

GET OUT OF JAIL FREE? A SURVEY OF PAY-TO-STAY STATUTES THROUGH A CONSTITUTIONAL LENS

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ABSTRACT

Dating back to the 1960s, when mass incarceration boomed and federal spending plummeted, states enacted cost-of-confinement fees under the guise of recouping the exorbitant costs of keeping prisons open. However, in the following decades, states rarely revisited and amended or updated their statutes. What resulted were predatory fees in numerous states, leaving ex-offenders fresh out of prison with crippling debts. This Comment aims to shed light on the wide array of fines implemented from state to state through a survey of all prison reimbursement statutes nationwide. No piece of literature to date has identified and analyzed all the relevant statutes categorically. Next, this Comment will explore estate planning implications for ex-offenders and the statutes that might allow leeway for offenders with assets and dependents; more specifically, it will explore how proper estate planning could help protect a person's assets—or how proper estate planning may not be an aid. This Comment posits that cost-of-confinement fees violate the Excessive Fines Clause of the Eighth Amendment by exploring relevant jurisprudence and inspecting each subsection of prison reimbursement fines through a constitutional lens. Next, this Comment draws on an analogous tenet under the Mandatory Victims Restitution Act that requires narrow statutory interpretation to demonstrate how certain statutes are unconstitutionally overbroad. Finally, this Comment explores sociological theories of prisoner reassimilation in society and the main issues ex-offenders confront in the outside world—livelihood, relationships, and collateral legal consequences. This Comment aims to demonstrate how a total repeal of pay-to-stay fees nationwide could allow for smoother prisoner reentry into society and combat recidivism, helping offenders become productive members of society once again.

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I. INTRODUCTION

Teresa Beatty owes \$83,762 to the state of Connecticut.¹ Two decades ago, Teresa served two and a half years in prison for selling drugs.² Now, twenty years later, she is a certified nursing assistant and a caregiver for her two adult children, her grandchild, and her disabled brother.³ She also recently lost her mother, who left Teresa a home in Stamford—the same home Teresa has lived in for fifty-one years.⁴ Now, this home hangs in the balance; the state of Connecticut placed a lien on Teresa’s property to recover the money she owes for her time behind bars.⁵

While Connecticut recently overhauled their pay-to-stay laws, approximately forty-five states still seek cost-of-confinement fees from formerly incarcerated individuals.⁶ These fines can encompass room and board, medical care, and even clothing.⁷ While state governments justify these fees as offsetting the cost of keeping prisons running, certain states’ penalties fringe on predatory, charging inmates up to \$250 per day for scant lodgings and cafeteria food.⁸

These pay-to-stay statutes have broad implications for the estates of formerly incarcerated individuals.⁹ States can recover these fines by seizing assets and pensions and garnishing wages.¹⁰ Certain states will even go after a decedent’s estate or enact civil penalties on their family members.¹¹

In Part I, this article will address some of the concerns raised by pay-to-stay statutes and the interest of society at large in abolishing and repealing such statutes.¹² Throughout this article, the phrases “pay-to-stay” and “cost-of-confinement” will be used interchangeably.¹³ Part II will address the sordid history of pay-to-stay statutes, as well as recent updates and statistics on their efficacy.¹⁴ Part III contains a state-by-state survey of

1. Pat Eaton-Robb, *At \$249 per day, prison stays leave ex-inmates deep in debt*, ASSOCIATED PRESS (Aug. 27, 2022, 10:00 AM), <https://apnews.com/article/crime-prisons-lawsuits-connecticut-074a8f643766e155df58d2c8fbc7214c> [https://perma.cc/Y3RG-A5SE].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Is Charging Inmates to Stay in Prison Smart Policy?*, BRENNAN CTR. FOR JUST. (Sept. 9, 2019), <https://www.brennancenter.org/our-work/research-reports/charging-inmates-stay-prison-smart-policy> [https://perma.cc/2CNK-U8YF].

7. *See id.*

8. Eaton-Robb, *supra* note 1.

9. See Megan Schumann, *States Unfairly Burdening Incarcerated People With “Pay-to-Stay” Fees*, RUTGERS TODAY (Nov. 20, 2020), <https://www.rutgers.edu/news/states-unfairly-burdening-incarcerated-people-pay-stay-fees> [https://perma.cc/3S7M-SB55].

10. *Id.*

11. *Id.*

12. *See infra* Part I.

13. *Author’s original thought.*

14. *See infra* Part II.

pay-to-stay statutes, categorized by the type of fees sought from inmates and the severity of the fees imposed.¹⁵ Section III.A addresses those states that do not impose pay-to-stay fees, but it also explores the probability that certain inmates will still be liable.¹⁶ Section III.B explores several common situations that will trigger pay-to-stay fee imposition in certain states: Section III.B.1 addresses pay-to-stay fees for inmate medical care; Section III.B.2 tackles fees for inmates involved in prison-work programs; Section III.B.3 analyzes limitations certain states have imposed on pay-to-stay fees; Section III.B.4 provides a catch-all for unique pay-to-stay scenarios; and finally, Section III.B.5 discusses those states who impose pay-to-stay fees in all scenarios and in whatever way they see fit.¹⁷ Next, Part IV explains possible consequences these fines can have on the estates of recently released individuals.¹⁸ Finally, Part V proposes a solution and presents the probable benefits of that solution to quash this discriminatory crisis, concluding in Part VI.¹⁹ If federal action is not taken, the cost—both for inmates and society at large—is high, and a total repeal is necessary to protect and preserve this country's scheme of ordered liberty.²⁰

II. THE HISTORY OF PAY-TO-STAY STATUTES

While pay-to-stay statutes have become increasingly common in recent years, the origins of these fees have deep roots, dating back to the nineteenth century.²¹ In 1846, Michigan was the first state to impose a correctional fee which allowed counties to seek reimbursement for local inmates' medical care.²² While fees were typically sought from currently imprisoned offenders, they generally went uncollected due to a prisoner's inability to pay.²³ One exception, however, was inmates in work-release programs whose wages were often seized by the jail to cover their room and board.²⁴

The phenomenon of room and board fees for prisoners, however, did not become widespread until the mid-1980s in response to the political

15. *See infra* Part III.

16. *See infra* Section III.A.

17. *See infra* Section III.B.

18. *See infra* Part IV.

19. *See infra* Parts V–VI.

20. Author's original thought; *see infra* Part VI.

21. *See* Dale Parent, *Recovering Correctional Costs Through Offender Fees*, NAT'L INST. OF JUST. 1, 1 (June 1990), <https://www.ojp.gov/pdffiles1/Digitization/125084NCJRS.pdf> [<https://perma.cc/2EP6-DR8D>].

22. *Id.*

23. *Id.*

24. *Id.*

climate of the United States.²⁵ The Civil Rights Movement provided an ironic backdrop to the swell of violent crime that erupted in the 1960s, particularly in urban centers.²⁶ Politicians, such as Presidents Lyndon B. Johnson and Richard Nixon, equated the two phenomena, stirring up fear amongst working- and middle-class white Americans.²⁷ In particular, President Johnson declared a “War on Crime,” connecting “street crime with civil rights activism” and, in turn, with black Americans in general.²⁸ What resulted was a massive uptick in incarceration rates, with the prison population more than doubling from 1970 to 1985.²⁹ Concurrently, local law enforcement budgets were plummeting due to federal spending cutbacks.³⁰ To offset rising operating costs in prisons, many states revived and expanded their pay-to-stay statutes, popularizing the aforementioned room and board fees.³¹

A. Statutory Updates

Since their infancy in the mid-1990s, very few of these statutes have been substantially amended or updated.³² Recently, however, discourse around pay-to-stay fines has become prevalent with civil rights activists speaking out against predatory practices.³³ Over the past three years, California, New Hampshire, and Illinois abolished their pay-to-stay statutes.

States have updated their pay-to-stay statutes over the years, making slight amendments, usually to the types of prisoners charged.³⁴ However, these amendments rarely absolve former inmates of any real financial

25. Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, BRENNAN CTR. FOR JUST. (July 31, 2014), <https://www.brennancenter.org/our-work/research-reports/paying-your-time-how-charging-inmates-fees-behind-bars-may-violate> [https://perma.cc/2H46-QC5K].

26. Ruth Delaney et al., *American History, Race, and Prison*, VERA INST. OF JUST., <https://www.vera.org/reimagining-prison-web-report/american-history-race-and-prison> (last visited Oct. 12, 2023) [https://perma.cc/AD76-GQWE].

27. *Id.*

28. *Id.*

29. *Id.*; accord Bureau of Just. Statistics Bulletin, *State and Federal Prisoners, 1925-85*, U.S. DEP'T OF JUST. (Oct. 1986), <https://bjs.ojp.gov/content/pub/pdf/sfp2585.pdf> [https://perma.cc/9V2J-HPQ4] (totaling 196,441 prisoners in 1970 and 481,616 in 1985).

30. Morning Edition, *The vast majority of states allow people to be charged for time behind bars*, NPR, at 1:07 (Mar. 4, 2022, 5:13 AM), <https://www.npr.org/2022/03/04/1084452251/the-vast-majority-of-states-allow-people-to-be-charged-for-time-behind-bars> [https://perma.cc/QBU7-PKMA].

31. See Lauren-Brooke Eisen, *Charging Inmates Perpetuates Mass Incarceration*, BRENNAN CTR. FOR JUST. 1, 1, https://www.brennancenter.org/sites/default/files/blog/Charging_Inmates_Mass_Incarceration.pdf (last visited Oct. 24, 2023) [https://perma.cc/63TE-AH3L].

32. Eaton-Robb, *supra* note 1.

33. Joanne Chung, *Rutgers professor discusses pay-to-stay practice, criminal justice reform*, DAILY TARGUM (Dec. 2, 2020, 12:00 AM), <https://dailytargum.com/article/2020/12/rutgers-professor-discusses-pay-to-stay-practice-criminal-justice-reform> [https://perma.cc/GKY4-NKF5].

34. See *infra* Section V.B.

strain.³⁵ Absent the states that have implemented total repeals, most cost-of-confinement statutes have remained more or less the same.³⁶

B. Statutory Efficacy

Despite the sometimes-exorbitant bills former inmates receive upon leaving prison, state and county collections offices typically only recoup approximately 10%–15% of their assessed fees.³⁷ For example, in Eaton County, Michigan alone, over one million dollars in pay-to-stay fines were imposed against former inmates over the past two fiscal years; only 5% of that money was recovered.³⁸ In fact, experts estimate that approximately ten million Americans have a combined fifty billion dollars, and likely more, of debt in fines incurred through the criminal justice system.³⁹

However, an inmate's inability to pay does not free them of their financial obligations to the state.⁴⁰ More often than not, states will use civil means to recoup costs from indigent ex-offenders, whether through property liens, lawsuits, or seeking compensation from the person's family members.⁴¹

Typically, estate planning is a tool that has been utilized by wealthy, upper-class populations.⁴² Whether it be lack of education, lack of "wealth," or lack of access, only about 33% of Americans have estate plans, and lower class populations make up a large majority of this statistic.⁴³ Asset protection, whatever those assets may be, is an important tool that could allow lower income individuals to stymie the cycle of poverty and reincarceration.⁴⁴

35. *Id.*

36. *Id.*

37. Morning Edition, *supra* note 30, at 1:24.

38. *Id.*

39. Karin D. Martin et al., *Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-Entry They Create*, U.S. DEP'T OF JUST.: NEW THINKING IN CMTY. CORR. (Jan. 2017), <https://www.ojp.gov/pdffiles1/nij/249976.pdf> [<https://perma.cc/F63G-2FZX>].

40. See Patrick Liu et al., *Nine facts about monetary sanctions in the criminal justice system*, THE BROOKINGS INST. (Mar. 15, 2019), <https://www.brookings.edu/research/nine-facts-about-monetary-sanctions-in-the-criminal-justice-system/> [<https://perma.cc/V2K6-7N64>].

41. See *infra* Part IV.

42. Alex Chalekian, *Why Estate Planners Aren't Just For The Ultra-Rich*, FORBES: MONEY (Apr. 15, 2019, 9:00 AM), <https://www.forbes.com/sites/forbesfinancecouncil/2019/04/15/why-estate-planners-arent-just-for-the-ultra-rich/?sh=6d87b7793d17> [<https://perma.cc/Y9XM-WHPL>].

43. Lorie Konish, *67% of Americans have no estate plan, survey finds. Here's how to get started on one*, CNBC: ADVICE & THE ADVISOR (Apr. 11, 2022, 3:25 PM), <https://www.cnbc.com/2022/04/11/67-percent-of-americans-have-no-estate-plan-heres-how-to-get-started-on-one.html> [<https://perma.cc/9296-WA24>].

44. Author's original thought.

III. A STATE-BY-STATE SURVEY OF PAY-TO-STAY STATUTES

With the vast majority of states charging inmates fees from their incarceration, categorizing each statute into particularized groups gives better insight into the broad variety and prevalence of pay-to-stay fees.⁴⁵ This section groups the relevant statutes based on the type of fees, the inmates affected, and the anomalies.⁴⁶

A. States that Do Not Use Pay-to-Stay

There are several states that do not implement pay-to-stay fees for recently released individuals.⁴⁷ These states include Hawaii, New Hampshire, Illinois, California, and Maine.⁴⁸

Hawaii is the only state that has never imposed pay-to-stay fines on its inmates.⁴⁹ Hawaiian inmates, however, are not always exempt from paying cost-of-confinement fees when not confined in Hawaii.⁵⁰ Due to Hawaii's strict policies on crime and policing, the state is experiencing a prison population boom of its own.⁵¹ To combat overcrowding and offset rising costs, Hawaii has outsourced over a quarter of its incarcerated population to prisons run by for-profit organizations on the mainland of the United States, meaning unfortunate Hawaiians incarcerated in certain states might still be on the hook for pay-to-stay fines.⁵²

As mentioned above, recent discourse has led to several states repealing their pay-to-stay laws.⁵³ In 2019, New Hampshire repealed a 1996 pay-to-stay law that allowed the state to bill inmates for incarceration costs.⁵⁴ This bill, however, did not work retroactively: former inmates with fees imposed before the September effective date were still liable for their cost-of-confinement fees.⁵⁵

Similarly, in 2019, Illinois passed Public Act 101-0235, repealing a provision that empowered the Department of Corrections to seek

45. Morning Edition, *supra* note 30, at 0:02.

46. *See infra* Sections III.A–C.

47. *See infra* text accompanying notes 50–60.

48. *See id.*

49. Schumann, *supra* note 9.

50. *See* Eli Hager & Rui Kaneya, *The Prison Visit That Cost My Family \$2,370*, THE MARSHALL PROJECT (Apr. 12, 2016, 7:00 AM), <https://www.themarshallproject.org/2016/04/12/the-hawaii-prison-visit-that-cost-my-family-2-370> [<https://perma.cc/LD74-BKPK>].

51. *Id.*

52. *Id.*

53. *See supra* Section II.A.

54. Holly Ramer, *N.H. to end 'pay to stay' for prison inmates*, SEACOASTONLINE: NEWS (July 16, 2019, 11:33 AM), <https://www.seacoastonline.com/story/news/2019/07/16/nh-to-end-pay-to/4681989007/> [<https://perma.cc/F7RU-JHYM>].

