rankings should, therefore, be construed as ballpark figures for policy analysis purposes.

⁷³ See *infra* Parts IV(A), (B).

⁷⁴ See *infra* Parts IV(A), (B).

⁷⁵ eTc—National Perspective, *supra* note 48.

⁷⁶ eTc—Current Status, *supra* note 9.

⁷⁷ See *id.*

⁷⁸ See, e.g., NEB. ADMIN. CODE § 81-8 (2005), available at http://www.sos.state.ne.us/business/regsearch/Rules/Law_Enforcement_and_Criminal_Justice/Title-81/Chapter-8.pdf ("It is the policy of the State of Nebraska that all detention facilities shall, to the best of their ability, offer a range of rehabilitative services and programs of benefit to the inmates to assist in their successful reintegration into the community.") (last visited Oct. 31, 2006).

⁷⁹ IOWA LEGISLATIVE FISCAL BUREAU, ISSUE REVIEW, DEP'T OF CORR.: TEL. REBATE FUND 4 (2001), <http://www.legis.state.ia.us/lsadocs/IssReview/2001/IR218B.pdf> (last visited Oct. 30, 2006) (on file with the North Carolina Journal of Law & Technology).

2. *Washington, D.C.*

Correctional institutions run by the nation's capital charge a flat rate for all local and long-distance calls (\$3.00 for fifteen minutes).⁸⁰ While the rates are somewhat expensive for local calls, D.C.'s out-of-state rates are even cheaper than Nebraska's. The rates in D.C. are governed by a local statute that prevents prisons from charging a commission on collect calls and thus represents a rare legislative success.⁸¹ However, D.C.'s law making body—which is arguably more similar to a city council than a state legislature—is almost entirely governed by a single party.⁸² As such, this legislation should be viewed as an anomaly.

3. *West Virginia*

West Virginia's Division of Corrections (DOC) has also made affordable prison phone rates an institutional priority. The DOC code requires that "[t]elephone facilities shall be provided to permit reasonable and equitable access to all inmates."⁸³ Accordingly, state corrections officials selected a service provider, Global Tel*Link, which agreed to a contract giving prisoners and their families the third lowest collect-call rates in the country.⁸⁴

4. *New Hampshire*

New Hampshire provides inmates with the fourth lowest collect-call rate schedules in the country.⁸⁵ However, the rates in New Hampshire are not a result of state legislation. In fact, state legislators have been unwilling to consider whether the rates were problematic. A 2001 bill seeking to establish "a committee to

⁸⁰ eTc—Current Status, *supra* note 9.

⁸¹ D.C. CODE § 24-263.01 (2006).

⁸² DCWatch, Carol Schwartz-Biographical Data, <http://www.dcwatch.com/archives/election98/schwartz-1.htm> (last visited Oct. 27, 2006) (on file with the North Carolina Journal of Law & Technology). *See also* Lori Montgomery, *D.C. GOP Chooses a Gay Chairman*, THE WASH. POST, Dec. 16, 2004, at T2, available at <http://www.washingtonpost.com/wp-dyn/articles/A1638-2004Dec15.html> ("Added at-large council member Carol Schwartz [is] the only Republican on the 13-member D.C. Council . . .").

⁸³ W. VA. CODE R. § 95-2-17.11.1 (2006).

⁸⁴ eTc—National Perspective, *supra* note 48.

⁸⁵ *Id.*

study the cost of telephone calls from state prison inmates to their families” failed to gain support.⁸⁶

The State Division of Plant and Property Management is responsible for the state’s low rates. Although New Hampshire does receive some of the telephone revenue, the Division of Plant and Property Management has refused to accept commissions in excess of 20% and, as a matter of policy, will not contract with service providers that charge inmates over \$0.21 per minute.⁸⁷

Interestingly, New Hampshire’s service provider, Public Communications Service (PCS), charges inmates in New Mexico, a state that has successfully enacted legislation on prisoner collect-call rates,⁸⁸ over twice the amount of money for a fifteen-minute collect call.⁸⁹ Such a difference demonstrates that state legislation is not an effective means of providing relief to recipients of collect calls from state correctional facilities.

5. *Missouri*

Missouri’s rates are the fifth lowest in the United States.⁹⁰ Missouri was able to provide such low rates without any state legislation or new regulations.⁹¹ After learning about the collect-call kickbacks their state was receiving during an appropriations hearing, Missouri Democratic Senator Wayne Goode and

⁸⁶ H.R. 1418, 2d Sess. (N.H. 2001).

⁸⁷ NEW HAMPSHIRE DIVISION OF PLANT AND PROPERTY MANAGEMENT, BUREAU OF PURCHASE AND PROPERTY, PROPOSAL FOR INMATE AND PAY TELEPHONE SERVICES, GENERAL TERMS AND CONDITIONS FOR PROPOSAL, Proposal No. 523, Attachment A § 3, § 1 (Mar. 15, 2003), *available at* http://admin.state.nh.us/purchasing/rfp_523_06.pdf (on file with the North Carolina Journal of Law & Technology).

⁸⁸ N.M. STAT. ANN. § 33-14-1 (2003) (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”).

⁸⁹ eTc—Current Status, *supra* note 9 (showing that a fifteen-minute out-of-state collect call costs \$4.30 in New Hampshire and \$10.50 in New Mexico).

⁹⁰ eTc—National Perspective, *supra* note 48.

⁹¹ Prison Talk, A Proposal to Address the Cost of Collect Phone Calls, <http://www.prisonstalk.com/forums/showthread.php?t=5614> (last visited Oct. 27, 2006) (on file with the North Carolina Journal of Law & Technology).

Republican Senator Larry Rohrbach agreed that the practice must end.⁹² After two bills failed to gain support,⁹³ the two Senators worked together to pressure the State Department of Corrections to forgo revenue-producing commissions and renegotiate a contract with the service provider that would allow inmates to “maintain contacts with their families at a reasonable cost.”⁹⁴

6. *Kentucky*

In 1999, a claim was filed against the State of Kentucky and several phone companies alleging violations of both the Sherman Anti-Trust Act and 42 U.S.C. § 1983.⁹⁵ Plaintiffs’ claims were eventually dismissed, partly based on the “filed-rate” doctrine.⁹⁶ “The ‘filed-rate’ doctrine is a way in which courts intervene to bar suits against unregulated utilities, so that purchasers will be fully informed of the consequences of their purchases.”⁹⁷ However, “[i]n response to complaints of Plaintiffs, the [Kentucky Public Service Commission] began reviewing the reasonableness of inmate telephone rates.”⁹⁸ As a result of its investigation, the Kentucky Public Service Commission “reduced the surcharge to \$1.50.”⁹⁹ Today, thanks in large part to the publicity garnered by

⁹² *Id.*

⁹³ See Stelzer, *supra* note 3 (“Missouri Sen. Larry Rohrbach . . . sponsored a failed bill that would have prohibited the state from profiting from its prison-pay-phone contract. Another ill-fated bill, sponsored by Rep. Charles Quincy Troupe (D-St. Louis), would have allocated the state’s share of the profits to prison education programs.”).