55. *See id.*

incarceration costs from inmates.⁵⁶ Following suit, California repealed its pay-to-stay statute as of January 1, 2022.⁵⁷ Most recently, Maine repealed its pay-to-stay statute, effective August 8, 2022.⁵⁸ As for Illinois, Maine, and California, it is unclear how these repeals will affect fines already on the books at the time of the legislative changes, however, one thing is clear—if these repeals meet the same fate as New Hampshire, it is probable that many prisoners will still be saddled with massive incarceration debts.⁵⁹

B. States that Only Impose Pay-to-Stay in Certain Scenarios

There are a few scenarios that trigger fee imposition in certain states.⁶⁰ Several of these schemes require reimbursement fees for medical care for inmates—both for all inmates and for nonindigent inmates—employed in prison-work programs and limitations on fees sought from inmates.⁶¹

1. States that Only Impose Pay-to-Stay for Inmate Medical Care

In most states, inmates are responsible for at least a copayment of the medical care they receive while incarcerated.⁶² This can become incredibly burdensome because inmates are a high-risk population for chronic and infectious diseases, with over 50% of “state and federal prisoners and local jail inmates report[ing] ever having a chronic condition.”⁶³ This section will explore statutes that assess fines against inmates who seek medical care while incarcerated.⁶⁴

a. For All Inmates

This section will evaluate states that impose medical fees against all inmates regardless of indigency.⁶⁵ The first grouping will cover states with

56. Law of June 22, 2012, 730 ILL. COMP. STAT. 5/3-7-6 (repealed 2020).

57. Law of Sept. 23, 2021, CAL. PENAL CODE § 1203.1c (repealed 2022).

58. Law of Sept. 23, 2019, ME. STAT. tit. 17-A, § 1751 (repealed 2020).

59. See Ramer, *supra* note 54.

60. See *infra* Section III.B.

61. See *infra* Sections III.B.1–4.

62. Wendy Sawyer, *The steep cost of medical co-pays in prison puts health at risk*, PRISON POL’Y INITIATIVE (Apr. 19, 2017), <https://www.prisonpolicy.org/blog/2017/04/19/copays/> [<https://perma.cc/62F9-C7FL>].

63. Laura M. Maruschak et al., *Medical Problems of State and Federal Prisoners and Jail Inmates, 2011-12*, U.S. DEP’T OF JUST.: SPECIAL REP. 1, 1, <https://bjs.ojp.gov/content/pub/pdf/mpsfpi1112.pdf> (Oct. 4, 2016) [<https://perma.cc/BN7E-GCN8>].

64. See *infra* Sections III.B.1.a–b.

65. See *infra* Section III.B.1.a.

broad pay-to-stay fees that include medical reimbursement provisions: Kentucky, South Dakota, Ohio, and Alabama.⁶⁶ The next grouping includes Michigan, Mississippi, Texas, Massachusetts, Arizona, Louisiana, and Washington, which require reimbursement for basic healthcare services.⁶⁷ The next grouping explores caps on medical reimbursement statutes, imposed by West Virginia, Florida, Colorado, Maryland, Utah, South Carolina, and New Jersey.⁶⁸ Finally, this section will explore unique medical reimbursement statutes, including self-harm provisions in Michigan, Nevada, Pennsylvania, South Carolina, and Wyoming, and Virginia's payment plan program.⁶⁹

Several states' overarching cost-of-confinement statutes include provisions factoring in or allowing separate recovery of medical fees.⁷⁰ Both Kentucky and South Dakota have broad pay-to-stay statutes that include general medical care.⁷¹ Kentucky's statute provides that the prisoner expense reimbursement policy includes "actual charges for medical and dental treatment" from those inmates incarcerated in county jails.⁷² South Dakota's statute assigns liability to the inmate for their cost of confinement, including "medical, dental, optometric, and psychiatric services charges."⁷³ Ohio's general cost-of-confinement statute includes a provision that assigns liability to the inmate for "the cost of any medical care," to be attained through the inmate's assets that the department has been authorized to collect.⁷⁴ Alabama's general cost-of-confinement statute is only applicable to inmates in prison-work programs, but it includes a provision that a portion of the inmate's earnings should be set aside to "furnish [their] . . . medical and dental care."⁷⁵

Several states charge inmates for any basic healthcare services they receive.⁷⁶ Both Michigan and Mississippi pursue fees for any nonemergency medical care, with Michigan pursuing a copayment for specifically nonemergency medical, dental, or optometric services, and Mississippi broadly authorizing the Department of Corrections to seek any "expenses of

66. See *infra* Section III.B.1.

67. *Id.*

68. *Id.*

69. *Id.*

70. See, e.g., ALA. CODE § 14-8-37 (1976); DEL. CODE ANN. tit. 11, § 6532 (2021); KY. REV. STAT. ANN. § 441.265 (West 2022); OHIO REV. CODE ANN. § 5120.56 (West 2002); S.D. CODIFIED LAWS § 24-2-28 (2004).

71. See KY. REV. STAT. ANN. § 441.265; S.D. CODIFIED LAWS § 24-2-28.

72. KY. REV. STAT. ANN. § 441.265(2)(a).

73. S.D. CODIFIED LAWS § 24-2-28.

74. OHIO REV. CODE ANN. § 5120.56(D)(7), (B).

75. ALA. CODE § 14-8-37.

76. Michelle Andrews, *Prisons and Jails Forcing Inmates to Cover Some Medical Care Costs*, KAISER FAM. FOUND.: HEALTH NEWS (Sept. 29, 2015), <https://khn.org/news/prisons-and-jails-forcing-inmates-to-cover-some-medical-care-costs/> [https://perma.cc/J8SK-BSP3].

nonemergency medical care, treatment and medicine.”⁷⁷ Texas, Massachusetts, and Arizona have similarly broad medical statutes—with Texas pursuing a “reimbursement fee” for “medical, dental, or health related services,” and Massachusetts and Arizona allowing the recovery of “reasonable medical and health service[s] fees.”⁷⁸ Conversely, Louisiana seeks the actual cost of any “medical or dental expenses incurred.”⁷⁹ Finally, Washington also authorizes the prison’s governing unit to seek “all or part of the medical costs” from the inmate but allows reimbursement from the inmate’s “insurance program or . . . other medical benefit programs.”⁸⁰

Some states impose nominal copayment fees or repayment caps on the medical fines that can be sought from inmates.⁸¹ West Virginia’s cap is the highest, allowing a “reasonable charge” up to \$25 for “health care and treatment services.”⁸² Conversely, Florida and Colorado only require a \$5 copayment for any nonemergency medical care or inmate-initiated medical visits.⁸³ Maryland requires a \$4 copayment for medical, dental, or optometric services.⁸⁴ Utah imposes specified copayment fees for different services: \$5 for primary medical and dental care and \$2 for prescription medicine.⁸⁵ South Carolina similarly charges a \$5 copayment to “defray the costs . . . for medical services . . . which have been requested by the inmate,” but it also includes a provision authorizing the same copayment for treatment of self-inflicted injuries or injuries inflicted upon another inmate.⁸⁶ New Jersey’s statute is more vague, imposing a nominal fee for medical care and prescription medicine to be determined “by the State Treasurer in accordance with guidelines promulgated by the commissioner.”⁸⁷

There are several other unique medical reimbursement situations.⁸⁸ The most common example of these are statutes that allow recovery of medical

77. MICH. COMP. LAWS § 791.267(a)(1) (2012); MISS. CODE ANN. § 47-5-179(1) (1995).

78. TEX. CRIM. PROC. CODE ANN. § 104.002(d) (2020); MASS. GEN. LAWS ch. 124, § 1(s) (2019); ARIZ. REV. STAT. ANN. § 31-201.01(G) (2021).

79. LA. STAT. ANN. § 15:705(C)(2) (2012).

80. WASH. REV. CODE § 70.48.130(5) (2015).

81. See, e.g., COLO. REV. STAT. § 17-1-113 (2016); FLA. STAT. § 945.6037 (2023); MD. CODE ANN., CORR. SERVS. § 2-118 (West 1999); N.J. STAT. ANN. § 30:7E-2 (West 1996); S.C. CODE ANN. § 24-13-80 (2010); UTAH CODE ANN. § 64-13-30 (West 2016); W. VA. CODE § 15A-4-13 (2018).

82. W. VA. CODE § 15A-4-13(a)–(b).

83. FLA. STAT. § 945.6037(1)(a); COLO. REV. STAT. § 17-1-113(2).

84. MD. CODE ANN., CORR. SERVS. § 2-118(b)(1).

85. UTAH CODE ANN. § 64-13-30(1)(b).

86. S.C. CODE ANN. § 24-13-80(B)(2), (B)(1)(b).

87. N.J. STAT. ANN. § 30:7E-2 (West 1996).

88. Chad Kinsella, *Corrections Health Care Costs*, THE COUNCIL OF STATE GOV’TS: TRENDSALERT 1, 21 (Jan. 2004), <https://www.prisonpolicy.org/scans/csg/Corrections+Health+Care+Costs+1-21-04.pdf> [<https://perma.cc/E7LM-WR5U>].

fees for treatment of self-inflicted injuries; Michigan, Nevada, Pennsylvania, South Carolina, and Wyoming's statutes each include self-harm provisions.⁸⁹ South Carolina also includes reimbursement fees for injuries inflicted on others while Nevada's self-harm provision appends a repayment requirement for injuries "which occur during voluntary recreational activities."⁹⁰ Another unique scenario appears in Virginia, where the medical repayment statute authorizes the superintendent of prisons to establish a payment plan program for inmates to repay the costs of medical treatment.⁹¹

b. For Inmates with the Ability to Pay

Certain states only seek reimbursement for medical care from inmates they deem nonindigent.⁹² Each state has different standards for determining which inmates can pay and different enforcement policies.⁹³ This section surveys medical repayment statutes for nonindigent defendants in Alaska, Minnesota, West Virginia, Montana, Idaho, and Wyoming.⁹⁴

Alaska and Minnesota's statutes provide that nonindigent inmates will be liable for a portion of their medical care.⁹⁵ Both statutes give allowances on how much the prisoner must reimburse, but at a minimum require a copayment based on their ability to pay.⁹⁶ Indiana's statute is similar, requiring reimbursement for medical, dental, and eye care in an amount to be determined by the inmate's ability to pay.⁹⁷ Conversely, West Virginia seeks general reimbursement from nonindigent inmates with no copayment allowances.⁹⁸ Its statute seeks reimbursement "at the rate at which the care is generally available in the community," so long as the inmate "is able to pay without undue hardship."⁹⁹ Montana seeks actual medical costs from its inmates if they are "found by the sentencing court to have the ability to pay."¹⁰⁰

There are other unique medical payment scenarios for nonindigent inmates.¹⁰¹ Idaho charges nonindigent inmates a nominal fee of \$20 for

89. MICH. COMP. LAWS § 791.267a(2) (2012); NEV. REV. STAT. § 209.246 (2023); 61 PA. CONS. STAT. § 1757 (2009); S.C. CODE ANN. § 24-13-80(B)(1)(b); WYO. STAT. ANN. § 18-6-303(d) (1995).

90. S.C. CODE ANN. § 24-13-80(B)(1)(b); NEV. REV. STAT. § 209.246(1)(b)(2).

91. VA. CODE ANN. § 53.1-133.01 (2020).

92. See Phil Schaenman et al., *Opportunities for Cost Savings in Corrections Without Sacrificing Service Quality: Inmate Health Care*, URB. INST. 1, 6 (Feb. 2013), <https://www.urban.org/sites/default/files/publication/23341/412754-Opportunities-for-Cost-Savings-in-Corrections-Without-Sacrificing-Service-Quality-Inmate-Health-Care.PDF> [<https://perma.cc/CWK3-Y7TE>].

93. *Id.*

94. See *infra* Section III.B.1.b.

95. ALASKA STAT. § 33.30.028(b) (2022); MINN. STAT. § 641.15(2) (2023).

96. ALASKA STAT. § 33.30.028(b); MINN. STAT. § 641.15(2).

97. IND. CODE § 11-10-3-6(d) (2015).

98. W. VA. CODE § 7-8-2(b)-(c) (1985).

99. *Id.*

100. MONT. CODE ANN. § 7-32-2245(1) (2003).

101. See, e.g., IDAHO CODE § 20-619 (2005); WYO. STAT. ANN. § 18-6-303 (1995).

medical care; this is deducted from their inmate accounts.¹⁰² Wyoming's statute is more unusual: medical reimbursement is only sought from nonindigent inmates in very specific situations.¹⁰³ These include, but are not limited to, "injuries incurred . . . while in custody, . . . during the commission of a crime, . . . while unlawfully resisting arrest, . . . self-inflicted injuries," and pre-existing injuries, illnesses, or dental conditions.¹⁰⁴

2. States that Only Impose Pay-to-Stay for Inmates in Prison-Work Programs

Several states only pursue cost-of-confinement fees from those inmates who are employed in prison-work or work-release programs.¹⁰⁵ Work-release programs have roots in well-meaning policies, generally meaning to give inmates structure and allow them to reacclimate to the community while offsetting the costs of running such programs.¹⁰⁶ However, these fees are less good-natured in practice than in theory; a Washington study found that incarcerating a prisoner in a work-release program costs nearly \$4,000 less than a traditional inmate, yet in many states, work-release participants bear the burden of paying cost-of-confinement fees for the prison population at large.¹⁰⁷ States with prison-work program reimbursement fees include Georgia, North Carolina, Oregon, Utah, Delaware, Montana, Nevada, Nebraska, New Mexico, Vermont, South Carolina, Rhode Island, Kentucky, North Dakota, New York, and Alaska.¹⁰⁸

Several states impose general prison-work cost-of-confinement fees.¹⁰⁹ Georgia, North Carolina, Oregon, and Utah each have incredibly broad statutes that presumably could allow the state to seize all of an inmate's earnings to offset cost-of-confinement expenses.¹¹⁰ Georgia's statute provides that "any wages earned" may be disbursed to the director, with the

102. IDAHO CODE § 20-619(1).

103. See WYO. STAT. ANN. § 18-6-303(d).

104. *Id.*

105. Sara Feldschreiber, *Fee at Last? Work Release Participation Fees and the Takings Clause*, 72 FORDHAM L. REV. 213–14 (2003).

106. *Id.*

107. Susan Turner & Joan Petersilia, *Work Release: Recidivism and Corrections Costs in Washington State*, U.S. DEP'T OF JUST.: NAT'L INST. OF JUST. 1, 6–7 (Dec. 1996), <https://www.ojp.gov/pdffiles/163706.pdf> [<https://perma.cc/7F9K-TKRK>].

108. See *infra* Section III.B.2.

109. See DEL. CODE ANN. tit. 11, § 6532 (2021); GA. CODE ANN. § 42-1-9 (2022); MONT. CODE ANN. § 53-30-132 (2021); N.C. GEN. STAT. § 148-32.1 (2023); OR. CONST. art. I, § 41.

110. GA. CODE ANN. § 42-1-9(f); N.C. GEN. STAT. § 148-32.1(d); OR. CONST. art. I, § 41(8); UTAH CODE ANN. § 64-13-23 (West 2022).

first priority deduction being “to defray the cost of the inmate’s keep.”¹¹¹ North Carolina’s statute is aimed only at inmates serving a sentence of more than thirty days but provides that “the amount of earnings” may be disbursed to the jail “to be paid for the cost of the prisoner’s keep.”¹¹² Oregon’s provision allows “any compensation” earned through work-release programs to offset the cost “of the inmate’s rehabilitation, housing, health care, and living costs,” among other things, such as restitution, payment of court costs, and any child support or alimony payments the inmate may owe; the inmate seemingly never sees any of their earned wages.¹¹³ Finally, Utah allows the state to place the inmate’s income into an account, from which they can deduct day-to-day expenses, as well as expenses of the person’s treatment, court-ordered payments, and other debts to the state.¹¹⁴

Delaware and Montana have more particularized statutes; Delaware’s statute allows deductions for support payments, court fees, and “a proportionate share of the costs of incarceration of inmates in the facility,” and Montana’s statute allows wage deductions for room and board fees.¹¹⁵ Nevada’s statute allows the offender’s wages to be disbursed in a specific order: first to pay program costs, second for travel to and from work, third to the inmate’s dependents, and fourth to be paid toward restitution and court costs, with the remaining balance to become available to the inmate upon their release.¹¹⁶

Several states allow for “reasonable” wage deductions for room and board.¹¹⁷ Nebraska’s statute provides that costs of confinement can be withheld from an inmate’s wages “as the director deems appropriate and reasonable,” New Mexico’s statute allows for deductions of “reasonable costs incident to confinement,” and finally, Vermont’s statute provides that the Commissioner, “to the extent reasonable,” can withhold wages for the inmate’s living expenses.¹¹⁸

Several states have imposed caps on their pay-to-stay fines for inmates in work-release programs.¹¹⁹ One of these caps authorizes the state to collect a percentage of the inmate’s total salary to reimburse the prison.¹²⁰ Both Alabama and South Carolina authorize the state to retain up to 25% of the prisoner’s earnings to offset confinement costs.¹²¹ Conversely, Rhode

111. GA. CODE ANN. § 42-1-9(f)(1).

112. N.C. GEN. STAT. § 148-32.1(d).

113. OR. CONST. art. I, § 41(8).

114. UTAH CODE ANN. § 64-13-23(4), (5)(a)–(b), (5)(e).

115. DEL. CODE ANN. tit. 11, § 6532(f) (2021); MONT. CODE ANN. § 53-30-132(3)(c) (2021).

116. NEV. REV. STAT. § 213.330 (2003).

117. See NEB. REV. STAT. § 83-184 (2018); N.M. STAT. ANN. § 33-8-8 (1991); VT. STAT. ANN. tit. 28, § 755 (2005).

118. NEB. REV. STAT. § 83-184(3); N.M. STAT. ANN. § 33-8-8(C)(2); VT. STAT. ANN. tit. 28, § 755.

119. Feldschreiber, *supra* note 105, at 208.

120. *Id.*

121. ALA. CODE § 14-8-37 (1975); S.C. CODE ANN. § 24-3-40(A)(3) (2017) (noting that this statute also allows other deductions for victim compensation, child support obligations, and federal and state

Island's statute allows the state to collect at a minimum 30% of the inmate's salary for room and board.¹²² Another type of cap allows states to withhold a nominal fee from inmate wages.¹²³ Both Kansas and North Dakota's statutes authorize the state to collect up to \$20 a day from working inmates to defray incarceration costs.¹²⁴ New York only allows a \$1 deduction from the inmate's wages per week.¹²⁵ Alaska's cap is unique for placing a monetary limit on which wages can be garnished.¹²⁶ Alaska's statute only allows for cost-of-confinement deductions up to the statewide average from prisoners whose wages amount to "[fifty] percent or more of the minimum wage."¹²⁷

3. States that Impose Limits on Pay-to-Stay

In response to low collection rates, reincarceration based on an inability to pay, and public resistance to pay-to-stay fees, several states have written purported "protections" for inmates into their statutes.¹²⁸ This section explores caps on pay-to-stay fees and fees enacted only for inmates with the ability to pay.¹²⁹

a. Pay-to-Stay Caps

Virginia and Missouri have implemented caps on their pay-to-stay statutes, imposing a ceiling on collection fees that can be sought from inmates.¹³⁰ Virginia's statute restricts the fee to \$3 a day "to defray the costs associated with the prisoners' keep."¹³¹ In Missouri, the director conducts an offender report that contains an estimate of their assets and the total cost of

taxes, with a separate provision guaranteeing at least 10% to be held in an escrow account for the prisoner and another 10% to be disbursed to the inmate's commissary account to purchase "incidentals").

122. 42 R.I. GEN. LAWS § 42-56-38(b) (2021).

123. Feldschreiber, *supra* note 105, at 217–18.

124. KAN. STAT. ANN. § 19-1930(d) (2004); N.D. CENT. CODE § 12-44.1-18.2 (2011) (noting that this statute includes a caveat for prisoners who make less than \$20 a day, authorizing the state to instead withhold the "funds earned by the inmate" in those scenarios).

125. N.Y. CORRECT. LAW § 189 (McKinney 1995) (noting that this statute is only effective until September 1, 2023, then the fee is eradicated).

126. *See* ALASKA STAT. § 33.30.201 (2006).

127. *Id.* § 33.30.201(b).

128. *See, e.g.,* Graham Moomaw, *Report: Cutting prison fees could save incarcerated Virginians and their families \$29.3M*, VA. MERCURY (Oct. 5, 2022, 12:04 AM), <https://www.virginiamercury.com/2022/10/05/report-cutting-prison-fees-could-save-incarcerated-virginians-and-their-families-28-3m/> [<https://perma.cc/27A8-NFKK>].

129. *See infra* Section III.B.3.

130. *See* VA. CODE ANN. § 53.1-131.3 (2010); MO. REV. STAT. § 217.831 (1995).

131. VA. CODE ANN. § 53.1-131.3.

their care.¹³² This report is sent to the state attorney general, who determines whether the “former offender has sufficient assets to recover not less than ten percent of the estimated cost of care of the offender or ten percent of the estimated cost of care of the offender for two years, whichever is less”¹³³ If the offender is found able to pay, they are liable for the lower of the two costs.¹³⁴ Iowa’s statute seeks reimbursement from those prisoners who serve their sentence intermittently and are permitted to leave the jail throughout the week.¹³⁵ Prisoners who maintain employment during this period are liable for room and board and meals, but costs are not to “exceed fifty percent of the wages or salaries of the prisoner.”¹³⁶

b. For Inmates with the Ability to Pay

Several states only impose pay-to-stay fees upon inmates found to have the ability to pay.¹³⁷ While some states have procedures to determine whether an inmate is indigent, such as assessing the inmate’s property and assets, it is unclear how these state courts are able to establish a defendant’s ability to pay because judges rarely hold hearings to determine indigency.¹³⁸ These states include Montana, Washington, Florida, Michigan, Tennessee, Colorado, Minnesota, Wyoming, Louisiana, and South Dakota.¹³⁹

Montana’s statute merely provides that if the sentencing court finds that an inmate has the ability to pay, the inmate is liable for the cost of his confinement, including actual medical costs.¹⁴⁰ Washington goes a step further, defining indigency as the portion of the population that receives government assistance, is involuntarily committed to a mental health facility, or earns 125% or less of the national poverty level.¹⁴¹ People meeting these criteria are not liable for cost-of-confinement fees.¹⁴²

Florida, Michigan, and Tennessee all appraise the prisoner’s assets at the time of their conviction to determine indigency.¹⁴³ Florida’s statute provides that the prisoner must disclose all their assets as a condition of

132. MO. REV. STAT. § 217.831(1).

133. *Id.* § 217.831(3).

134. *Id.*

135. IOWA CODE § 356.30 (2021).

136. *Id.*

137. Parent, *supra* note 21, at 1.

138. See Matthew Menendez et al., *The Steep Costs of Criminal Justice Fees and Fines*, BRENNAN CTR. FOR JUST. (Nov. 21, 2019), <https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines> [https://perma.cc/SB3K-7JJR].

139. See *infra* Section III.B.3.b.

140. MONT. CODE ANN. § 7-32-2245(1) (2003).

141. WASH. REV. CODE § 10.101.010(3)(a)–(c) (2022).

142. *Id.* § 9.94A.760(1) (noting that this statute is only effective until January 1, 2023; however, the revisions effective as of 2023 do not affect this part of the statute).

143. See FLA. STAT. § 944.485 (1997); MICH. COMP. LAWS § 800.404 (1984); TENN. CODE ANN. § 41-21-907 (2010).

release and, based on their ability to pay, shall pay “all or a fair portion of [their] daily subsistence costs.”¹⁴⁴ Michigan’s statute empowers courts to issue an order requiring whoever is in possession of an inmate’s assets to apply the assets toward a reimbursement fee not to exceed “the per capita cost of care for maintaining prisoners.”¹⁴⁵ Tennessee’s statute mirrors Michigan’s, but the statute adds a provision allowing any unpaid child support payments to take priority to the state’s cost-of-confinement claim.¹⁴⁶

The last method courts use to determine indigency is through assessment of the effect repayment would have on the inmate’s family.¹⁴⁷ In Colorado, courts give the newly released offender six months before pursuing a cost-of-confinement claim—so they can seek employment—and then consider the offender’s owed restitution, support of their spouse and children, and the rights of anyone else with a claim to the offender’s estate.¹⁴⁸ If the court determines the offender has a “sufficient estate to pay all or part of the cost of care,” the court will determine the amount the offender owes, which cannot exceed the “per capita cost of maintaining prisoners.”¹⁴⁹ Minnesota’s statute allows the pay-to-stay fine to be waived if it would create undue hardship for the offender or their immediate family.¹⁵⁰ Wyoming’s statute also takes the offender’s family into consideration, blocking assessment of the fee when the cost “would impose a manifest hardship on the inmate, or the property of the inmate is needed for the maintenance and support of the inmate’s family.”¹⁵¹

Louisiana and South Dakota’s statutes focus entirely on the offender’s responsibility to their dependents.¹⁵² Louisiana’s statute imposes a cost-of-confinement fine on felony offenders so long as the imposition of the “fine would not unduly burden the defendant’s dependents”¹⁵³ South Dakota’s statute considers the number of dependents that the offender has to determine whether the offender is able to pay their cost-of-confinement fee.¹⁵⁴

144. FLA. STAT. § 944.485(b).

145. MICH. COMP. LAWS § 800.404(3)–(4).

146. TENN. CODE ANN. § 41-21-907(c).

147. *See, e.g.*, COLO. REV. STAT. § 18-1.3-701(4) (2021); MINN. STAT. § 641.12(3)(b) (2010); WYO. STAT. ANN. § 7-13-109(a)(ii) (1996).

148. COLO. REV. STAT. § 18-1.3-701(4).

149. *Id.*

150. MINN. STAT. § 641.12(3)(b).

151. WYO. STAT. ANN. § 7-13-109(a)(ii).

152. *See* LA. CODE CRIM. PROC. ANN. art. 890.2(A) (1997); S.D. CODIFIED LAWS § 24-2-28 (2004).

153. LA. CODE CRIM. PROC. ANN. art. 890.2(A).

154. S.D. CODIFIED LAWS § 24-2-28.

4. Other Unique Pay-to-Stay Scenarios

This section explores the distinctive reimbursement schemes in Connecticut, Maryland, Pennsylvania, Texas, and West Virginia.¹⁵⁵ There are several unique trends among these states that do not follow the typical pattern of seeking medical fees or assessing prisoner finances.¹⁵⁶ While Connecticut does seek cost-of-confinement fees from inmates, 2022 brought about sweeping changes to its statute, only keeping the requirement in place for serious crimes such as murder.¹⁵⁷ While Maryland does pursue repayment for medical care received by inmates not to exceed \$4 a visit, the state only seeks cost-of-confinement fees (which could include medical fees and room and board) from prisoners who serve their time in nonconsecutive periods of forty-eight hours a week.¹⁵⁸ Pennsylvania has followed suit, only seeking fees from weekend inmates or those who serve their time in short periods each week.¹⁵⁹

Texas only seeks cost-of-confinement fees from those inmates who die in prison and whose property would have reverted back to the state upon their death.¹⁶⁰ Cost-of-confinement claims are not enforced against inmates with a surviving spouse, dependent, or disabled child.¹⁶¹ Furthermore, this is not a priority claim and is collected after funeral costs, estate management, mortgage, child support, and taxes owed.¹⁶² Finally, while West Virginia does not seek room and board fees from inmates, it seeks reimbursement for a prisoner's shoes and clothing if they have the ability to pay.¹⁶³

C. States that Impose Pay-to-Stay in All Circumstances

There are a number of states that impose pay-to-stay fees on all inmates, regardless of their participation in prison-work programs, pursuance of medical treatment, or ability to pay.¹⁶⁴ These repayment statutes range from very broad to more particularized charges for goods and services received throughout incarceration, with unique situations that fall in between.¹⁶⁵ This

155. See *infra* Section III.B.4.

156. Author's original thought.

157. CONN. GEN. STAT. § 18-85a (2022).

158. MD. CODE ANN., CORR. SERVS. § 11-801 (West 1999).

159. 61 PA. CONS. STAT. § 1757 (2009).

160. TEX. GOV'T CODE ANN. § 501.017.

161. *Id.*

162. *Id.*

163. *Id.*

164. See, e.g., ARK. CODE ANN. § 12-41-505 (2021); OKLA. STAT. tit. 22, § 979a (2008); ARIZ. REV. STAT. ANN. § 31-238 (2018).

165. See, e.g., ARK. CODE ANN. § 12-41-505; OKLA. STAT. tit. 22, § 979a; ARIZ. REV. STAT. ANN. § 31-238.

section inspects statutes of this sort in Arkansas, Wisconsin, Kentucky, Ohio, Oklahoma, and Arizona.¹⁶⁶

Both Arkansas and Wisconsin have general reimbursement statutes for all prisoners, requiring that they reimburse the jail for any costs stemming from their confinement.¹⁶⁷ Wisconsin's statute is a blanket requirement making the prisoner liable for any "expenses incurred by the county to incarcerate the prisoner."¹⁶⁸ Arkansas's statute specifically requires the prisoner to pay for the cost of transfer to and from the facility and "support . . . for the whole time [they] remain[] there," but also contains a caveat that exempts the person from the fee if they are ultimately not convicted.¹⁶⁹

Kentucky, Ohio, and Oklahoma have more specified pay-to-stay statutes enumerating possible charges to be included in the total fee.¹⁷⁰ Kentucky's statute includes the inmate's booking fee, charges for actual medical and dental treatment, reimbursement for damaged county property, and a per diem fee capped at \$50 a day.¹⁷¹ Ohio's statute requires reimbursement for housing and supervision costs, food and medical provisions, and any ancillary services.¹⁷² The Ohio statute also includes an exemption for food and housing costs for those inmates working at a state job for less than minimum wage, provided that their inmate account contains less than \$100.¹⁷³ Oklahoma's incarceration fee includes "booking, receiving and processing out, housing, food, clothing, medical care, dental care, and psychiatric services."¹⁷⁴ This statute allows for a reduction in the total fee if the court warrants it, like in the case of an indigent defendant, but does not allow the fee to be waived in its entirety in any circumstance.¹⁷⁵

Arizona's statute is typical in that it requires inmate reimbursement for their incarceration but differs from other states in calculation.¹⁷⁶ This fee is determined on the annual statewide average cost of maintaining a prisoner,

166. See *infra* Section III.C.

167. See ARK. CODE ANN. § 12-41-505(a)(1); WIS. STAT. § 302.373 (2011).

168. WIS. STAT. § 302.373(2)(a).

169. ARK. CODE ANN. § 12-41-505.

170. See KY. REV. STAT. ANN. § 441.265 (West 2022); OHIO REV. CODE ANN. § 5120.56 (West 2022); OKLA. STAT. tit. 22, § 979a.