⁹⁴ See Prison Talk, *supra* note 91; see also Stelzer, *supra* note 3.

⁹⁵ Daleure v. Kentucky, 119 F. Supp. 2d 683, 685 (W.D. Ky. 2000), *rev’d*, 269 F.3d 540 (6th Cir. 2001).

⁹⁶ *Id.* at 542.

⁹⁷ 64 AM. JUR. 2d *Public Utilities* § 62.

⁹⁸ Daleure, 119 F. Supp. 2d at 686 n.8.

⁹⁹ See *id.* at 686 n.5. See also *In the Matter of: Establishment of an Operator Surcharge Rate for Collect Telephone Calls from Confinement Facilities*, Case No. 378, Commonwealth of Ky. Pub. Serv. Comm’n (filed Oct. 2, 2000), 2000 Ky. Pub. Util. Comm’n LEXIS 14.

the lawsuit,¹⁰⁰ Kentucky inmates enjoy the country's sixth lowest collect-call rate structure.¹⁰¹

7. *North Dakota*

After negotiating a contract with service provider Evercom that allows for both debit and collect calls, North Dakota prisons have the seventh most affordable rates.¹⁰² Fifteen minutes of interstate long-distance costs \$5.10 with a debit card and \$6.06 when calling collect.¹⁰³ These rates are consistent with North Dakota Department of Corrections and Rehabilitation policies that afford prisoners "reasonable and equitable" telephone access.¹⁰⁴

8. *Wisconsin*

Wisconsin Administrative Code governing the State Department of Corrections provides that:

The department shall encourage communication between an inmate and an inmate's family, friends, government officials, courts, and people concerned with the welfare of the inmate. Communication fosters reintegration into the community and the maintenance of family ties. It helps to motivate the inmate and thus contributes to morale and to the security of the inmate and staff.¹⁰⁵

In keeping with this value, the Wisconsin Department of Corrections "caps prison telephone rates at \$1.25 for the connection fee and \$0.22 for each additional minute."¹⁰⁶ Thus, collect-calls from Wisconsin state prisons are approximately the eighth lowest in the nation.¹⁰⁷

¹⁰⁰ See generally *Daleure*, 119 F. Supp. at 689 ("[T]he [Kentucky Public Service Commission] has held the rates at issue in this case 'unjust and unreasonable' and set new 'reasonable' rates.").

¹⁰¹ eTc—National Perspective, *supra* note 48.

¹⁰² eTc—Current Status, *supra* note 9.

¹⁰³ *Id.*

¹⁰⁴ See, e.g., Southwest Multi-County Correction Center, Policies and Procedures Manual, Dickinson Adult Detention Center at 1 (Sept. 22, 2004), http://www.state.nd.us/docr/central_office/POLICIES/Mail_Tele_Visiting/Telephones-F.doc (on file with the North Carolina Journal of Law & Technology).

¹⁰⁵ WIS. ADMIN. CODE DOC § 309.56 (2006).

¹⁰⁶ Michael Rigby, *CCA Closes Oklahoma Prison, Settles Tax Lawsuit Over Ohio Prison*, 15 PRISON LEGAL NEWS 3, 14 (Mar. 2004), <http://www.prisonlegalnews.org/Members/issues/PDF/03pln04.pdf>.

¹⁰⁷ eTc—National Perspective, *supra* note 48.

Excluding Washington, D.C.—a special case—legislation has played no role in the implementation of the aforementioned telephone rates. State prison systems with more affordable rates, such as the Wisconsin Department of Corrections, were able to establish reasonable long-distance policies without relying on the passage of relevant statutes.

B. *States with Much Higher Rates*

According to the Campaign to Promote Equitable Telephone Charges, the following eight states have the most expensive inmate telephone rates: Washington, Montana, Arizona, Kansas, New Jersey, Arkansas, Oklahoma, and Oregon.¹⁰⁸ Out-of-state collect calls cost over \$1.00 per minute in all but one of these states.¹⁰⁹

The lack of legislative activity and the failure of proposed legislation in these states supports the argument that state legislatures have simply not been an ineffective forum for bringing about a change to this issue. The fact that bills addressing this problem have been introduced in only three states¹¹⁰ suggests a striking lack of political will among legislators to seek reform. In fact, Washington is the only one among these states to have successfully enacted legislation.¹¹¹ Yet, it is telling how little Washington's statute has done to reduce rates: interstate long-distance calls still cost prisoners over a dollar per minute.¹¹²

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* See also Jennifer McKee, *Inmates Calls Cost Top Dollar*, MISSOULIAN, Nov. 25, 2004, available at <http://www.missoulian.com/articles/2004/11/29/news/mtregional/news02.txt>.

¹¹⁰ See, e.g., A.B. 168, 210th Sess. (N.J. 2002); H.B. 2425, 49th Leg., 2d Sess. (Okla. 2004); S.B. 6352, 58th Leg., Reg. Sess. (Wash. 2004).

¹¹¹ S.B. 6352, 58th Leg., Reg. Sess. (Wash. 2004).

¹¹² Associated Press, *Cell Calls (the Prison Kind) Soon Will Be Less Costly*, SEATTLE TIMES, Apr. 18, 2006, at B4.

1. *New Jersey*

Legislation considered in New Jersey focused on reducing the state's dependence on phone commissions rather than providing relief for prisoners' families.¹¹³ The bill that was drafted would have directed the state's annual prison long-distance commissions, totaling over \$5 million into a victim's compensation fund, but the bill garnered little support and died in committee.¹¹⁴ State legislators in Washington appear to be unwilling to give up the revenue stream provided by kickbacks, even for the benefit of crime victims.

2. *Oklahoma*

In Oklahoma, a number of prison telephone bills have failed, once again illustrating major hurdles involved in addressing this problem through legislation. Oklahoma state legislator Judy McIntyre introduced two bills seeking to lower inmate long-distance rates and end the state's practice of receiving commissions from prison phone service providers.¹¹⁵ Both bills languished in committee.¹¹⁶

Oklahoma State Representative Ron Kirby also introduced two bills during the 2003 and 2004 State House sessions.¹¹⁷ Though both bills failed, it is unclear whether their passage would have provided any relief.¹¹⁸ Kirby's bills, introduced after McIntyre's House Bill, had two fundamental flaws. First, the bills lacked specific "language to reduce the profit taken by [the Oklahoma Department of Corrections] and phone companies."¹¹⁹ Second, the bills required that all prisons update their phone systems to include new technological advances such as "[f]ingerprint identification of

¹¹³ A.B. 168, 210th Sess. (N.J. 2002).

¹¹⁴ *Id.*

¹¹⁵ H.B. 1552, 49th Leg., 1st Sess. (Okla. 2003); S.B. 393, 50th Leg., 1st Sess. (Okla. 2005).

¹¹⁶ H.B. 1552, 49th Leg., 1st Sess. (Okla. 2003); S.B. 393, 50th Leg., 1st Sess. (Okla. 2005).

¹¹⁷ H.B. 1590, 49th Leg., 1st Sess. (Okla. 2003); H.B. 2425, 49th Leg., 2d Sess. (Okla. 2004).

¹¹⁸ Opinion, *Phone Legislation Misses Mark*, OKLAHOMAN, Oct. 22, 2003, at A14.

¹¹⁹ *Id.*

the inmate placing the telephone call” and “[p]eriodic photographs of the inmate during the telephone conversation for identity verification.”¹²⁰ Although Kirby claimed to have introduced his legislation to combat “outrageous” phone bills,¹²¹ his bills ensured “the state a profit of at least \$2 million annually” and failed to make any provision for these additional costs.¹²²

3. *Washington*

In January 2004, eight state Senators introduced Washington State Senate Bill 6352, which sought to update the state’s prison phone systems and allow “offender families to select a low-cost option to communicate with inmates.”¹²³ The bill contained explicit language about its intent:

The legislature finds that the current telephone service for offender calls from department of corrections facilities is based on outdated technology that provides neither the most secure nor the most accountable system available and is provided at a high cost to the offenders’ families. The legislature, in budget provisions, has required the secretary of corrections to investigate other systems as offender telephone service contracts came due for renewal. The legislature now finds that the current statute prevents the secretary of corrections from using systems that provide greater security, more offender accountability, and lower costs. Therefore, the legislature intends to remove this barrier while retaining the intent of the statute to provide safe, accountable, and affordable telephone services.¹²⁴

Unlike the majority of prison telephone reform bills, Senate Bill 6352 was quickly passed by both the House and the Senate, and was immediately signed into law by the Governor.¹²⁵

Families of inmates initially celebrated the bill’s passage, but other than giving inmates a new direct-dial, debit-account option, it

¹²⁰ H.B. 1590, 49th Leg., 1st Sess. (Okla. 2003); H.B. 2425, 49th Leg., 2d Sess. (Okla. 2004).

¹²¹ Ryan McNeil, *Phone Costs for Inmates Examined*, OKLAHOMAN, Dec. 1, 2003, at A1.

¹²² Lynn Powell, *Bill Won’t Cut Inmate Phone Rates*, OKLAHOMAN, Mar. 25, 2004, at A10.

¹²³ S.B. 6352, 58th Leg., Reg. Sess. (Wash. 2004).

¹²⁴ *Id.*

¹²⁵ WASH. REV. CODE § 9.73.095 (2004); S.B. 6352, 58th Leg., Reg. Sess. (Wash. 2004).

has had little positive impact on many families' phone bills.¹²⁶ In addition, disagreements between competing phone companies, contract disputes, and other related legal wrangling¹²⁷ prevented the state from offering debit telephone calls for over two years.¹²⁸ Furthermore, Washington's new telephone contract with FSH Communications guarantees the state even more in annual commissions: \$5.1 million—as opposed to the \$3.8 million—received each year under the old contract with AT&T prior to the passage of Senate Bill 6352.¹²⁹

Before the enactment of Washington's new prison telephone legislation, the state had the highest inmate collect call rates in the country; recipients were charged \$17.77 for a fifteen-minute, out-of-state call.¹³⁰ Today, even under the new legislation, many families still incur exorbitantly high phone bills.¹³¹ Although in-state long-distance rates have been reduced, local calls are even more expensive than before, and out-of-state collect calls are now only slightly lower at \$17.41 for a fifteen-minute call.¹³² Given that inmates with family members in other states have fewer

¹²⁶ Richard Roesler, *Cheaper Prison Calls on Hold; Families Struggle to Stay in Touch Amid Contract Snafu*, SPOKESMAN REV. (Spokane, WA), July 23, 2005, at B1.

¹²⁷ *Id.* Washington's contract renegotiations had numerous irregularities: When the bids came in, corrections officials told a California company, Public Communications Services Inc., that it was 'the apparent successful vendor.' It was a contract worth \$132 million, according to court documents filed later by PCS. The company said it would charge half of what AT&T has been charging Within a week of notifying PCS, however, the state received a complaint from AT&T, which had held the state prison contract since 1991. The Department of Corrections then decided that it hadn't had the authority to issue such a large telecommunications bid, and that the state Department of Information Services should have done it instead Corrections told PCS that it wasn't the bid winner. PCS sued Corrections is about to re-issue a request for proposals. Essentially, the process is starting all over again.

Id.

¹²⁸ Associated Press, *supra* note 112, at B4.

¹²⁹ *Id.*

¹³⁰ eTc—Current Status, *supra* note 9.

¹³¹ Associated Press, *supra* note 112, at B4.

¹³² *Id.*

opportunities for visits and are most in need of relief, the overall effect of Washington's legislation has been disappointing.

C. *State Legislation Will Not Reduce Excessive Rates*

After analyzing four statutes, Severin's 2004 Cardozo Law Review note reasoned that state legislation would be more effective than litigation in reducing excessive prison telephone rates.¹³³ While legislatures technically have the power to reduce rates, it is not politically realistic to expect other states to follow the lead of Vermont and Washington D.C. Thus far, the majority of bills seeking to remedy the problem—including the one and only federal bill ever introduced on prison phone rates¹³⁴—have died in committee.¹³⁵ Furthermore, the passage of such bills does not guarantee reduced phone rates.

Vermont's legislature, for example, has been praised for "providing substantial relief for prison phone call recipient[s] . . . and should serve as a model to all states where call recipients are forced to pay exorbitant and unjust rates for calls from their incarcerated family members and friends."¹³⁶ Vermont's law has been celebrated for requiring the state to provide "the lowest reasonable cost to inmates, to their families, and to others communicating with inmates."¹³⁷ Despite the language of this lauded statute, Vermont does not have the lowest rates in the

¹³³ Severin, *supra* note 10, at 1532.

¹³⁴ Telephone Correction Protection Act of 2005, H.R. 4466, 109th Cong. (2005). In December, 2005, Congressman Bobby Rush (D-Ill.) introduced the Family Telephone Correction Protection Act of 2005, challenging high prison phone rates. *Id.* The bill, which sought to "end this shameful practice by requiring the Federal Communications Commission to set fair rates for interstate phone calls made from prison," garnered only five co-sponsors and appears to have died in the Subcommittee on Telecommunications and the Internet. *Id.*; see, e.g., Editorial, *Keeping in Touch with a Parent in Prison*, N.Y. TIMES, Jan. 14, 2006, at A14.

¹³⁵ See, e.g., A.B. 168, 210th Sess. (N.J. 2002); H.B. 7784, Reg. Sess. (R.I. 2004).

¹³⁶ Severin, *supra* note 10, at 1529 (citing VT. STAT. ANN. tit. 28, 802a (2006)).