171. KY. REV. STAT. ANN. § 441.265(2)(a).

172. OHIO REV. CODE ANN. §§ 5120.56(D)(4)–(7).

173. *Id.* § 5120.56(E).

174. OKLA. STAT. tit. 22, § 979a(A).

175. *Id.* § 979a(D).

176. See, e.g., ARIZ. REV. STAT. ANN. § 31-238 (2018).

divided or multiplied by the length of the inmate's sentence, including time served prior to conviction.¹⁷⁷

IV. ESTATE PLANNING IMPLICATIONS

While a number of pay-to-stay statutes—particularly those garnishing wages of inmates in prison-work programs—seek to recover costs while an individual is incarcerated, many claims against offenders survive their release from prison and sometimes even the offender's death.¹⁷⁸ While this section will focus specifically on the cost-of-confinement statutes that implicate an offender's estate, it is likely that many other states enact these same penalties on offenders who are unable to pay, regardless of whether made explicit in the statute.¹⁷⁹ This section will explore Oregon, Colorado, Florida, and Ohio's statutes which include textual provisions holding offenders' estates liable for the states' costs.¹⁸⁰

Oregon has a statute specifically regarding the administration of its state institutions, which include both state hospitals and corrections facilities.¹⁸¹ This section outlines that “[a] person and the personal estate of the person, or a decedent's estate, is liable for the full cost of care,” as determined by the Department of Corrections, which totaled \$94.55 per day in 2016.¹⁸² This fee is somewhat lenient as it takes into account the offender's ability to pay and prevents the state from pursuing assets the offender places into trust for their beneficiaries.¹⁸³

The protections built into Oregon's statute favor offenders who leave prison with costly fines and want to protect their assets.¹⁸⁴ This is especially advantageous for offenders who are not evidently wealthy, as Oregon typically only pursues recovery for an inmate's cost of care when the inmate has “demonstrable assets.”¹⁸⁵ Furthermore, offenders with substantial assets tied up in real property will likely be able to maintain their interests in such property; Oregon has only placed a lien on an inmate's home twice to recover cost-of-incarceration fees.¹⁸⁶ While the offender will still be liable for any imposed fines, they can ensure security for their beneficiaries by placing their

177. *Id.* § 31-238(B)–(C).

178. Dara Lind, *At least 2 states let prisons charge the families of dead ex-prisoners for their food and health care*, VOXMEDIA, <https://www.vox.com/2015/5/26/8660001/prison-jail-cost> (Oct. 16, 2015, 12:44 PM) [<https://perma.cc/3ULF-J76T>].

179. Author's original thought.

180. *See infra* Part IV.

181. *See* OR. REV. STAT. § 179.010(1) (2022).

182. *Id.* § 179.701(1)(a), 179.620(1); Emily Green, *Oregon's price tag on a run-in with the law*, ST. ROOTS (June 7, 2016), <https://www.streetroots.org/news/2016/06/07/oregon-s-price-tag-run-law> [<https://perma.cc/3334-DAT8>].

183. OR. REV. STAT. § 179.620(2)–(3).

184. Author's original thought.

185. Green, *supra* note 182.

186. *Id.*

assets into a trust; it is unclear, however, if trusts established subsequent to the offender's release will be subject to the trust exemption.¹⁸⁷ If an offender does not have an estate plan in place prior to their incarceration, it is possible that they will not qualify for this exemption and the total sum of their assets could be subject to recovery by the state.¹⁸⁸

Colorado's statute is also forgiving to offenders, only allowing recovery for the cost of care when "the court determines that the offender has a sufficient estate to pay all or part of the cost."¹⁸⁹ To make this indigency determination, the court takes into account "the offender's spouse, dependent children, or other persons having a legal right to support and maintenance from the estate of the offender."¹⁹⁰ Colorado's statute is silent as to how courts determine whether an offender's estate will qualify as "sufficient" to justify seeking care costs; however, if an offender has substantial assets, they will likely be liable for the state's fine.¹⁹¹ If an offender has considerable beneficiaries, however, it is less likely that their estate will be subject to stringent pay-to-stay fines.¹⁹² Unfortunately, proper estate planning is not a solution that will alleviate the consequences of this statute; while Colorado's statutory provisions seemingly allow offenders to leave a considerable portion of their assets to loved ones, these protections are not guaranteed.¹⁹³ This is especially true as Colorado's promise to take spouses and dependents into account is all based on the discretion of the judge.¹⁹⁴

In Florida, offenders are required to disclose their revenue and assets to the court upon their release from prison.¹⁹⁵ The court will take into account the person's ability to pay, the needs of their dependents, and any claims against the offender by the victim.¹⁹⁶ In light of these considerations, the court will then direct the offender to pay a portion, or all, of their daily subsistence costs from their stay in prison; this claim can survive against the offender's estate.¹⁹⁷ The typical recovery fee is approximately \$5 a day and although "the majority of Florida jails have not placed civil liens on any inmates," it reserves this right statutorily.¹⁹⁸ This is no solace for the average Florida

187. OR. REV. STAT. § 179.620(3).

188. Author's original thought.

189. COLO. REV. STAT. § 18-1.3-701(3) (2021).

190. *Id.*

191. *Id.*

192. *See id.*

193. *See id.*

194. *See id.*

195. FLA. STAT. § 944.485(1)(a) (2023).

196. *Id.* § 944.483(1)(b).

197. *c.* § 944.485(1)(b)-(2)(b).

198. *Subsistence Fees & Collection in Florida Jails*, FLA. SHERIFFS ASS'N, <https://www.flsheriffs.org>

offender; however, outstanding fines are passed off to civil collection courts and the consequences of failing to pay or appear at a hearing triggers the issuance of a blue writ—essentially a warrant for the offender’s arrest.¹⁹⁹ This lands many less fortunate offenders back in jail to continue compounding upon their daily subsistence costs.²⁰⁰

The implications on beneficiaries of former inmates in Florida are broad.²⁰¹ While the Florida statute makes allowances for an offender’s dependents when making an indigency determination, there is no statutory protection for said dependents once a fine has been imposed.²⁰² Furthermore, any potential heirs who are not per se dependents of the offender are not considered whatsoever.²⁰³ Again, this is not something an offender can account for in their estate plan to protect their assets; offenders will be liable to the state of Florida for whatever amount the court imposes.²⁰⁴

In summation, proper estate planning is rarely a solution for inmates to protect their assets from the long-reaching arm of cost-of-confinement fees.²⁰⁵ This is problematic as many offenders leave prison with exorbitant bills.²⁰⁶ For the few offenders who have assets to seize, this could be the difference between ensuring financial protection for their family members or getting trapped in a cycle of poverty and re-incarceration, which can promulgate across generations.²⁰⁷

V. HOW TO COMBAT PREDATORY PAY-TO-STAY STATUTES

With such a wide variety of pay-to-stay statutes in use across the country, it is difficult to analyze them under one specific legal principle.²⁰⁸ This section examines several guiding authorities such as the Eighth Amendment, the tenet of lenity, analogous criminal case law, and sociological theories that are persuasive in showing the gross unfairness of cost-of-confinement statutes and their potential illegality.²⁰⁹

/uploads/Subsistence%20Fee%20Final%20PDF.pdf (last visited Nov. 11, 2022) [https://perma.cc/BM8R-GAFQ].

199. Rebekah Diller, *The Hidden Costs of Florida’s Criminal Justice Fees*, BRENNAN CTR. FOR JUST. 1, 17 (2010), https://www.brennancenter.org/sites/default/files/2019-08/Report_The%20Hidden-Costs-Florida%27s-Criminal-Justice-Fees.pdf [https://perma.cc/3286-TCCM].

200. *Id.*

201. Author’s original thought.

202. *See* FLA. STAT. § 944.485(2)(b).

203. *See id.*

204. *See id.* § 944.485(1)(b).

205. *See supra* Part IV.

206. *See, e.g.,* Eaton-Robb, *supra* note 1.

207. *See* TCR Staff, *How Mass Incarceration Fuels Cycle of Poverty*, THE CRIME REP. (Mar. 1, 2021), <https://thecrimereport.org/2021/03/01/how-mass-incarceration-fuels-cycle-of-poverty/> [https://perma.cc/7RVU-Z3K8].

208. Author’s original thought.

209. *See infra* Sections V.A–C.

A. Pay-to-Stay Statutes Should Be Found to Violate the Eighth Amendment

The Eighth Amendment, specifically the Excessive Fines Clause, is a rarely utilized protection of the Constitution.²¹⁰ This subsection explores traditional Eighth Amendment jurisprudence and its applicability to certain types of pay-to-stay statutes, positing that cost-of-confinement fees violate the Excessive Fines Clause and should be repealed.²¹¹

1. Traditional Eighth Amendment Jurisprudence

The Eighth Amendment to the Constitution provides that “excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”²¹² Courts are thus given broad volition to decide whether an enacted punishment violates the Eighth Amendment based on the “evolving standards of decency that mark the progress of a maturing society.”²¹³

While the Eighth Amendment was first proposed in 1789, the Excessive Fines Clause was not interpreted by the Supreme Court until the mid-1990s.²¹⁴ In 1993, the Supreme Court decided *Austin v. United States*, in which the government brought an in rem action against a defendant’s mobile home and auto body shop seeking forfeiture of “vehicles and real property used, or intended to be used, to facilitate the commission of certain drug-related crimes.”²¹⁵ The Court held that, despite the government bringing a civil action, the forfeiture still sought—at least in part—to punish the defendant and thus was subject to the Eighth Amendment protection against excessive fines.²¹⁶

In 1998, the Supreme Court decided its first Eighth Amendment case in a criminal context.²¹⁷ In *United States v. Bajakajian*, a passenger attempted to board an international flight with over \$300,000, violating 31 U.S.C. § 5316(a)(1)(A) which prohibits transporting more than \$10,000 in currency without reporting the money.²¹⁸ The government sought forfeiture of the

210. *The Excessive Fines Clause*, PUB. JUST., <https://www.publicjustice.net/what-we-do/debtors-prison-project/the-excessive-fines-clause/> (last visited Sept. 26, 2023) [<https://perma.cc/2QGW-95TK>].

211. See *infra* Sections V.A.1–3.

212. U.S. CONST. amend. VIII.

213. *United States v. Pena*, 64 M.J. 259, 265 (C.A.A.F. 2007).

214. Brian R. Frazelle & Brianne J. Gorod, *Timbs v. Indiana: Mere Constitutional Housekeeping or the Timely Revival of a Critical Safeguard?*, CATO SUP. CT. REV. 215, 218–19 (2019).

215. *Austin v. United States*, 509 U.S. 602, 602 (1993).

216. *Id.*

217. *United States v. Bajakajian*, 524 U.S. 321, 321 (1998).

218. *Id.*

entire sum of \$357,144, but the Supreme Court held that this would violate the Eighth Amendment as the entire sum of money would not be a proportional punishment to the offense.²¹⁹ The Court determined that forfeitures are “‘fines’ if they constitute punishment for an offense.”²²⁰ Further, the Court held that “a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of the offense that it is designed to punish.”²²¹

It was not until 2019 that the Supreme Court officially declared the Eighth Amendment applicable to the states.²²² In *Timbs v. Indiana*, the government sought civil forfeiture of a defendant’s Land Rover SUV, worth four times more than the maximum monetary fine assessable against the defendant, on the grounds that the Excessive Fines Clause was inapplicable to state action.²²³ The Court duly incorporated the Eighth Amendment to the states through the Fourteenth Amendment’s Due Process Clause, noting the importance of this protection due to the nation’s history of using “fines to coerce involuntary labor” from newly freed slaves in the Reconstruction Era.²²⁴

2. Applying the Eighth Amendment to Pay-to-Stay Statutes

With the wide array of pay-to-stay statutes, it is difficult to say that all are predatory, or that they all violate the Eighth Amendment.²²⁵ Analysis of these fines requires a more nuanced look at the goals of each statute and the means employed to accomplish said goals.²²⁶

a. Pay-to-Stay for Inmates in Prison-Work Programs Violates the Eighth Amendment

Sixteen states only impose pay-to-stay fines for those prisoners who are employed in some variant of a prison-work program.²²⁷ These fines range from garnishing a percentage of the inmate’s gross earnings to flat fees up to a certain amount a day and cover anything from room and board to medical care, legal services, prison education, library services, and more.²²⁸

219. *Id.*

220. *Id.* at 322.

221. *Id.*

222. *See Timbs v. Indiana*, 139 S. Ct. 682, 691 (2019).

223. *Id.* at 684.

224. *Id.* at 689.

225. Author’s original thought.

226. *Id.*

227. *Is Charging Inmates to Stay in Prison Smart Policy?*, *supra* note 6.

228. *See, e.g.*, ALA. CODE § 14-8-37 (2023); KAN. STAT. ANN. § 19-1930 (2023); MONT. CODE ANN. 53-30-132 (2023); DEL. CODE ANN. tit. 11, § 6532 (2021).

Certain states wrote protections into their statutes to attempt to avoid predatory wage garnishment.²²⁹ For example, in Alabama and South Carolina, the Department of Corrections may not seek more than 25% of the inmate's earnings to offset the offender's cost of living.²³⁰ Other statutes, like those in North Dakota and Kansas, bar the state from seeking any more than \$20 a day from working inmates.²³¹ These statutes, while seemingly reasonable, still violate the Eighth Amendment.²³²

Prisoners are paid far less than minimum wage; on the high end of the average, inmates make approximately \$0.63 an hour for regular, non-industry jobs and approximately \$1.40 an hour for jobs in state-owned businesses or correctional industries.²³³ With such paltry wages, even a deduction of 25% of a prisoner's earnings could be a devastating loss for indigent inmates.²³⁴ Furthermore, a cap at \$20 a day is no real protection for inmates in Kansas or North Dakota; the highest wages paid in those states (for jobs in the correctional industry) are \$3 an hour and \$1.69 an hour, respectively.²³⁵ While \$20 a day seems relatively low, that could be an inmate's entire wages for that day of work—or more.²³⁶

If these purported “more reasonable” statutes miss the mark, more stringent wage garnishment statutes certainly come no closer.²³⁷ States such as Rhode Island, that demand that a prisoner pay no *less* than 30% of their wages for room and board, encroach on far more dangerous territory.²³⁸ Likewise, Oregon's constitution dictating that “any compensation shall be used to reimburse” room and board costs opens a dangerous door for the state to potentially seize all of the inmate's income.²³⁹ Similarly, North Carolina authorizes the state to seize “the amount of earnings to be paid for the cost of the prisoner's keep”; this begs the question, where is the line drawn?²⁴⁰

229. See, e.g., ALA. CODE § 14-8-37; KAN. STAT. ANN. § 19-1930; S.C. CODE ANN. § 24-3-40 (2017).

230. ALA. CODE § 14-8-37; S.C. CODE ANN. § 24-3-40.

231. N.D. CENT. CODE § 12-44.1-18.2 (2023); KAN. STAT. ANN. § 19-1930.

232. Author's original thought.

233. Wendy Sawyer, *How much do incarcerated people earn in each state?*, PRISON POL'Y INITIATIVE (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/> [<https://perma.cc/LN7H-L4KX>].