¹³⁷ eTc—More About, *supra* note 58 (citing VT. STAT. ANN. tit. 28, 802a (2006)).

country. Thirteen other states have more affordable rates than Vermont, where an out-of-state, fifteen-minute collect call costs \$10.75.¹³⁸

Other statutes, such as the one enacted in Washington, have failed to affect a significant reduction in out-of-state long-distance rates.¹³⁹ Unfortunately, Washington is not alone in its passage of purely symbolic legislation. Virginia passed House Bill 1765,¹⁴⁰ codified at § 53.1-1.1 of the Virginia Code, which called for a reduction in phone rates for prisoners. The legislation provided for the adoption of a new debit calling system with “the lowest available rates” for inmates and their families.¹⁴¹ Nevertheless, many inmates’ families have complained that their phone bills have gone up under the state’s new contract with MCI.¹⁴²

Although legislation has failed to alleviate the problem, more indirect means of reform have succeeded in lowering rates. By pressuring their department of corrections, two state Senators from Missouri were able to negotiate lower rates for prisoners without having to enact any new laws or regulations.¹⁴³ The Missouri senators, one left-leaning and one conservative, should be commended for having the courage to stick up for a politically unpopular group. In states like Nebraska, West Virginia, North Dakota, and Wisconsin, the decision to offer lower rates came about as a result of concern for rehabilitation and good corrections policy. West Virginia corrections policy emphasizes equity and reasonableness.¹⁴⁴ Other corrections agencies, like Nebraska and Wisconsin, stress the importance of communication with family

¹³⁸ eTc—Current Status, *supra* note 9.

¹³⁹ See *supra* notes 123–32 and accompanying text.

¹⁴⁰ H.B. 1765, 2004 Leg., Reg. Sess. (Va. 2005).

¹⁴¹ VA. CODE ANN. § 53.1–1.1 (2006).

¹⁴² MEETING MINUTES, COMMONWEALTH OF VA. BD. OF CORRECTIONS 1–2 (Mar. 15, 2006), <http://www.vadoc.state.va.us/about/board/minutes/32006mins.doc> (“[F]amilies claim they are now paying more money under the new contract than they did with the old.”) (on file with the North Carolina Journal of Law & Technology).

¹⁴³ See *supra* notes 91–95 and accompanying text.

¹⁴⁴ See, e.g., W. VA. CODE R. § 95-2–17.11.1 (2006).

and community as an integral part of the rehabilitation process.¹⁴⁵ These facts seem to indicate that enlightened corrections departments are better suited to bring about reform than are well-intentioned state legislators. Unfortunately the policies in these states are the exception, rather than the rule. While some corrections departments acknowledge the ethical and rehabilitative reasons for maintaining affordable phone rates in prison, many have found a reason to look the other way.

D. *Prison Systems That Are Gouging Families Need Reform*¹⁴⁶

State corrections agencies' willingness to participate in price gouging is evidence of the general trend away from viewing rehabilitation as the goal of incarceration.¹⁴⁷ Excessive prison telephone rates are caused by deeper institutional defects.¹⁴⁸

¹⁴⁵ See *supra* notes 76–80 and accompanying text; see also *supra* notes 105–07 and accompanying text.

¹⁴⁶ See, e.g., Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J. L. & PUB. POL'Y 247, 292 (1997) (“The widespread complaints . . . that state prisons are under funded and overcrowded . . . and that urban areas now receive substantial federal funding for their criminal justice systems can be seen as evidence . . . that, left to their own devices, states devote insufficient resources to combating crime in poor communities.”).

¹⁴⁷ See, e.g., Mark J. Heyrman, *Mass Incarceration: Perspectives on U.S. Imprisonment: Mental Illness in Prisons and Jails*, 7 U. CHI. L. SCH. ROUNDTABLE 113, 118 (2000) (“For a period of time, which largely ended during the 1970’s, one of the goals of incarceration was to make available to criminals an array of social services which would reduce the likelihood that they would re-offend upon release. Very little rehabilitation occurs or is intended to occur in any United States prison today.”).

¹⁴⁸ See, e.g., TESTIMONY OF MARY L. LIVERS, PH.D., DEPUTY SEC’Y OF OPERATIONS, MD. DEP’T OF PUB. SAFETY & CORR. SERVICES, TO THE COMM’N FOR SAFETY & ABUSE IN AMERICA’S PRISONS (Nov. 2, 2005), <http://www.prisoncommission.org/statements/livers.pdf> (“Effecting change is hard for most of us just in everyday life situations. It is particularly hard in correctional settings.”) (on file with the North Carolina Journal of Law & Technology). In her testimony to the Commission for Safety and Abuse in America’s Prisons, Mary Livers notes that specific institutional flaws contribute to many of the problems common to the modern American state correctional agencies. *Id.* at 8–10. She contends that they are especially resistant to change because they (1) lack transparency; (2) tend to be secretive; (3) lack adequate funding, staff, and programs needed to do “the science of changing criminal behavior”; and (4) have directors serving short tenures tied to the election cycle. *Id.*

Accordingly, the problem requires some degree of institutional reform.

V. FEDERAL REGULATORY REFORM

A. *FCC Intervention*

The Federal Communications Commission (FCC) has the authority to lower excessive rates through federal regulation, but as of yet they have declined to take action.¹⁴⁹ Critics of the FCC believe that the Commission is susceptible to pressure from the communications industry,¹⁵⁰ and thus, unwilling to limit such a profitable practice. Since November 2003, the FCC has been “examining long-distance telephone service rates imposed on inmates and their families in an ongoing proceeding regarding the provision of inmate payphone service.”¹⁵¹ While the agency’s failure to act is disappointing, the possibility of administrative action has not been eliminated. Proponents of reform have had close to three years to file comments demanding regulation. These advocates have used the FCC proceedings to create an extensive record detailing the injustice of the situation.

¹⁴⁹ In 1998, the FCC declined to dictate specific price controls or rate benchmarks, to implement billed party preferences, or to grant all operator services providers (“OSPs”) access to the calling card validation databases of all carriers. Instead, the Commission addressed exorbitant OSP charges for calls from public phones and other aggregator locations such as payphones, hotels, hospitals, and educational institutions seeking to ensure “better informed consumers, foster a more competitive marketplace, and better serve the public interest.” Second Report and Order, 13 F.C.C.R. 6122, 6123 (1998) [hereinafter 0+Second Report].

¹⁵⁰ See, e.g., Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407, 427 (1990) (citation omitted); see also *id.* at 426–427 (stating that “[t]he independent agencies have generally been highly susceptible to the political pressure of well-organized private groups—perhaps even more susceptible, on balance, than executive agencies”).

¹⁵¹ The FCC’s examination of the issue began when a group of prison inmates and non-inmates filed the Wright Petition. The petitioners there asked that the FCC “initiate a notice and comment rulemaking proceeding to consider precluding exclusive service arrangements and other restrictions on inmate calling options.” FCC, CC Docket No. 96-128, Public Notice, DA 03-4027 (Dec. 31, 2003).