234. See *Prison Labor and the Private Sector: The Corporate Exploitation of Prison Labor Reaches Deep into the Supply Chain*, WORTH RISES (Dec. 9, 2021), <https://worthrises.org/blogpost/the-corporate-exploitation-of-prison-labor-reaches-deep-into-the-supply-chain> [<https://perma.cc/A2EB-BDD8>].

235. Sawyer, *supra* note 233.

236. *Id.*

237. Author's original thought; see, e.g., VT. STAT. ANN. tit. 28, § 755 (2005); N.M. STAT. ANN. § 33-8-8 (1991).

238. 42 R.I. GEN. LAWS § 42-56-38 (2023).

239. OR. CONST. art. I, § 41.

240. N.C. GEN. STAT. § 148-32.1 (2023).

The more vague statutes authorizing wage garnishment are no less restrictive.²⁴¹ States like Vermont and New Mexico tread a slippery slope by using verbiage such as “reasonable” in determining what the prisoner must repay to the state.²⁴² What may seem reasonable to the Department of Corrections could be altogether unreasonable for an inmate making less than minimum wage.²⁴³ Arbitrary terms such as “reasonable” are altogether unacceptable in the context of wage garnishment; considering that the meagerness of wages has no bearing on the price of goods in prison for daily needs, such as tampons (\$6.30 in Colorado) or a phone card (\$10 in Pennsylvania), this reasonableness standard makes it more likely than not that prisoners will not retain any wages.²⁴⁴ In fact, from July 2020 to June 2021, prisons deducted up to 80% of wages from workers in the Prison Industry Enhancement Certification Program; is this reasonable?²⁴⁵

Garnishing prisoners’ wages hearkens back to the same policy that guided the incorporation of the Eighth Amendment to the states: indentured servitude.²⁴⁶ In *Timbs v. Indiana*, Justice Ginsburg discussed the Black Codes enacted in southern states during the Reconstruction Era that criminalized “dubious offenses” and imposed “draconian fines” on black Americans who, when unable to pay, were forced into involuntary labor.²⁴⁷ Now, in the modern era of mass incarceration, in which approximately 38% of prisoners are black, and black Americans comprise only 13% of the U.S. population, Justice Ginsburg’s warning to not return to such barbaric and archaic policing rings true.²⁴⁸

Eighth Amendment jurisprudence dictates that if a fine is even partially intended to be punitive it is subject to the protections of the Excessive Fines Clause.²⁴⁹ Supporters of pay-to-stay statutes often use the rationale that these fines are “financial reimbursement to the state,” sidestepping the Eighth Amendment argument.²⁵⁰ However, the average cost of maintaining an inmate ranges anywhere from \$14,000 to \$70,000 a year, depending on the state.²⁵¹ For example, in 2015, North Dakota reported a total annual

241. See, e.g., VT. STAT. ANN. tit. 28, § 755; N.M. STAT. ANN. § 33-8-8.

242. VT. STAT. ANN. tit. 28, § 755; N.M. STAT. ANN. § 33-8-8.

243. See Sawyer, *supra* note 233.

244. See *id.*

245. ACLU & The Univ. of Chi. L. Sch. Glob. Hum. Rts. Clinic, *Captive Labor: Exploitation of Incarcerated Workers*, ACLU 1, 11, <https://www.aclu.org/wp-content/uploads/legal-documents/2022-06-15-captivelaborresearchreport.pdf> (last visited Oct. 17, 2023) [<https://perma.cc/2JD4-KD4S>].

246. *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019).

247. *Id.* at 688–89.

248. *Race and ethnicity*, PRISON POL’Y INITIATIVE, https://www.prisonpolicy.org/research/race_and_ethnicity/ (last visited Oct. 16, 2023) [<https://perma.cc/M64M-YRPJ>].

249. *Austin v. United States*, 509 U.S. 602, 602 (1993).

250. Schumann, *supra* note 9.

251. *Prison spending in 2015*, VERA INST. OF JUST., <https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending> (last visited Sept. 11, 2023) [<https://perma.cc/2X97-DECN>].

expenditure of \$65,467,993, or approximately \$38,601 per inmate.²⁵² That boils down to about \$106 per inmate a day.²⁵³ Assuming that North Dakota does actually collect its statutorily imposed \$20 a day from working inmates, that barely covers one-fifth of its daily cost of maintaining inmates.²⁵⁴ Now compare South Carolina, where the highest wage a prisoner can earn, on average, is \$1.80 per hour.²⁵⁵ If the average prisoner works eight hours a day, five days a week, that comes out to a yearly salary of \$3,744.²⁵⁶ If South Carolina actually recoups 25% from their working prisoners, that totals out to approximately \$936 a year, which barely makes a dent in their average yearly cost of maintaining an inmate: \$20,053.²⁵⁷

If states are recovering so little from their inmates, it is unlikely that they are offsetting prison costs by very much.²⁵⁸ In fact, privately-run, for-profit prisons that participate in Unicor, a government corporation that sells inmate-produced goods and services generated by such prison-work programs, seem to generate much higher profits than what seems plausible through wage garnishment.²⁵⁹ While the Unicor program presents its own myriad of issues, such as the ethicality of companies and suppliers who purchase goods off the backs of poorly compensated inmates, namely anywhere from \$0.23 to \$1.15 an hour, Unicor recorded approximately \$300 million in total sales in the first half of 2018 alone.²⁶⁰ When prison labor generates such a profit, the practice of wage garnishment is trivial, if not unfounded.²⁶¹

The question still remains: what purpose does wage garnishment serve other than a secondary form of punishment?²⁶² Because the wages paid to inmates are so insubstantial and returns from garnishing prisoner wages are so negligible, pay-to-stay fines for inmates in prison-work programs are certainly punitive and subject to the Eighth Amendment.²⁶³ In our modern

252. *Id.*

253. *See id.*

254. *See* N.D. CENT. CODE § 12-44.1-18.2 (2023).

255. Sawyer, *supra* note 233.

256. *See id.*

257. *See* S.C. CODE ANN. § 24-3-40 (2023); *Prison Spending in 2015*, *supra* note 251.

258. Author's original thought.

259. Julie Goodridge et al., *Prison Labor in the United States: An Investor Perspective*, NORTHSTAR ASSET MGMT. 5, 19 (Apr. 2018), https://northstarasset.com/wp-content/uploads/2018/04/Prison-Labor-in-the-Supply-Chain_April-2018.pdf [<https://perma.cc/5CAC-BVKR>].

260. Alexia Fernández Campbell, *The federal government markets prison labor to businesses as the "best-kept secret"*, VOXMEDIA (Aug. 24, 2018, 10:00 AM), <https://www.vox.com/2018/8/24/17768438/national-prison-strike-factory-labor> [<https://perma.cc/98SR-P6CG>].

261. *See id.*

262. Author's original thought.

263. *Id.*

standard of decency, pay-to-stay statutes of this nature are certainly not ethical, moral, or constitutional.²⁶⁴

b. Income-Based Fines Violate the Eighth Amendment

Ten states seek cost-of-confinement fees from those offenders who the state deems as non-indigent.²⁶⁵ This is immediately cause for criticism because despite several statutes' procedures for determining indigency, such as assessing the effect a fee would have on an inmate's dependents or determining if their income places them below the poverty line, very few states have drawn a clear line in the sand for what qualifies an offender as non-indigent, opening the door for arbitrary and unfair statute interpretation and fine imposition.²⁶⁶ Beyond subjective standards for determining indigency, basing a fine on the income or assets of the liable party violates the Eighth Amendment because it undermines the tenet of proportionality that Eighth Amendment jurisprudence requires.²⁶⁷

In *United States v. Bajakajian*, a culmination of four prior Excessive Fines Clause holdings and the only case in which the Supreme Court has struck down a fine as excessive, the Court held that the Eighth Amendment will be violated if a fine is "grossly disproportional to the gravity of a defendant's offense."²⁶⁸ In the instance of wage garnishment, the fine imposed would be the same for any offender, merely tailored to the amount of time they spent incarcerated, so proportionality requires a much more complex analysis.²⁶⁹ To analyze proportionality, it is also relevant what the *Bajakajian* Court intended gravity to mean in terms of an offense.²⁷⁰ The Court used a two-prong analysis: first, it examined the offender's culpability—the "essence" or seriousness of the crime and defendant's *mens rea* at the time of the offense—and second, the harm, or the specific consequences of the offender's individual conduct.²⁷¹ This gravity analysis is less material for income-based fines, but it is still relevant to demonstrate the shortcomings of these fines.²⁷²

In determining that the forfeiture imposed in *Bajakajian* violated the Excessive Fines Clause, the Court found that there was "no articulable correlation to any injury suffered by the Government," indicating that there must be some connection between the burden to the state and the fine

264. See *United States v. Pena*, 64 M.J. 259, 265 (C.A.A.F. 2007).

265. See *supra* Section III.B.3.b.

266. See S.D. CODIFIED LAWS § 24-2-28 (2004); WASH. REV. CODE § 10.101.010(3)(c) (2022).

267. See *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

268. *Id.*

269. See Eisen, *supra* note 25.

270. See *Bajakajian*, 524 U.S. at 337.

271. *Id.* at 337–39.

272. Author's original thought.

imposed.²⁷³ In the case of fines, there is a logical connection between the fine and the injury to the state—proponents of fine imposition assert that these are meant to offset the state’s costs of housing and maintaining the prisoner.²⁷⁴ However, this very connection subverts the logic of income-based fine imposition.²⁷⁵ If this connection exists for all prisoners, states should not be able to disregard this connection for indigent defendants under the guise of equity that is not afforded in other aspects of the criminal justice system.²⁷⁶

The proportionality analysis falls victim to this same pitfall.²⁷⁷ There is an inherent logical disconnect between asserting that pay-to-stay fines are proportional to the offense charged and not applying the fines to the same offenses by different offenders equally.²⁷⁸ Furthermore, charging inmates for room and board on top of court fees, lawyers’ fees, and a period of imprisonment is not proportional to any offense merely because the offender is non-indigent.²⁷⁹

While the *Bajakajian* Court did not create a test for proportionality, it did find that the forfeiture imposed in that case was disproportional to the crime, exceeding the maximum statutory penalty by sixty-five to one.²⁸⁰ This suggests that a numerical approach may be a means to analyze a fine’s proportionality.²⁸¹ As an example, take Florida, where the most common crimes are drug abuse violations.²⁸² If an offender were to be convicted of possession with intent to sell, manufacture, or deliver Schedule V drugs, such as stimulants, and the court imposed the statutory maximum sentence, the offender would serve a year in jail and be subject to a fine of \$1,000.²⁸³ Consequently, Florida typically does not seek more than \$5 a day in cost-of-confinement fees from its non-indigent inmates.²⁸⁴ This would equate

273. *Bajakajian*, 524 U.S. at 340.

274. Eisen, *supra* note 25.

275. See Alec Schierenbeck, *The Constitutionality of Income-Based Fines*, 85 U. OF CHI. L. REV. 1869, 1903 (2018).

276. See *id.*

277. See Kristen M. Haight, *Paying for the Privilege of Punishment: Reinterpreting Excessive Fines Clause Doctrine to Allow State Prisoners to Seek Relief from Pay-to-Stay Fees*, 62 WM. & MARY L. REV. 287, 313 (2020).

278. *Id.*

279. See Schierenbeck, *supra* note 275, at 1896.

280. *United States v. Bajakajian*, 524 U.S. 321, 340 (1998).

281. See *id.*

282. LMW Att’ys, *Most Common Crimes Committed in Florida*, LAPORTE, MULLIGAN & WERNER-WATKINS, P.A. (May 1, 2016), <https://accidentshappenattylaw.com/5-common-crimes-committed-florida/> [https://perma.cc/3F78-V3R7].

283. *Drug Possession With Intent to Sell*, BLAKE & DORSTEN P.A., <https://www.blake-dorstenlaw.com/drug-possession-with-intent-to-sell.html> (last visited Oct. 17, 2023) [https://perma.cc/WX9F-BZ75].

284. *Subsistence Fees & Collection in Florida Jails*, *supra* note 198.

to a cost-of-confinement fee of \$1,825.²⁸⁵ While the disparity is not as striking as in *Bajakajian*, this fee is almost double the statutory maximum fine for the charged offense.²⁸⁶ It is also important to note that Florida is one of five states that do not compensate working inmates, meaning that fines are not the only profit the state receives from an inmate's incarceration.²⁸⁷ This hardly seems proportional, especially considering Florida's history of harsh sentencing, indicating that offenders will likely be subject to lengthy sentences and severe fines on top of their pay-to-stay fees.²⁸⁸

It cannot be said that each state that imposes such pay-to-stay fines will be disproportionate under this numerical framework, but as the *Bajakajian* Court did not outline a hard-and-fast test for proportionality, it is not necessarily controlling.²⁸⁹ In fact, the gravity test, outlined above, was emphasized by the Court in determining whether a forfeiture or fine was unconstitutionally disproportionate.²⁹⁰ It is interesting to note the disparity in underlying offenses—wealthier criminals typically commit higher-stakes crimes while poor offenders are typically subject to harsher penalties for lesser crimes.²⁹¹ However, as this variant of cost-of-confinement fees is not linked to an offender's specific offense—only their assets and ability to pay—the gravity test must be slightly modified.²⁹² On a base level, the “offense” that triggers imposition of a pay-to-stay fee is merely being incarcerated; adding another layer, the “offense” that triggers an income-based pay-to-stay fee is being incarcerated and having assets.²⁹³

285. See *id.*

286. See *id.*

287. Jean Trounstein, *Fighting the Fees that Force Prisoners to Pay for Their Incarceration*, PRISON LEGAL NEWS (Nov. 6, 2018), <https://www.prisonlegalnews.org/news/2018/nov/6/fighting-fees-force-prisoners-pay-their-incarceration/> [https://perma.cc/L9YD-FA8G].

288. *Florida's Harsh Punishments for Drug Crimes Have Questionable Benefits*, MOSES & ROTH, <https://www.mosesandrooth.com/articles/floridas-harsh-punishments-for-drug-crimes-have-questionable-benefits/> (last visited Oct. 17, 2023) [https://perma.cc/Q8J2-N3ER]; see also *Florida Moves to Reform History of Harsh Sentencing*, SPATZ L. FIRM, PL (Feb. 28, 2017), <https://www.spatzlawfirm.com/blog/2017/02/florida-moves-to-reform-history-of-harsh-sentencing/> [https://perma.cc/AE9S-74HQ] (noting that as of 2017, Florida voted to end mandatory minimum sentences for non-violent crimes, but there have been no other indications of sentencing changes; policies such as the two-strike rule, directing prosecutors to seek the maximum sentence for offenders who recommit felonies in the three years since leaving prison, still remain in place).

289. See *United States v. Bajakajian*, 524 U.S. 321, 336 (1998).

290. *Id.* at 336–37.

291. Matt Zbrog, *Follow the Money: How Rich Criminals Get Treated Differently*, FORENSICS COLLS. (Jan. 22, 2020), <https://www.forensicscolleges.com/blog/follow-the-money/white-collar-prison> [https://perma.cc/2GBL-YV7L].

292. See Stephen Handelman, *Income-Based Fines Could Reduce Justice Debts for Poor: Study*, CRIME REP. (Mar. 15, 2019), <https://thecrimereport.org/2019/03/15/income-based-fines-could-reduce-justice-debts-for-poor-study/> [https://perma.cc/TPW9-FA42].

293. See Cortney Sanders & Michael Leachman, *Step One to an Antiracist State Revenue Policy: Eliminate Criminal Justice Fees and Reform Fines*, CTR. ON BUDGET & POL'Y PRIORITIES (Sept. 17, 2021), <https://www.cbpp.org/research/state-budget-and-tax/step-one-to-an-antiracist-state-revenue-policy-eliminate-criminal> [https://perma.cc/W6HL-AHE8].

Under the first prong of the gravity test, the seriousness of the offense and the offender's *mens rea* must be analyzed.²⁹⁴ It is important to note that the following analysis is not meant to undermine the nature of a prisoner's incarceration—many offenders commit incredibly serious and heinous crimes that justify retributionist or incapacitation-based punishment.²⁹⁵ However, from an income-based pay-to-stay standpoint, the offender's crime itself is irrelevant.²⁹⁶

The simpler analysis of this prong is *mens rea*.²⁹⁷ While there are specific instances when an offender would prefer jail time—perhaps it is a better alternative to sleeping on the street and provides a guaranteed three meals a day—it cannot be said that most offenders commit crime with the intention of getting caught and being incarcerated, especially wealthier offenders deemed able to pay cost-of-confinement fines.²⁹⁸ The more nuanced analysis pertains to the essence or seriousness of the offense.²⁹⁹ If the offense itself is being incarcerated and having assets, it cannot be said that this is somehow more serious than being incarcerated without assets.³⁰⁰ In fact, arguably, incarceration is much more serious for offenders without assets, as it can interfere with government benefits and access to housing or employment.³⁰¹ Income-based pay-to-stay fees fail this prong of the gravity analysis.³⁰²

As to the second prong, the harm and consequences of the offense must be analyzed.³⁰³ Here, the harm asserted by states is a financial harm, and the fee is meant to counteract high prison costs.³⁰⁴ It is certainly true that states have a higher likelihood of recouping fees from inmates who can afford to

294. *Bajakajian*, 524 U.S. at 337–39.

295. NORA V. DEMLEITNER, *THE OXFORD HANDBOOK OF CRIM. L.* 941–63 (Markus D. Dubber & Tatjana Hörnle eds., 2015).

296. Sanders & Leachman, *supra* note 293.

297. See Dugan Arnett, *Choosing prison: Why life behind bars seems better than freedom*, HAMILTON SPECTATOR (Mar. 22, 2014), https://www.thespec.com/news/world/choosing-prison-why-life-behind-bars-seems-better-than-freedom/article_e55c8abf-d77d-5fe4-94fc-77320b0eabad.html [<https://perma.cc/WBT4-J7L9>].

298. *See id.*

299. *Bajakajian*, 524 U.S. at 337–39.

300. See Tara O'Neill Hayes & Margaret Barnhorst, *Incarceration and Poverty in the United States*, AM. ACTION F. (June 30, 2020), <https://www.americanactionforum.org/research/incarceration-and-poverty-in-the-united-states/> [<https://perma.cc/6N87-MR8B>].

301. *Id.*

302. Author's original thought.

303. *Bajakajian*, 524 U.S. at 337–39.

304. April D. Fernandes et al., *Forcing people to pay for being locked up remains common*, WASH. POST (May 2, 2022, 6:00 AM), <https://www.washingtonpost.com/outlook/2022/05/02/forcing-people-pay-being-locked-up-remains-common/> [<https://perma.cc/2UEF-XZBY>].

pay them.³⁰⁵ However, if the state also seeks to avoid future harm—namely, offenders reentering the system—an additional monetary fine will likely not safeguard against this if an offender’s assets are substantial enough.³⁰⁶

Much of this analysis hinges upon whether an offender has merely enough assets to pay the fine or if they have significant assets that would make the additional fine immaterial.³⁰⁷ Assuming that the fines are only being applied to incredibly affluent offenders, the harm to the state would be mitigated by collection.³⁰⁸ However, non-indigent does not necessarily mean wealthy.³⁰⁹

While indigence has been defined in forty-one states regarding “indigence policies,” or programs that give inmates access to basic necessities while incarcerated, indigence in terms of pay-to-stay fines is less well-defined.³¹⁰ Of the ten states that use income-based pay-to-stay fees, Washington’s definition is the most clear, barring recovery from offenders who received government assistance, were committed to a mental health facility, or earn 125% or less of the national poverty level.³¹¹ While the buffer written into the statute allows grace for those just above the poverty level, as of 2022, it only protects inmates making a mere \$16,988 per year.³¹² Any offender who falls just outside of this limit will be hard-pressed to repay any sort of substantial pay-to-stay fee, meaning fine imposition in such cases will likely be unimpactful on the harm done to the state.³¹³ Drawing the indigency line at such a low threshold means Washington’s statute fails the gravity test.³¹⁴

Other states, namely Louisiana, South Dakota, Colorado, Minnesota, and Wyoming, that determine indigency by assessing the effect that fine imposition will have on an offender’s family, again, fail the gravity test for lack of efficacy.³¹⁵ If a sentencing court determines an offender’s ability to pay merely based on their dependents, or lack thereof, it impedes a totality of

305. Schierenbeck, *supra* note 275, at 1879.

306. *Id.* at 1876–78.

307. Author’s original thought.

308. See Mirko Bagaric, *Rich Offender, Poor Offender: Why It (Sometimes) Matters in Sentencing*, 33 MINN. J. L. & INEQ. 1, 13 (2015).

309. See Tiana Herring, *For the poorest people in prison, it’s a struggle to access even basic necessities*, PRISON POL’Y INITIATIVE (Nov. 18, 2021), <https://www.prisonpolicy.org/blog/2021/11/18/indigence/> [https://perma.cc/PN3T-BFHC].

310. *Id.*

311. WASH. REV. CODE § 10.101.010(3)(a)–(c) (2022).

312. Off. of the Assistant Sec’y for Plan. & Evaluation, *2022 Poverty Guidelines*, U.S. DEP’T OF HEALTH & HUMAN SERVS., <https://aspe.hhs.gov/sites/default/files/documents/4b515876c4674466423975826ac57583/Guidelines-2022.pdf> [https://perma.cc/SZT9-Y9SJ].

313. Kiren Jahangeer, *Fees and Fines: The Criminalization of Poverty*, AM. BAR ASS’N: PUB. LAW. ARTICLES (Dec. 16, 2019), https://www.americanbar.org/groups/government_public/publications/public_lawyer_articles/fees-fines/ [https://perma.cc/NX4V-ECQP].

314. See *United States v. Bajakajian*, 524 U.S. 321, 337–39 (1998).

315. *Id.*

the circumstances analysis.³¹⁶ A court cannot determine with certainty that an offender with no children will be any more able to pay than an offender with four children; while it certainly implicates an offender's finances differently, poverty still affects those without dependents.³¹⁷ These statutes constrict an indigency determination far too narrowly, meaning they fail the gravity test for their inability to prove mitigation of the harm to the state.³¹⁸

Furthermore, arbitrary language contained in Minnesota and Wyoming's statutes makes them unworkable, especially under the gravity test.³¹⁹ Both statutes contain language barring fine imposition when it would create "undue hardship" for the offender or their family.³²⁰ This phrase, while defined in employment law, is too amorphous to be equitably applied or enforced regarding pay-to-stay fines.³²¹ Would undue hardship mean the offender's children would go without new school clothes or without electricity?³²² Further, even if a court determines undue hardship would not result, that does not necessarily mean that the fine will be recoverable.³²³ Again, these statutes fail the gravity test for lack of harm mitigation to the state.³²⁴

All in all, income-based pay-to-stay statutes are unconstitutional due to an inability to make a clear showing of the gravity of the offense and a lack of proportionality across the board for similar offenses and different offenders.³²⁵ Proportionality, as emphasized by the *Bajakajian* Court, would require fines to be imposed equally across the board for all offenses.³²⁶

316. See *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963) (using a totality of the circumstances determination to determine whether a defendant was indigent and thus, entitled to an appointed attorney; while this is not completely analogous, it implies that an indigency determination will usually require an analysis of all facts involved).

317. See Stephanie Hingtgen et al., *Gaps in Economic Support for Non-Elderly Adults Without Children Continue to Leave Millions in Poverty, Data Show*, CTR. ON BUDGET & POL'Y PRIORITIES (Jan. 29, 2021), <https://www.cbpp.org/research/poverty-and-inequality/gaps-in-economic-support-for-non-elderly-adults-without-children> [<https://perma.cc/Y4N4-ZZ2M>].

318. See *Bajakajian*, 524 U.S. at 337–39.

319. See MINN. STAT. § 641.12(3)(b) (2010); WYO. STAT. ANN. § 7-13-109(a)(ii) (1996).

320. MINN. STAT. § 641.12(3)(b); WYO. STAT. ANN. § 7-13-109(a)(ii).

321. See *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Oct. 17, 2002), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada> [<https://perma.cc/89EH-UGT4>].

322. Author's original thought.

323. See *Bajakajian*, 524 U.S. at 337–39.

324. *Id.*

325. See *id.* at 334.

326. *Id.*

However, the discussion below demonstrates why this is unconstitutional as well.³²⁷

c. Pay-to-Stay Statutes for All Offenders Should Be Unconstitutional

While income-based fines are dubious at best in light of the Eighth Amendment, enforcing fines across the board for indigent and non-indigent defendants is a direct violation of the Excessive Fines Clause.³²⁸ While the Supreme Court rarely invokes the powers of the Excessive Fines Clause, there is no situation more apt for its application than the criminalization of poverty.³²⁹ Under the Supreme Court's most recent Excessive Fines Clause decision in *Timbs v. Indiana*, a fine is unconstitutional if it is "grossly disproportionate" to the offense or if it "deprives an offender of his livelihood."³³⁰ Thus, imposing the same fees on wealthy and indigent offenders is unconstitutional.³³¹

For indigent offenders, pay-to-stay fees almost always constitute a deprivation of livelihood.³³² Many offenders enter the criminal justice system in an already-precarious financial position; these offenders leave prison with, typically, no prospects of employment, few savings or assets, and an enormous fine looming in the background exacerbating this position, often leading to recidivism.³³³ Newly released offenders are often faced with a "Sophie's choice" between civil forfeiture proceedings or re-incarceration due to an inability to pay.³³⁴ This cycle of incarceration, fine imposition, defaulting on payments, and re-incarceration only creates an increasingly insurmountable mass of debt.³³⁵

With such low collection rates, many states use civil means, such as asset forfeiture, to recoup their costs.³³⁶ While this method in and of itself is not unconstitutional, it casts the statutes implicating it in an unfavorable light.³³⁷ Many indigent inmates have very few assets to be seized by the court to begin with.³³⁸ Allowing courts to confiscate what little they have is not

327. See *infra* Section V.A.2.c.

328. See U.S. CONST. amend. VIII.

329. *The Excessive Fines Clause*, *supra* note 210.

330. *Timbs v. Indiana*, 139 S. Ct. 682, 684, 688 (2019) (quoting *Browning-Ferris Indus. of Vt. v. Kelco Disposal*, 492 U.S. 257, 263 (1989)).

331. Author's original thought.

332. Jessica Brand, *How Fines and Fees Criminalize Poverty: Explained*, THE APPEAL (July 28, 2018), <https://theappeal.org/the-lab/explainers/how-fines-and-fees-criminalize-poverty-explained/> [<https://perma.cc/265P-UXPE>].

333. Annie Harper et al., *Debt, Incarceration, and Re-entry: a Scoping Review*, PUBMED CENT. (Aug. 11, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7417202/> [<https://perma.cc/PM77-KAVP>].

334. Brand, *supra* note 332.

335. See *infra* Section V.C.2.

336. Schumann, *supra* note 9.

337. Author's original thought.

338. Brand, *supra* note 332.

only a deprivation of livelihood but an almost certain life sentence of poverty, destitution, and desperation.³³⁹

The solution seems clear: bar fine imposition for indigent inmates.³⁴⁰ However, as discussed above, income-based fines are no more constitutional than fines imposed evenly across the board.³⁴¹ The only real solution is a total repeal.³⁴² While this may seem an overly simplistic analysis, deprivation of livelihood is all it should take to invoke the protections of the Excessive Fines Clause.³⁴³ Because this is a scarcely litigated topic, the outer confines of the Clause have not truly been tested.³⁴⁴ However, this rarely-worked muscle of the Excessive Fines Clause should be exercised against any and all cost-of-confinement statutes, despite the Supreme Court's hesitancy to apply the Eighth Amendment in a pay-to-stay context.³⁴⁵ The Court should clearly define the *Timbs* standard and invoke more generous protections for defendants who have already paid their debt to society.³⁴⁶

B. Broadly Written Pay-to-Stay Statutes Must be Interpreted Narrowly

Many state legislatures purposely construct their pay-to-stay statutes to be vague to allow enforcement officers broad volition to impose sweeping fines.³⁴⁷ While broad statute construction is acceptable, if not encouraged, in other areas in the law, such statutes must be construed in favor of the defendant (i.e., narrowly) to be constitutional for two reasons.³⁴⁸ First, the rule of lenity, a widely accepted tenet of criminal law, requires that vague statutes must be construed in the light most favorable to the defendant—meaning imprecise statutes are immediately dubious.³⁴⁹ Second, an analogous case under the Mandatory Victims Restitution Act also implies that criminal statutes must be interpreted narrowly to be constitutional.³⁵⁰

The rule of lenity is derived from the separation of powers, which dictates that the courts must not encroach on the legislature's duly enacted

339. Author's original thought.

340. *Id.*

341. See *supra* Section V.A.1.b.

342. Author's original thought.

343. See *Timbs v. Indiana*, 139 S. Ct. 682, 688 (2019).

344. *The Excessive Fines Clause*, *supra* note 210.

345. Author's original thought.

346. *Id.*

347. See Alana Semuels, *The Fines and Fees That Keep Former Prisoners Poor*, THE ATLANTIC: BUS. (July 5, 2016), <https://www.theatlantic.com/business/archive/2016/07/the-cost-of-monetary-sanctions-for-prisoners/489026/> [<https://perma.cc/AH96-2254>].

348. See Intisar A. Rabb, *The Appellate Rule of Lenity*, 131 HARV. L. REV. F. 179, 181 (2018).

349. See *id.* at 186.

350. *Lagos v. United States*, 138 S. Ct. 1684, 1686 (2018).

lawmaking duty to define the inner and outer bounds of crime and punishment.³⁵¹ It also preserves the constitutional due process right of “fair warning,” which ensures that citizens be reasonably aware of the scope of penal statutes that could restrict their liberty, rights, and freedoms.³⁵² The rule of lenity has been whittled down over the years, with the Supreme Court’s most recent *Dixson v. United States* decision requiring courts to look to legislative history and intent to resolve ambiguous statutory language before applying the rule in favor of the defendant.³⁵³ While the Supreme Court seems to require “ultimate and grievous ambiguity” before applying the rule of lenity, it remains a constitutional cornerstone of statutory construction and interpretation.³⁵⁴ There are three states whose cost-of-confinement statutes should trigger application of the rule of lenity under the Supreme Court’s *Dixson* decision: New Mexico, Wisconsin, and Arkansas—each will be evaluated individually.³⁵⁵

First, New Mexico’s statute provides that the state can deduct “reasonable costs incident to confinement” from an inmate’s prison-work program compensation.³⁵⁶ Ambiguity arises from the “costs incident” language, as there is no enumerated list of what these costs may include or limitations on how broadly fines can be enacted.³⁵⁷ Under *Dixson*, this ambiguous language must be evaluated under the statute’s legislative history.³⁵⁸ This statute was amended as recently as 2022, but the pertinent section of text has remained unchanged since its addition in 1991.³⁵⁹ Intent can be surmised by the statute’s historical context.³⁶⁰ The section of text added in 1991 was meant to “provide for an increase in crime victim restitution”; therefore, the “costs incident to confinement” clause was likely never in contention or of utmost priority to legislators.³⁶¹ If legislative intent provides no statutory clarification, as in this case, *Dixson* requires that the rule of lenity be applied, meaning New Mexico’s statute must be narrowly construed in favor of the defendant.³⁶² This requires that “costs incident to confinement” be restricted as scrupulously as possible to avoid overbroad fine enactment by the state.³⁶³

351. David S. Romantz, *Reconstructing the Rule of Lenity*, 40 CARDOZO L. REV. 523, 524 (2018).

352. *Id.*

353. *Dixson v. United States*, 465 U.S. 482, 491 (1984).