Under the separation of powers doctrine, Congress and state legislatures are typically responsible for fact finding.¹⁵² However, these bodies have failed to investigate the issue adequately, and many courts have refused to reach the merits of challenges to excessive prison phone rates.¹⁵³ As a result, telephone companies have largely avoided having to defend their practices in a public forum. The FCC proceeding has finally forced telephone companies to publicly account for exorbitant rates.

B. *Legal Background*

Congress has granted the FCC exclusive authority to enforce 47 U.S.C. § 201, which provides that “practices, classifications, and regulations for and in connection with such [interstate wire] communications service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful.”¹⁵⁴

Under § 201(b), the FCC can take steps to regulate common carriers if their long-distance telephone rates are unjust and unreasonable by prescribing “such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.”¹⁵⁵

¹⁵² See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (“We owe Congress’ findings deference in part because the institution is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions.”) (internal quotations omitted); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 572 (1990) (“The ‘special attribute [of Congress] . . . lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue.’”) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 502–03 (1980)).

¹⁵³ *Severin*, *supra* note 10, at 1482–83 (citations omitted) (“Courts, however, tend to dismiss these challenges for reasons based on judicially-created doctrines and statutory bars [such as lack of jurisdiction to rule on utility rates], rather than on the merits.”); see also *id.* at 1483 n.57 (“This tendency of courts to dismiss prison phone rate challenges for lack of jurisdiction would not be as remarkable if it was doctrinally inevitable, but in the *Arsberry* case . . . the court persuasively argued it is not.”) (citing *Arsberry v. Illinois*, 244 F.3d 558 (2001)).

¹⁵⁴ 47 U.S.C. § 201(b) (2000).

¹⁵⁵ *Id.*

In 1998, responding to complaints about excessive prison telephone rates, the FCC considered for the first time whether to establish benchmark rates on inmate calling services.¹⁵⁶ The commission acknowledged that “the recipients of collect calls from inmates . . . require additional safeguards to avoid being charged excessive rates from a monopoly provider.”¹⁵⁷ The FCC used their § 201(b) authority to order interstate long-distance providers to orally disclose billing rates to inmate call recipients before asking them to accept the charges.¹⁵⁸ However, the Commission stopped short of setting rate caps, reasoning that benchmarks would interfere with market forces that would, in theory, drive rates down automatically.¹⁵⁹ Eight years later, it is clear that the posited market forces have failed to bring down prices and that the time has come for the FCC to intervene.

C. *The Wright Petition*

Federal courts have all too often refused to decide telephone rate challenges on their merits, holding that they lack jurisdiction to review interstate long-distance rates and that such questions are a matter for the FCC.¹⁶⁰ In *Wright v. Corrections Corporation of America*, a D.C. district court dismissed plaintiffs’ claims and referred the matter to the FCC, finding that “Congress has given the FCC explicit statutory authority to regulate inmate payphone services.”¹⁶¹ Accordingly, on November 3, 2003, plaintiffs filed the Wright Petition with the FCC, seeking regulatory lowering of

¹⁵⁶ See 0+Second Report, *supra* note 149.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 6141–42 (“We believe that the imposition of price controls or benchmarks upon the entire industry, in order to curtail rate gouging by some carriers and aggregators, would be overly regulatory and could even stifle rate competition.”).

¹⁶⁰ See, e.g., *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). See also *Valdez v. State*, 54 P.3d 71, 75 (2002) (dismissing plaintiffs’ claims under primary jurisdiction).

¹⁶¹ *Wright Petition*, *supra* note 54, at *10–11.

prison telephone rates.¹⁶² Specifically, the Wright Petition requests that the FCC:

[P]rohibit exclusive inmate calling service agreements and collect call-only restrictions[,] . . . permit multiple long distance carriers to interconnect with prison telephone systems[,] . . . require inmate service providers to offer debit card or debit account service as an alternative to collect calling services[,] and establish a benchmark access fee.¹⁶³

At the time of this article, nearly three years after the initial filing of the Wright Petition, the FCC has still not ruled on the matter. Nevertheless, the petition's meticulous itemization of technical and financial matters affecting prison telephone systems is powerful evidence for parties rebutting the assertion that security costs justify the inflated telephone rates.¹⁶⁴

D. *The Dawson Affidavit*

In addition to highlighting the Federal Bureau of Prisons' success in its use of a direct-dial debit system,¹⁶⁵ the Wright Petition goes several steps further by attacking the "assumption that security and other penological considerations justify these practices."¹⁶⁶ Much of the information in the petition is provided

¹⁶² *Id.* at *11.

¹⁶³ *Id.*

¹⁶⁴ See *Wright Petition*, *supra* note 54, at *44–120. See also Jackson, *supra* note 11, at 274.

[T]he 388-page Wright petition called upon the Commission to redress the issue of excessive charges by requiring competition in inmate telephone service provision, along with debit calling options as an alternative to more expensive collect calls. Citing the experience of the Federal Bureau of Prisons with debit-based calling systems, together with affidavits from industry security experts attesting to the technical feasibility of a secure-yet-competitive inmate calling market, the Wright petition asks the Commission to reverse its traditional position of deferential non-action to protect the public interest with non-exorbitant inmate calling rates.

Id. (citation omitted).

¹⁶⁵ See, e.g., *Wright Petition*, *supra* note 54, at *71–72 ("For example, the federal prison system has had a debit product for prisoners for many years. . . . Given a choice, many of these called parties would much rather establish a personal debit fund if the calls could be cheaper.").

¹⁶⁶ *Id.* at *8.

by Douglas A. Dawson, a telecommunications expert for the petitioners.¹⁶⁷ In a seventy-eight-page affidavit attached to the Wright Petition, Dawson:

a) describe[s] the history and development of telephone systems—both generally as well as specifically for prison systems; b) discuss[es] the various penological requirements that must be satisfied by a prison calling system; c) discuss[es] specifically the current payment methods that are used with prison calling systems; d) demonstrate[s] that there are no justifications for prison administrators not to allow debit card or debit account calling or for inmate service providers not to offer debit card or debit account calling; and e) demonstrate[s] the feasibility and reasonableness of opening inmate calling services to competition, so that inmates have a choice of carriers.¹⁶⁸

Dawson explains that “each separate penological requirement for prison telephone switching systems has only been made possible, and thus really created, in response to changes in technology.”¹⁶⁹ When the technological components of today’s prison phone system were first introduced, they were more expensive than they are today. However, the price of these components has “dropped drastically over the last few years” and current trends will continue to “lower the cost[s] . . . even further in the near future.”¹⁷⁰ To support his assertions, Dawson provides detailed cost analysis charts showing that prison phone systems can be provided for considerably less than the price prison telephone providers typically charge.¹⁷¹

Dawson concludes that long-distance rates cost service providers approximately “[\$]0.139 to \$0.155 per minute before profit and taxes,”¹⁷² while a pure debit system “could be provided

¹⁶⁷ *Id.* at *44. The Wright Petition contains an affidavit containing over seventy pages of Douglas A. Dawson’s written testimony. Douglas A. Dawson is the President of CCG Consulting, Inc., a firm providing services “for over 250 communications companies, which include local exchange carriers (‘LECs’), competitive LECs (‘CLECs’), cable TV providers, electric utilities, wireless providers, paging companies, municipalities and other governments and interexchange carriers.”

¹⁶⁸ *Id.* at *42–43.

¹⁶⁹ *Id.* at *56–57.

¹⁷⁰ *Id.* at *83–84.

¹⁷¹ *Id.* at *86–120.

¹⁷² *Id.* at *119.

at much lower rates.”¹⁷³ Predictably, major prison phone service providers like MCI and Sprint criticized the Dawson Affidavit, but their attacks relied primarily on the argument that the rates are “reasonably related to legitimate penological interests”¹⁷⁴ Though many service providers criticized Dawson’s cost estimates “none of them provided contrary estimates,” with the exception of MCI, which attempted “to prove costs at \$0.65 per minute, a number that nobody in this industry can take seriously.”¹⁷⁵ If it truly costs MCI \$0.65—before tax and profits—to provide a state prisoner with one minute of long-distance, then competitor AT&T must actually lose money to provide interstate long-distance to Nebraska prisons for \$0.16 per minute, after tax and profits.¹⁷⁶

The FCC has yet to act on any of the issues raised in the Wright Petition. However, as this article was being written, Wright’s attorneys were contemplating filing an alternative rulemaking proposal offering further evidence that inmates can be offered secure and penologically sound long-distance service at much lower cost.¹⁷⁷

¹⁷³ *Wright Petition*, *supra* note 54, at *119.

¹⁷⁴ See *In the Matter of: Implementation of Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Reply Comments of MCI*, FCC Docket No. 96-128, at 3 (filed Apr. 21, 2004) (“[C]ourts have repeatedly upheld the authority of prison officials to further security concerns when they make decisions on telecommunications services for inmates.”) (on file with the North Carolina Journal of Law & Technology); see also Jackson, *supra* note 11, at 274 (“[B]oth MCI and AT&T responded to the Wright [P]etition on ostensibly jurisdictional and security grounds, arguing that the FCC should maintain its traditional pattern of deference vis-à-vis the penological discretion and contractual freedoms of state departments of correction . . .”).

¹⁷⁵ *In the Matter of: Implementation of Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Reply Declaration of Douglas A. Dawson*, FCC Docket No. 96-128 (filed Apr. 21, 2004).

¹⁷⁶ eTc—More About, *supra* note 68.

¹⁷⁷ Telephone Interview with Frank Krogh, Morrison & Foerster, L.L.P. (Oct. 5, 2006).

VI. THE BENEFITS OF LITIGATION

Court challenges to excessive prison telephone rates have consistently failed to provide relief, and future legal victories are unlikely given current Supreme Court jurisprudence.¹⁷⁸ Furthermore, courts tend to dismiss excessive phone rate challenges “for reasons based on judicially-created doctrines and statutory bars, rather than on the merits.”¹⁷⁹ Nevertheless, litigation can play a role in “an effective political strategy for achieving . . . reform.”¹⁸⁰

A. Federal Judicial Policymaking

In the 1960s and 1970s, “federal court judges played a critical policymaking role in prison reform litigation.”¹⁸¹ Just as critics of mandatory school desegregation have argued that *Brown v. Board of Education*¹⁸² actually created more racial animus because of the widespread resentment towards such federal intervention, opponents of federally mandated prison reform have criticized the

¹⁷⁸ Severin, *supra* note 10, at 1514–23.

¹⁷⁹ Severin notes that “prison phone service providers are nearly always shielded from antitrust liability by either filed rate doctrine, state action doctrine, and/or the doctrine of primary jurisdiction.” *Id.* at 1503. Primary jurisdiction, for example, “allows a court to defer to a regulatory agency [—in this case, the FCC—] when faced with an issue that is within the agency’s area of expertise.” *Id.*, at 1479 n.41. *See, e.g.,* *Arsberry v. Illinois*, 244 F.3d 558, 567 (7th Cir. App., 2001) (dismissing plaintiffs’ equal protection claim based on doctrine of primary jurisdiction).

In *Arsberry v. Illinois*, 244 F.3d at 562, Judge Posner noted that courts typically use such doctrines to avoid rate-setting, “a task [courts] are inherently unsuited to perform.” Judge Posner also found excessive prison phone rates do not implicate antitrust laws. *Id.* at 566 (“States and other public agencies do not violate the antitrust laws by charging fees or taxes that exploit the monopoly of force that is the definition of government. They have to get revenue somehow, and the ‘somehow’ is not the business of the federal courts unless a specific federal right is infringed.”).

¹⁸⁰ Jules Lobel, *Courts as a Forum for Protest*, 52 UCLA L. REV. 477, 486 (2004) (citation omitted).

¹⁸¹ Neal Devins, *I Love You, Big Brother*, 87 CAL. L. REV. 1283, 1285 (1999) (reviewing Malcolm Feeley & Edward Rubin, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS* (1998)).

¹⁸² 347 U.S. 483 (1954).

court's active role in past prison reform movements.¹⁸³ Some even contend that the involvement of federal courts in state prison reform contributed to the backlash that led to the Prison Litigation Reform Act (PLRA),¹⁸⁴ legislation that severely limits "the court's power to, among other things, appoint special masters, approve consent decrees, and maintain jurisdiction over prison reform litigation."¹⁸⁵ Even though the PLRA has sharply reduced the amount of prison reform litigation and federal intervention, courts are still willing to mandate systemic change in certain limited situations.¹⁸⁶ In 2003, for example, a federal district court ordered the New York State Department of Correctional Services (NYDOCS) to stop categorizing the Nation of Islam as an official security threat group and held that NYDOCS could no longer ban all Nation of Islam literature.¹⁸⁷ In addition, there have been a number of post-PLRA cases in which federal courts have mandated state prison policy reform with regard to prison health and mental health care.¹⁸⁸

The time has come for federal intervention into state prison policies that allow excessive prison phone rates. The past failure of legislation shows that states are not likely to solve this problem on their own.

¹⁸³ Devins, *supra* note 181, at 1294–95.

¹⁸⁴ Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321–66 (1995).

¹⁸⁵ Devins, *supra* note 181, at 1295 n.37.

¹⁸⁶ See generally Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison*, 81 N.Y.U. L. REV. 550 (2006).

¹⁸⁷ *Marria v. Broaddus*, No. 97 Civ. 8297, 2003 U.S. Dist. LEXIS 13329 (S.D.N.Y. July 31, 2003).

¹⁸⁸ See, e.g., *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999), *rev'd and remanded by*, 243 F.3d 941 (5th Cir. 2001), *on remand*, 154 F. Supp. 2d 975 (S.D. Tex. 2001) (ordering oversight of the Texas prison system due to egregious treatment of prisoners with mental and physical health problems); *Madrid v. Gomez*, 889 F. Supp. 1146, 1205 (N.D. Cal. 1995) (ordering oversight of California prisons due to poor health care).