354. Romantz, *supra* note 351, at 556.

355. See N.M. STAT. ANN. § 33-8-8(C)(2) (1991); WIS. STAT. § 302.373(2)(a) (2011); ARK. CODE ANN. § 12-41-505 (2021).

356. N.M. STAT. ANN. § 33-8-8(C)(2).

357. Author’s original thought.

358. *Dixson*, 465 U.S. at 491.

359. See N.M. STAT. ANN. § 33-8-8.

360. Author’s original thought.

361. See N.M. STAT. ANN. § 33-8-8.

362. See *Dixson*, 465 U.S. at 491.

363. Author’s original thought.

Next, Wisconsin's statute provides that the state can seek "expenses incurred by the county to incarcerate the prisoner."³⁶⁴ "[E]xpenses incurred by the county" is ambiguous, as these expenses could theoretically extend to anything from typical room and board fees to costs of importing food or supplies for the prison.³⁶⁵ Similar to New Mexico, the pertinent section of text has not changed since the original statute's enactment in 2003.³⁶⁶ Upon the statute's proposal in 2003, a fiscal estimate upon which the legislature relied was provided by the Wisconsin Department of Administration; it cited that while the statute would increase revenues, it would also increase court costs and the likelihood of fine recovery could not be guaranteed.³⁶⁷ The Department of Administration concluded by stating they were unable "to estimate the fiscal impact of this legislation."³⁶⁸ Therefore, not only is the language ambiguous, but the legislative intent is as well.³⁶⁹ Thus, under *Dixon*, the rule of lenity must be applied construing the statute narrowly in favor of defendants; "expenses incurred by the county" must be restricted to only direct expenses, not speculative costs, as narrowly as is equitably possible.³⁷⁰

Finally, Arkansas's statute requires that an inmate reimburse the state for their "support . . . for the whole time [the prisoner] remains [incarcerated]."³⁷¹ While the statute contains enumerated booking and administration fees based on the gravity of the offense, "support" remains undefined and provides ambiguity as to costs it encompasses.³⁷² Consistent with New Mexico and Wisconsin, the pertinent text has remained unchanged since the statute's enactment.³⁷³ The legislative intent merely contains the same ambiguous language, stating its intent "to amend Arkansas Code 12-41-505 to require all persons committed to the common jail of the county to pay . . . for his support while he remains there."³⁷⁴ With legislative intent failing to clear up the ambiguity, again *Dixon* requires a narrow statutory interpretation in favor of the defendant, requiring support to be attenuated as narrowly as is equitably possible.

364. WIS. STAT. § 302.373(2)(a) (2011).

365. Author's original thought.

366. See WIS. STAT. § 302.373.

367. *Fiscal Estimate – 2003 Session*, WIS. DEP'T OF ADMIN.: DIV. OF EXEC. BUDGET & FIN. (2003), https://docs.legis.wisconsin.gov/2003/related/fe/ab53/ab53_doc.pdf [<https://perma.cc/W4Z8-BSB2>].

368. *Id.*

369. Author's original thought.

370. *Id.*

371. ARK. CODE ANN. § 12-41-505(a)(1) (2021).

372. See *id.* § 12-41-505(b)(1)–(3).

373. See ARK. CODE ANN. § 12-41-505.

374. *Id.*

Outside of the rule of lenity, *Lagos v. United States*, a 2018 Supreme Court case, also provides support for a narrow reading of overly broad statutes.³⁷⁵ *Lagos* determined the scope of a clause from the Mandatory Victims Restitution Act of 1996, ruling in favor of narrow statutory interpretation.³⁷⁶ The phrase at issue there dealt with expenses “incurred during participation in the investigation of prosecution of the offense or attendance at proceedings related to the offense.”³⁷⁷ The United States argued that this should include private investigations and civil proceedings, which the Court struck down in favor of a narrow reading, extending the holding only to government investigations and criminal proceedings.³⁷⁸

Drawing a parallel, *Lagos* dealt with the Mandatory Victims Restitution Act (MVRA), which requires offenders to reimburse victims of their crimes.³⁷⁹ As discussed in Section V.A.2.b, if the purported “victim” of an inmate’s incarceration is the state, cost-of-confinement fines essentially constitute restitution to the inmate’s “victim.”³⁸⁰ Thus, just as the *Lagos* Court found that broad statutory interpretation in the MVRA would invite unnecessary controversy and “significant administrative burdens,” such as whether costs asserted by the state were necessary to the proceedings, pay-to-stay statutes should also be narrowly construed to the most basic costs that the state can specifically enumerate, eliminating overly speculative fine imposition.³⁸¹

The *Lagos* Court also held that the MVRA required specific “enumeration of limited categories of covered expenses, in contrast with the broader language that other federal restitution statutes use.”³⁸² In a similar fashion, pay-to-stay statutes, which constitute a type of restitution that bears a strong resemblance to the MVRA, should require a specific enumeration of the charges against the inmate that their fee encompasses (i.e., room and board *at a specific daily cost*, food *at a specific daily cost*, medical expenses *at a specific daily cost*, and so on).³⁸³ Furthermore, these specific daily costs must be objectively reasonable and equivalent to the goods and services provided to the inmate.³⁸⁴ This is the only way to ensure that fines are being enacted and enforced in an equitable and proportional manner against all inmates.³⁸⁵ The principles of lenity and criminal restitution statutes require a

375. *Lagos v. United States*, 138 S. Ct. 1684, 1686 (2018).

376. *See id.*

377. *Id.* at 1685.

378. *Id.* at 1686.

379. *Id.* at 1685.

380. *See supra* Section V.A.2.b.

381. *See Lagos*, 138 S. Ct. at 1689.

382. *Id.* at 1686.

383. *Id.*

384. *Id.*

385. Author’s original thought.

limited reading of broad statutes and rejection of speculative fine imposition.³⁸⁶

C. Public Policy Benefits to Repealing Pay-to-Stay Statutes

There is a sociological phenomenon in prisoners, sometimes called a synchronicity, which refers to the phenomenon of an inmate's shifted worldview due to the so-called "frozen time" in prison.³⁸⁷ Inmates feel a disconnect from the time passing in the outside world because they are stuck inside, waiting out their sentence.³⁸⁸ This presents especially onerous challenges for those who serve extended periods of time in prison and come out to a completely different world.³⁸⁹ There are a myriad of issues that confront recently released individuals, further exacerbated by sometimes exorbitant pay-to-stay fines.³⁹⁰

1. Facilitating Smoother Prisoner Reentry

Prisoner reentry challenges can more or less be grouped into three broad categories: livelihood or employment; relationships, both interpersonal and the individual's relationship to society; and collateral legal consequences.³⁹¹ Each presents unique struggles, and each can be linked to recidivism.³⁹²

As to the first category of livelihood, due to limited educational and vocational resources in prisons, inmates often leave prison with few marketable job skills, save for those required for low-paying jobs in the service sector.³⁹³ On top of that, approximately "seventy percent of offenders and ex-offenders are high-school dropouts."³⁹⁴ This is an even greater

386. See *supra* Section V.A.2.b.

387. Think Out Loud, 'Free' illustrates enormous reentry challenges for those coming out of prison, OR. PUB. BROAD., at 2:25 (Aug. 16, 2022, 3:39 PM), <https://www.opb.org/article/2022/08/16/free-profiles-enormous-reentry-challenges-for-those-coming-out-of-prison/> [<https://perma.cc/SKR5-QS5M>].

388. See *id.*

389. See, e.g., *Frozen in Time: What Older People Face After Prison*, THE FORTUNE SOC'Y: MEDIA CTR., at 1:12 (Oct. 2, 2018), https://fortunesociety.org/media_center/frozen-in-time-what-older-people-face-after-prison/ [<https://perma.cc/R4NM-W7UA>].

390. See Schumann, *supra* note 9.

391. *The Challenges of Prisoner Re-Entry Into Society*, SIMMONS UNIV., <https://online.simmons.edu/blog/prisoner-reentry/> (last visited Oct. 17, 2023) [<https://perma.cc/3VGC-B2XE>].

392. See *id.*

393. *Id.*; see Christy Visser et al., *Employment after Prison: A Longitudinal Study of Releasees in Three States*, URB. INST. JUST. POL'Y CTR. 1, 3 (Oct. 2008), <https://www.urban.org/sites/default/files/publication/32106/411778-Employment-after-Prison-A-Longitudinal-Study-of-Releasees-in-Three-States.PDF> [<https://perma.cc/GT29-GYPC>].

394. *The Challenges of Prisoner Re-Entry Into Society*, *supra* note 391.

impediment to their success in the job market.³⁹⁵ However, those inmates with an education may not be much better off.³⁹⁶ In a 1993 survey, the Bureau of Justice reported that a mere 12.5% of employers would even accept a job application from someone with a criminal record.³⁹⁷ A more recent 2021 study indicated that 33% of a pool of 50,000 inmates were unable to find employment in the four years following their release from prison.³⁹⁸ Even if an ex-offender is able to find a job, men can expect to see an 11% reduction in the wages they earned prior to their incarceration.³⁹⁹ Ex-offenders also have a hard time keeping steady jobs; of the same previously mentioned sample of 50,000 offenders, inmates had an average of 3.4 jobs over four years.⁴⁰⁰ Suffice to say, maintaining a consistent source of income is typically a struggle for many ex-offenders.⁴⁰¹

As to the second category of relationships, many ex-offenders find the transition back into daily life to be taxing due to strained relationships with their families and needing to rebuild their social and societal connections.⁴⁰² The Urban Institute Justice Policy Center conducted a study that found that just prior to their release, 82% of ex-offenders “thought it would be easy to renew family relationships,” with over half later noting it was much more difficult than expected.⁴⁰³ Researchers typically cite years of limited contact and tensions arising from family members often having to financially support the recently released individual.⁴⁰⁴

Finally, collateral legal consequences upon release complicate a prisoner’s trepidatious return to society.⁴⁰⁵ These issues vary for each offender, including restricted access to food stamps, public housing, and an inability to vote.⁴⁰⁶ Furthermore, many ex-offenders have parole requirements they must meet to stay in good standing with the state, such as keeping a steady job and attending periodic meetings with their parole officer; these seemingly simple tasks are exponentially more complicated for

395. *See id.*

396. *Id.*

397. Brentin Mock, *The Case For Hiring Ex-Offenders*, BLOOMBERG (June 15, 2017, 9:21 AM), <https://www.bloomberg.com/news/articles/2017-06-15/the-costs-of-excluding-ex-offenders-from-the-workforce> [https://perma.cc/Y58E-ENVF].

398. E. Ann Carson et al., *Employment of Persons Released from Federal Prison in 2010*, U.S. DEP’T OF JUST. 1, 6 (Dec. 2021), <https://bjs.ojp.gov/content/pub/pdf/eprfp10.pdf> [https://perma.cc/L6K2-3JYS].

399. *Prison Impacts Livelihood*, THREEFOLD ADVOC. (Apr. 26, 2017), <http://advocate.jbu.edu/2017/04/26/prison-impacts-livelihood/> [https://perma.cc/R4DM-UHFX].

400. Carson et al., *supra* note 398, at 10.

401. Leah Wang & Wanda Bertram, *New data on formerly incarcerated people’s employment reveal labor market injustices*, PRISON POL’Y INITIATIVE (Feb. 8, 2022), <https://www.prisonpolicy.org/blog/2022/02/08/employment/> [https://perma.cc/RP74-R8DD].

402. *Id.*

403. *See The Challenges of Prisoner Re-Entry Into Society*, *supra* note 391.

404. *Id.*

405. *Id.*

406. *The Rights of Felons After Release*, THE COCHRAN FIRM (Oct. 2, 2018), <https://cochranfirm.com/rights-felons-release/> [https://perma.cc/HUX8-QSGV].

people with a criminal record due to lack of access to steady transportation, inability to re-obtain a driver's license, and discrimination within the job market.⁴⁰⁷

In recent years, ex-offender reintegration has come to the forefront of the conversation around recidivism.⁴⁰⁸ Organizations that assist in the reentry process "have proven to have a demonstrable impact on . . . recidivism."⁴⁰⁹ A closer look at these three main categories of issues that challenge inmates upon release, alongside the aggravating factor of prison debt, can inform society of how to help ex-offenders reassimilate into society.⁴¹⁰

Achieving post-prison employment for ex-offenders is often the difference between those who are able to reassimilate into society and those who will reoffend.⁴¹¹ However, as discussed above, there are a myriad of roadblocks that preclude finding viable employment after leaving prison.⁴¹² Furthermore, wages for ex-offenders typically "will not induce most to remain attached to the regular labor market over the long term."⁴¹³ Unreliable employment and wages, coupled with enormous fines from the criminal justice system, are often a lethal combination for struggling, newly-released offenders.⁴¹⁴ Not only can failure to pay a fine often result in legal consequences such as a suspended driver's license or being re-incarcerated, but it often leads many offenders to re-offend to cover their costs.⁴¹⁵ These consequences disproportionately affect low-income, uneducated, and unemployed ex-offenders, trapping them "in a cycle of debt and jail."⁴¹⁶

Proponents of pay-to-stay fines often tout its efficacy of reducing court and prison-system costs; however, the cycle resulting from unpaid fines can

407. *The Challenges of Prisoner Re-Entry Into Society*, *supra* note 391.

408. Adiah Price-Tucker et al., *Successful Reentry: A Community-Level Analysis*, THE HARV. UNIV. INST. OF POL. CRIM. JUST. POL'Y GRP. 1, 3 (Dec. 2019), https://iop.harvard.edu/sites/default/files/2023-02/IOP_Policy_Program_2019_Reentry_Policy.pdf [<https://perma.cc/68KC-GP9V>].

409. *Id.*

410. *The Challenges of Prisoner Re-Entry Into Society*, *supra* note 391.

411. Harry J. Holzer et al., *Employment Barriers Facing Ex-Offenders*, URB. INST. 1, 12 (May 19, 2003), <https://www.urban.org/sites/default/files/publication/59416/410855-Employment-Barriers-Facing-Ex-Offenders.PDF> [<https://perma.cc/2MEK-Y47V>].

412. *See supra* Section V.C.1.

413. Holzer et al., *supra* note 411, at 13.

414. Tim Lau et al., *Criminal Justice Fees and Fines Don't Work*, BRENNAN CTR. FOR JUST. (Nov. 21, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/criminal-justice-fees-and-fines-dont-work> [<https://perma.cc/RSF4-965A>].