B. *Walton v. New York State Department of Correctional Services*

A recent New York case also provides reason for finding some hope in the courts. Supporters of the New York Campaign for Telephone Justice and other advocates for equitable telephone rates have been hopeful¹⁸⁹ about the recent decision of New York's highest court to grant plaintiff's motion for leave to appeal the intermediate court's decision in *Walton v. New York Department of Correction Services*.¹⁹⁰ The plaintiffs, recipients of prisoners' collect calls—mainly family members—seek to enjoin the State from collecting the 57.5% commission provided in their contract with MCI.¹⁹¹ Plaintiffs' claims were dismissed by the lower court based on a ruling that they missed the four-month statute of limitations appropriate to their particular constitutional claims.¹⁹²

In the *Walton* proceedings to date, defendants NYDOCS and MCI have made familiar arguments. The State claimed that plaintiffs were barred by the filed rate doctrine,¹⁹³ while MCI claimed that their high rates and regular 57.5% commission payments to the NYDOCS were a “[s]tandard and [l]egitimate [c]ost of [p]roviding [t]elephone [p]ayphone [s]ervices,”¹⁹⁴ and that “commissions of 20–63% to prison authorities are customary.”¹⁹⁵

¹⁸⁹ New York Campaign for Telephone Justice, What's New?, July 10, 2006, http://www.telephonejustice.org/about/whats_new_content.asp?ID=21 [hereinafter Telephone Justice—What's New] (on file with the North Carolina Journal of Law & Technology).

¹⁹⁰ *Walton v. N.Y. Dep't of Corr. Servs.*, 853 N.E.2d 244 (2006).

¹⁹¹ *Walton v. N.Y. Dep't of Corr. Servs.*, 25 A.D.3d 999, 1000 (N.Y. App. Div. 2006).

¹⁹² *Walton*, 25 A.D.3d at 1001 (citing *Matter of Fed'n of Mental Health Ctrs. v. DeBuono*, 275 A.D.2d 557, 559–60, 712 N.Y.S.2d 667, 669–70 (2000)).

¹⁹³ Reply Brief for Plaintiffs-Appellants at 9, *Walton v. N.Y. Dep't. of Corr. Servs.*, available at http://www.ccr-ny.org/v2/legal/justice/docs/Walton_Appeal_Pltf_Reply_Brief102505.pdf.

¹⁹⁴ Brief of Respondent-Appellee at 4, *MCI, Walton v. N.Y. Dep't of Corr. Servs.*, available at http://www.ccr-ny.org/v2/legal/justice/docs/walton_MCI_appeal%20brief.pdf.

¹⁹⁵ *Id.* (citing *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 17 F.C.C.R. 3248, 3252–53 & n.34 (2002)).

Plaintiffs' claims, on the other hand, represent a combination of the last five years' most persuasive arguments challenging high collect call rates. In addition to free speech, equal protection, and due process claims,¹⁹⁶ plaintiffs make a compelling argument that the NYDOCS "surcharge is an unlawful tax, levied only against them, though used for the general public good, without proper legislative authorization."¹⁹⁷ They also argue that because the NYDOCS "unlawfully takes their property without just compensation," the kickback portion of the high rates violate the New York State Constitution's takings clause.¹⁹⁸ New York City-based nonprofit, the Center for Constitutional Rights, "expects the appeal to be heard sometime this Fall, 2006."¹⁹⁹

C. *Litigation as an Effective Political Strategy*

Litigation often has the ability to rally support and crystallize public opinion around an issue. "[R]eformers must recognize the importance of continuing efforts to influence public opinion,"²⁰⁰ and litigation is often a good way to do so:

¹⁹⁶ *Walton*, 25 A.D.3d at 1000.

¹⁹⁷ Reply Brief for Plaintiffs-Appellants, *supra* note 193, at 15–16 ("Taxes may not be imposed in *absence* of affirmative legislative action."). Similar arguments were made in *Fair v. Sprint Payphone Services, Inc.*, 148 F. Supp. 2d 622 (D.S.C. 2001), *Alexander v. Cottey*, No. 49A02-0301-CV-32, 2004 Ind. App. LEXIS 10 (Ind. Ct. App. Jan. 13, 2004), and *Valdez v. New Mexico*, 54 P.3d 71 (N.M. 2002).

¹⁹⁸ Reply Brief for Plaintiffs-Appellants, *supra* note 193, at 17 ("Because the surcharge is without authorization in law, is appropriated from a discrete segment of the populace, and is applied toward the general public good, it violates the State takings clause.") Similar arguments were made in *Fair v. Sprint Payphone Services, Inc.*, 148 F. Supp. 2d 622 (D.S.C. 2001) and *Valdez v. New Mexico*, 54 P.3d 71 (N.M. 2002). This argument in particular is relatively untested. *See Severin*, *supra* note 10, at 1524.

¹⁹⁹ Telephone Justice—What's New, *supra* note 189.

²⁰⁰ Joseph S. Patt, *School Finance Battles: Survey Says? It's All Just a Change in Attitudes*, 34 HARV. C.R.-C.L. L. REV. 547, 575 (1999).

The efficacy of lawsuits in generating publicity has been well documented. Social scientists have observed ‘that litigation is one of the most effective ways to win publicity for a cause.’ Public interest litigators and organizations have come to view litigation as a vehicle for attracting the media. Reflecting this recognition, it is now a common practice to announce a pending or filed public interest lawsuit at a press conference. Often, litigation attracts the media’s attention in a way that nothing else does.²⁰¹

As compared to a state-house floor, a courtroom often holds more promise for an underdog up against a powerful foe, such as MCI or the State of New York. Groups like the New York Campaign for Telephone Justice, established by the Center for Constitutional Rights, the Fifth Avenue Committee’s Prison Families Community Forum, and Prison Families of New York, Inc., have been effective in rallying support around the *Walton* case.²⁰² Visitors to its website can read all the *Walton* briefs and opinions to date.²⁰³ In addition, the organization has a bulletin board where persons with loved ones in prison can post stories about their experiences with unfair prison phone rates as well as share information on petitions and boycotts.²⁰⁴

Political Science Professor Richard Gambitta has written about the effects of litigation on public opinion.²⁰⁵ Gambitta studied the impact of *San Antonio Independent School District v. Rodriguez*,²⁰⁶ a case challenging the constitutionality of using local property taxes to finance school districts because it produced vast inequities between schools in rich and poor neighborhoods.²⁰⁷ Gambitta

²⁰¹ Lobel, *supra* note 180, at 487 (citations omitted).

²⁰² New York Campaign for Telephone Justice, About the Campaign, <http://www.telephonejustice.org/about/> (last visited Oct. 30, 2006) (on file with North Carolina Journal of Law & Technology).

²⁰³ New York Campaign for Telephone Justice, Legal Cases, http://www.telephonejustice.org/about/legal_cases.asp (last visited Nov. 4, 2006) (on file with North Carolina Journal of Law & Technology).

²⁰⁴ New York Campaign for Telephone Justice, Family Stories, http://www.telephonejustice.org/family_stories/ (last visited Oct. 20, 2006) (on file with North Carolina Journal of Law & Technology).

²⁰⁵ Lobel, *supra* note 180, at 488 (citing RICHARD A.L. GAMBITTA, GOVERNING THROUGH COURTS 259 (1981) [hereinafter GAMBITTA]).

²⁰⁶ *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

²⁰⁷ Lobel, *supra* note 180, at 488 (citing GAMBITTA).

concluded that even though the plaintiffs lost their case, they succeeded in making equitable school funding a higher priority for policymakers all over the country.²⁰⁸ Thus, even when plaintiffs lose, litigation “can recast the nature of a debate,” and “facilitate debates that otherwise may not occur, thus setting in motion, at times, the process of policy change.”²⁰⁹ By publicizing the problem and highlighting its injustice, court challenges to excessive prison phone rates play a similarly important role in pushing for reform in this area.

VII. CONCLUSION

A. *The General Trend Toward Privatization*

The trend in government is to increasingly rely on private corporations to provide services and programs once presumed to be governmental tasks.²¹⁰ Legal scholars such as Columbia Law Professor Gillian Metzger have noted:

Privatization holds the potential to yield more efficient and innovative government programs, by allowing the government to harness private expertise, flexibility, and market competition to its advantage. Yet privatization can also lead to abuse and exploitation, because the financial incentives of private companies and organizations often run counter to the public interest and the interests of program participants.²¹¹

This is not to suggest that government should provide its prisoners with phone service directly; rather, it is to suggest that the pervasiveness of usurious telephone rates among state prison systems should serve as a warning to policymakers. As private entities take over the responsibility for providing more programs and services—welfare programs, health care, public education, and criminal rehabilitation—government officials must be mindful that efficiency and innovation do not necessarily follow and the potential for abuses always exists in such business arrangements.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ See, e.g., Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1394 (2003) (“[P]rivatization often accompanies an expansion in government responsibilities.”).

²¹¹ See *id.* at 1408 (citations omitted).

When the well-being of the country's poorest, most vulnerable citizens is entrusted to private corporations, policymakers must be certain that government contracts ensure adequate accountability, oversight, and regulatory flexibility.²¹²

B. *The Need for Multiple Challenges on Multiple Fronts*

The problem of excessive prison phone rates has persisted for too long because the providers of phone services have the resources necessary to withstand repeated legal and political challenges. On the other side of the issue are those who have found traditional avenues of recourse elusive, ineffective, or both. Under such circumstances, the most promising route to successful reform is to continue to wage the battle on multiple fronts, using the various avenues of legal recourse to galvanize support and generate momentum behind this important issue.

In an environment where being "tough on crime" is the default position of most politicians, it comes as no surprise that even well-intentioned state legislation has proven so futile in bringing resolution to this issue. Indeed, in the rare cases where states have successfully enacted statutes, they have provided shockingly little relief to prisoners' loved ones. Furthermore, given the courts' deference to state prison management decisions, successful court challenges also face a steep uphill battle.

So far, telecommunications companies and state prisons with which they do business have been successful in warding off various phone-rate challenges. While telecom companies claim that their high rates are a direct result of costly security technology, they fail to acknowledge that technological advances have resulted in more affordable methods of providing the required security measures and that these cheaper technologies have made it possible to offer more affordable rates. Further, overhead and operational costs do not explain why the cost of the same services

²¹² *See id.* at 1436 ("Close oversight is particularly important when market failure or abuse of power is most likely: where providers hold a monopoly on provision of particular services; the services at issue are complex . . . ; competitive pressures are minimized by . . . lack of information; and recipients are relatively powerless.").

vary wildly from state to state. Due to a lack of legislative investigation and the frequent dismissal of court challenges, phone companies have largely avoided having to publicly justify their rates with facts and figures.

The evidence indicates that large commissions are the true culprits behind high prison phone rates.²¹³ Most states receive commissions ranging from 18% to 60% from their prison phone service provider.²¹⁴ Furthermore, the very method by which these government contracts are awarded virtually guarantees the practice of price gouging. A phone company that offers a larger commission to the state government will naturally seek to recoup this cost by passing it on to the consumer—in this case, prisoners and their families. While questions about technology and legitimate penological interests are relevant, telecom companies have also been allowed to cloud the issue and make it easier for policymakers to ignore the fundamental injustice of forcing prisoners and their families to bear the extra costs that result from alliances between prison phone service providers and state governments.

Some states, recognizing the injustice of these arrangements, have elected to significantly limit commissions. Other states have gone so far as to refuse this kind of revenue altogether.²¹⁵ By and large, decisions like this are a result of administrative policies that make equity and rehabilitation a priority. Nebraska's phone rate policy, for example, is not the result of a statute or court order. As a matter of corrections policy, administrators in states with affordable phone rates recognize that a prisoner's contact with family and community is an important part of the rehabilitation process. As such, their telephone contracts are consistent with their rehabilitation policy. While such examples are encouraging, the reform is piecemeal. Comprehensive, uniform reform is still a long way off, and change must be pursued through every possible avenue.

²¹³ See *supra* Parts III(B), IV(A)–(C).

²¹⁴ Severin, *supra* note 10, at 1469.

²¹⁵ See, e.g., *supra* Part IV(A)(1)–(2) (showing that Nebraska and Washington, D.C. do not accept commissions).

The most direct path to uniform affordable phone rates for prisoners across the country is the challenge currently before the FCC. On the other hand, if the plaintiffs in *Walton* win their case before New York's highest court, their victory would only directly impact phone rates in that state, at least in the short term. While neither challenge appears likely to succeed, they can help build support for this issue. The FCC proceedings have given opponents ample opportunity to document the most egregious examples of excessive prison telephone rates. This record might ultimately prove most useful in turning the tide against the telecommunication companies that engage in such practices. In addition, the New York court challenge is a good opportunity to rally support and garner media attention. Ultimately, public opinion will determine whether there is sufficient political will to precipitate change.

To gain more traction with the public, one fact must be emphasized above all others: excessive phone rates affect society as a whole. In addition to having a direct, measurable impact on prisoners and their families, they impede re-entry and encourage recidivism, which impacts public safety everywhere. The more the public hears about family members like Janet Logan in Missouri, who was forced to spend over \$700 to talk to her husband over the holidays, the more likely they will be spurred to act by the fundamental injustice of excessive prison phone rates.

It is no sin to be kin, yet families of the incarcerated are penalized for their natural efforts to maintain healthy, normal relationships with their loved ones behind bars. Although the contact provided by prison telephones takes place at the level of a whisper or a lonely goodnight, these brief exchanges build real connections, just as they do for family members separated by divorce or war. The people walking out the front door of our prisons every day need these connections to help them successfully transition back into society. Absent a uniform solution at the federal level, any success—whether it occurs in a state legislature, in a state department of correction, or a court room—is one more call for affordable phone rates for prisoners' families. A chorus of challenges is needed to achieve widespread change. Reform must be pursued through every possible avenue until justice is done.