415. *Under Pressure: How fines and fees hurt people, undermine public safety, and drive Alabama's racial wealth divide*, ALA. APPLESEED CTR. FOR L. & JUST. 1, 4, <http://alabamaappleseed.org/wp-content/uploads/2018/10/AA1240-FinesandFees-10-10-FINAL.pdf> (last visited Oct. 17, 2023) [<https://perma.cc/Y9YN-KW5T>].

416. Schierenbeck, *supra* note 275, at 1870.

actually end up costing the state even more money.⁴¹⁷ Because the courts are the main authority on fine administration, court employees can become bogged down with sending out notices of fines and attempting to motivate payment.⁴¹⁸ Furthermore, parole and probation agencies, as well as law enforcement, have their own costs such as warrant issuance, compliance checks, and enforcement of actual collection.⁴¹⁹ It is unlikely that strict fine enforcement does anything more than increase state costs.⁴²⁰ The only state attempting to tackle this issue is Colorado, which wrote a six-month buffer into its statute before the state is even allowed to seek collection of a fine.⁴²¹ Furthermore, Colorado's statute assesses the ex-offender's other financial responsibilities to decide the amount to be sought from the individual.⁴²² By allowing offenders time to seek adequate employment before collecting fines, states will likely see higher collection rates, lower court and law enforcement costs, and lower rates of re-offending.⁴²³

Ex-offenders' familial relationships can also become strained upon release.⁴²⁴ Much of this strain is either present at some level before incarceration or incited by familial withdrawal from the offender because of their criminal activity; regardless, it is typically exacerbated upon release.⁴²⁵ For those who leave prison with strained or nonexistent family ties, the lack of a solid support system can often be fatal, leaving them with no financial support, stable housing, or motivation to make positive lifestyle changes.⁴²⁶ For ex-offenders with familial support, exorbitant fines put an even more pronounced tension upon already strained relationships.⁴²⁷

Because ex-offenders often have a difficult time finding employment, their families bear the brunt of paying their prison fines: in 63% of cases, family members found themselves primarily responsible for paying the ex-offender's fines, while concurrently, approximately 65% of families found themselves unable to meet basic needs, such as food and housing.⁴²⁸ While it is not immaterial that many of these fines will likely go uncollected, the strain this puts on relationships between ex-offenders and their families

417. Lau et al., *supra* note 414.

418. *Id.*

419. *Id.*

420. *Id.*

421. COLO. REV. STAT. § 18-1.3-701(4) (2021).

422. *Id.*

423. Author's original thought.

424. See *The Challenges of Prisoner Re-Entry Into Society*, *supra* note 391.

425. Ian Brunton-Smith & Daniel J. McCarthy, *The Effects of Prisoner Attachment to Family on Re-entry Outcomes: A Longitudinal Assessment*, OXFORD ACAD.: BRITISH J. CRIMINOLOGY (Jan. 14, 2016), <https://academic.oup.com/bjc/article/57/2/463/2623932> [<https://perma.cc/N549-RKVQ>].

426. *Id.*

427. See Saneta deVuono-powell et al., *Who Pays? The True Cost of Incarceration on Families*, ELLA BAKER CTR. FOR HUM. RTS. 1, 7 (Sept. 2015), <https://ellabakercenter.org/wp-content/uploads/2022/09/Who-Pays-FINAL.pdf> [<https://perma.cc/BJ5G-AFXE>].

428. *Id.*

is even more damning, as the vast majority of these families live in poverty.⁴²⁹ Stronger familial bonds have been linked to a decrease in recidivism, so decreasing prison fines and easing financial burdens on the ex-offender's family will foster more positive relationships.⁴³⁰

Many offenders also leave prison with strained relationships to society, feeling ostracized or victimized; furthermore, many leave prison with mental health comorbidities that make it more difficult to reenter the general population without feeling rejected by the populous at large.⁴³¹ The resulting stigma of being a convicted offender is also incredibly detrimental to forming stronger societal connections, such as finding employment or pursuing further education.⁴³² Social bond theory, a school of sociological thought that emphasizes a strong connection to society as a positive agent of change, shows that social bonding among ex-offenders has led to a decrease in recidivism.⁴³³ Those who feel they are being doubly victimized by exorbitant fines upon already paying their debt to society during incarceration are much more likely to develop pronounced perceptions of being outcast and have a higher likelihood of reoffending.⁴³⁴

Collateral legal consequences, outside of pay-to-stay fines, often exacerbate problems already prevalent among ex-offenders.⁴³⁵ First, it can be difficult to find stable housing as many parole offices have restrictions on where former inmates can live, and landlords are typically wary of convicted criminals.⁴³⁶ The result of this is bleak: former inmates are almost ten times more likely to become homeless than the general population.⁴³⁷ This further weakens ex-offenders' societal bonds and creates a trepidatious foundation upon which to build a new life.⁴³⁸ If obtaining housing is complicated,

429. See *The Challenges of Prisoner Re-Entry Into Society*, *supra* note 391.

430. See deVuono-powell et al., *supra* note 427, at 9.

431. Janine M. Zweig et al., *Using General Strain Theory to Explore the Effects of Prison Victimization Experiences on Later Offending and Substance Use*, SAGE J.: PRISON J. (Dec. 26, 2014), <https://journals.sagepub.com/doi/10.1177/0032885514563283> [<https://perma.cc/Z3JX-DD75>].

432. Melissa Li, *From Prisons to Communities: Confronting Re-Entry Challenges and Social Inequality*, TARRANT CARES, <https://tarrant.tx.networkofcare.org/ps/library/article.aspx?id=3135> (last visited Dec. 20, 2023) [<https://perma.cc/2S8E-N832>].

433. Michael Rocque et al., *Unraveling Change: Social Bonds and Recidivism among Released Offenders*, RESEARCHGATE (Apr. 2013), https://www.researchgate.net/publication/257942714_Unraveling_Change_Social_Bonds_and_Recidivism_among_Released_Offenders [<https://perma.cc/9K9W-ZX52>].

434. Author's original thought.

435. See *supra* Section V.B.1.

436. Teresa Wiltz, *Where 'Returning Citizens' Find Housing After Prison*, STATELINE (Apr. 23, 2019, 12:00 AM), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/04/23/where-returning-citizens-find-housing-after-prison> [<https://perma.cc/VKM2-6YDX>].

437. *Id.*

438. Author's original thought.

obtaining consistent transportation is even more complicated.⁴³⁹ Many ex-offenders who are unable to pay their fines from the criminal justice system have their driver's licenses suspended and are left with the option of public transportation which is notoriously underfunded and inconsistent.⁴⁴⁰ Without transportation, ex-offenders are unable to maintain steady employment and thus, are unable to pay their fines: a vicious cycle.⁴⁴¹

One thing can be certain for newly released offenders: they require a strong foundation as a stepping stone to a new life.⁴⁴² The culmination of weaknesses in their livelihood and relationships in conjunction with collateral legal consequences creates shaky ground and a continual strained relationship with the criminal justice system and society at large.⁴⁴³ Pay-to-stay fines create unnecessary pressures on ex-offenders attempting to reassimilate into society and exacerbate difficulties already faced by ex-offenders upon release.⁴⁴⁴ By decreasing or eradicating these fees altogether, newly released individuals will be able to focus on rebuilding more fulfilling lives and becoming productive members of society.⁴⁴⁵

2. Combating Recidivism

More than two-thirds of state convicts will be rearrested at some point in the three years following their release.⁴⁴⁶ Many proponents of pay-to-stay fees argue that fines serve to dissuade recidivist behavior.⁴⁴⁷ However, an Alabama study found that around 38% of a pool of 980 prisoners had actually committed a second crime to pay off debts incurred through the criminal justice system, most commonly including: stealing, drug distribution, and sex work.⁴⁴⁸ The correlation between fines and repeated criminal behavior is undeniable, and reform is needed to combat the cycle of debt and incarceration.⁴⁴⁹ This section will explore recidivism in ex-offenders, the cycle of incarceration that trickles down to ex-offenders' dependents, and deterrents to re-offending.⁴⁵⁰

439. Holzer et al., *supra* note 411, at 16.

440. *The Challenges of Prisoner Re-Entry Into Society*, *supra* note 391.

441. *See id.*

442. *See id.*

443. Author's original thought.

444. *Id.*

445. *Id.*

446. *Top Prisoner Reentry Programs That Turn Exit Into A New, Meaningful Entry*, PLANSTREET (Oct. 11, 2022), <https://www.planstreetinc.com/top-prisoner-reentry-programs-that-turn-exit-into-a-new-meaningful-entry/> [<https://perma.cc/2STC-F4V7>].

447. Kevin Bliss, *Pay-to-Stay Fees Impoverish Prisoners, Increase Recidivism*, PRISON LEGAL NEWS (Mar. 1, 2021), <https://www.prisonlegalnews.org/news/2021/mar/1/pay-stay-fees-impoverish-prisoners-increase-recidivism/> [<https://perma.cc/6WGM-U9BJ>].

448. *Under Pressure: How fines and fees hurt people, undermine public safety, and drive Alabama's racial wealth divide*, *supra* note 415, at 4.

449. Author's original thought.

450. *See infra* Section V.C.2.

Recidivism amongst ex-offenders is shockingly common, with (as of 2005) 76.6% of prisoners being rearrested within five years of their initial arrest and 43.4% of prisoners being rearrested in the first year alone.⁴⁵¹ Those offenders who are released on parole (if they were incarcerated prior to November 1, 1987, and the eradication of federal parole) or probation also risk being reincarcerated due to failure to pay their fines, a provocation of already steep reincarceration statistics.⁴⁵² This pattern of criminal behavior typically extends beyond the offender themselves—most often to their children, grandchildren, or siblings.⁴⁵³

The cycle of reoffending often begins with low-income children who face one or many risk factors, most commonly: physical or sexual abuse as a child, parental drug or alcohol addiction, or parental mental illness.⁴⁵⁴ When the child becomes an adult, many high-risk tendencies are passed down from the child's parent or parents and the "withdrawal of the parental influence" in the child's life typically leads to their own eventual incarceration.⁴⁵⁵ The effects of this incarceration often trickles down to the incarcerated individual's family members, as children with at least one incarcerated parent are more likely to become incarcerated themselves.⁴⁵⁶ There are two warring sociological schools of thought about how to combat recidivism: deterrence and social bond theory.⁴⁵⁷ Deterrence theory focuses on punishment as a dissuasion for reoffending, and proponents of this theory often support harsh sentences and fines, such as pay-to-stay fines.⁴⁵⁸ While there may be some scenarios in which harsh punishment puts a person on the straight and narrow, contradictory research shows "that people who had been punished more severely actually engaged in more crime."⁴⁵⁹ There is no consensus

451. Nathan James, *Offender Reentry: Correctional Statistics, Reintegration into the Community, and Recidivism*, CONG. RSCH. SERV. 1, 11 (Jan. 12, 2015), <https://sgp.fas.org/crs/misc/RL34287.pdf> [<https://perma.cc/DN86-WUZG>].

452. *Id.* at 4.

453. Megan Harris, *Following in their Footsteps: The Risks of the Intergenerational Cycle of Incarceration among Inmates and their Children*, CLEMSON UNIV.; TIGERPRINTS ALL THESIS 1, 9 (Dec. 2006), https://tigerprints.clemson.edu/cgi/viewcontent.cgi?article=1043&context=all_theses [<https://perma.cc/7SH5-RF7N>].

454. *Id.* at 10.

455. *Id.* at 15–16.

456. *Id.* at 17.

457. Kelli D. Tomlinson, *An Examination of Deterrence Theory: Where Do We Stand?*, 80 FED. PROB. 33, 36–37 (Dec. 2016), https://www.uscourts.gov/sites/default/files/80_3_4_0.pdf [<https://perma.cc/9T8S-72EK>].

458. *Id.* at 34.

459. *Id.*

showing a correlation between harsher sentences (i.e., steeper fines) and less future interactions with the criminal justice system.⁴⁶⁰

On the other hand, methods encouraged by proponents of social bond theory have repeatedly been shown to have a minimizing effect on the frequency of recidivism amongst newly-released offenders, albeit accompanied by positive behaviors encouraged by probation supervision.⁴⁶¹ Ex-offenders who foster healthy relationships with family and friends, find steady employment, and forge connections amongst a community can “stymie the pathway of state dependence leading from prison to reoffending.”⁴⁶² As discussed above, exorbitant fine imposition creates substantial roadblocks to success in all of these areas and increases the likelihood of recidivism.⁴⁶³ States must roll back pay-to-stay fines and end practices of unduly burdensome punishment to allow a path for ex-offenders to achieve success both interpersonally and financially.⁴⁶⁴

VI. CONCLUSION

Teresa Beatty took a stand against the state of Connecticut and her inordinate fine in March of 2022.⁴⁶⁵ Beatty filed a class-action lawsuit against the state governor and attorney general “to eliminate Connecticut’s prison debt law” on behalf of all ex-offenders owing money to the state of Connecticut.⁴⁶⁶ After the case was filed, Connecticut amended its statute, only keeping pay-to-stay fines “in place for the most serious crimes . . . and exempting prisoners from having to pay the first \$50,000 of their incarceration costs.”⁴⁶⁷ This sweeping modification will absolve 98% of ex-offenders in Connecticut of their prison debts—but not Teresa Beatty, whose exorbitant fine exceeds the \$50,000 exception by \$33,762.⁴⁶⁸ Further, Connecticut still retains its ability to pursue fines already enacted prior to the amendment; this could mean Teresa Beatty may very well still lose her home.⁴⁶⁹

460. *Id.*

461. John R. Hepburn & Marie L. Griffin, *The Effect of Social Bonds on Successful Adjustment to Probation: An Event History Analysis*, SAGE J.: CRIM. JUST. REV. (2004), <https://journals.sagepub.com/doi/pdf/10.1177/073401680402900105> [<https://perma.cc/67KN-YX84>].

462. Mark T. Berg & Beth M. Huebner, *Reentry and the Ties that Bind: An Examination of Social Ties, Employment, and Recidivism*, JUST. Q. 382, 405 (Apr. 2011), <https://www.pacific-gateway.org/reentry,%20employment%20and%20recidivism.pdf> [<https://perma.cc/EW79-FFC2>].

463. *See supra* Section V.B.2.

464. Author’s original thought.

465. *Beatty v. Lamont*, ACLU OF CONN., <https://www.acluct.org/en/cases/beatty-v-lamont> (last visited Oct. 17, 2023) [<https://perma.cc/UMH4-LKXE>].

466. *Id.*

467. Eaton-Robb, *supra* note 1.

468. *Id.*

469. *Id.*

Beatty is still pursuing her case, arguing that *any* pay-to-stay fees violate the Excessive Fines Clause, regardless of Connecticut's amendment.⁴⁷⁰ While amendments such as this are a step in the right direction, the truth remains that pursuit of any cost-of-confinement fees is unconstitutional.⁴⁷¹ The federal government should take action to repeal such statutes for people like Teresa Beatty and other ex-offenders across the country.⁴⁷² The benefits will be vast—by unburdening such a large subsection of Americans of an excessive punitive fine, ex-offenders will be able to get back on their feet more easily, leading to a reduction in recidivism and a greater portion of people who can reassimilate and become productive contributors to society.⁴⁷³

470. *Id.*

471. *See supra* Part V.

472. Author's original thought.

473. *See supra* Section V.C.