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Katherine G. Porter

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A "Debt" to Society?: Reassessing the Constitutionality of Pay-to-Stay Programs in Ohio Jails and Prisons

KATHERINE G. PORTER

I. INTRODUCTION TO PAY TO STAY PROGRAMS

Pay-to-stay programs, sometimes lumped under the umbrella term "correctional fees," are a relatively new phenomenon that began in the latter part of the twentieth century.[1] In 1988, forty-eight states were utilizing a form of corrections fees, twenty-six of which were charging fees directly to jail inmates.[2] Generally, pay-to-stay fees are "non-criminal fee[s],"[3] assessed under various fee schedules, which charge inmates directly for the costs of their incarceration.[4] There are two general schemes under which fees are assessed: booking fees and daily fees.[5] Booking fees, sometimes referred to as a processing or reception fee, are a one-time charge assessed upon an individual's arrival at a correctional facility, while daily, or per diem, fees, as the name suggests, are assessed for each day the inmate is incarcerated.[6] Per diem fees are often equivalent to an inmate's total daily room and board cost; however, many programs that do not shift the entire

1. Dale Parent, *Recovering Corrections Costs Through Offender Fees*, NATIONAL INSTITUTE OF JUSTICE 1 (June 1990), https://www.ncjrs.gov/pdffiles1/Digitization/125084NCJRS.pdf.

2. *Id*.

3. *In Jail & In Debt: Ohio's Pay-to-Stay Fees*, ACLU OF OHIO 1 (Fall 2015), http://www.acluohio.org/wp-content/uploads/2015/11/InJailInDebt.pdf .

4. Alison Bo Andolena, *Can They Lock You Up and Charge You For It?: How Pay-To-Stay Corrections Programs May Provide a Financial Solution for New York and New Jersey*, 35 SETON HALL LEGIS. J. 94, 95 (2010).

5. *In Jail & In Debt*, *supra* note 3, at 3.

6. *Id.*

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cost of housing an inmate assess additional fees "à la carte" for items such as substance abuse treatment, medical care,[7] and meals.[8]

Pay-to-stay programs are designed to bolster state and local budgets, and do not replace traditional criminal sanctions such as fines and restitution, leaving many inmates with significant debts upon their re-entry into society.[9] Many of these programs came into existence in the midst of skyrocketing prison populations due to the aftermath of failed—and costly—policies such as the "War on Crime" and "three strikes" laws.[10] The United States currently boasts the highest prison population in the world, housing nearly 2.2 million inmates nationwide.[11] To illustrate: roughly 716 out of every 100,000 Americans are incarcerated.[12] In other words, while the United States makes up approximately five percent or less of the world's total population, it houses almost a quarter of the world's prisoners.[13] Faced with literally insurmountable prison populations, many state Departments of Corrections, as well as county jails, turned to programs like pay-to-stay in an attempt to temper rising budgets.[14] As of 2015, at least forty-three states have statutorily authorized charging incarcerated individuals for room and board.[15]

This paper questions not only the wisdom of pay-to-stay programs, but also seeks to challenge their constitutionality. Several attempts have been made, albeit unsuccessfully, at both the federal and state level to challenge the constitutionality of pay-to-stay programs.[16] The following attempts to reassess the constitutional arguments which have already been made and tweak them in anticipation of a future successful challenge of pay-to-stay

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7. Leah A. Plunkett, *Captive Markets*, 65 HASTINGS L. J. 57, 59 (2013);

8. Lauren-Brooke Eisen, *Paying For Your Time: How Charging Inmates Behind Bars May Violate The Excessive Fines Clause*, 15 LOY. J. PUB. INT. L. 319, 322 (2014).

9. Plunkett, *supra* note 7, at 60.

10. ERIC LOTKE, THE REAL WAR ON CRIME THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION, 14-16 (Steven R. Denziger, ed. 1996) (detailing significant criminal justice legislation of the late twentieth century).

11. *Highest to Lowest – Prison Population Total*, INTERNATIONAL CENTRE FOR PRISON STUDIES, http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All (last visited Apr. 23, 2017).

12. Michelle Ye Hee Lee, *Does the United States really have 5 percent of the world's population and one quarter of the world's prisoners?*, WASHINGTON POST (Apr. 30, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/04/30/does-the-united-states-really-have-five-percent-of-worlds-population-and-one-quarter-of-the-worlds-prisoners/?utm_term=.b8f0e5c19cbd.

13. Ye Hee Lee, *supra* note 12.

14. Eisen, *supra* note 8, at 322.

15. Lauren-Brooke Eisen, *Charging Inmates Perpetuates Mass Incarceration*, BRENNAN CENTER FOR JUSTICE 4 (2015),https://www.brennancenter.org/sites/default/files/publications/Charging_Inmates_Mass_Incarceration.pdf.

16. *See generally, e.g.*, Montanez v. Sec'y Pa. Dep't of Corr., 773 F.3d 472 (3rd Cir. 2014); Tillman v. Lebanon Cnty. Corr. Facility, 221 F.3d 410 (3rd Cir. 2000); Sickles v. Campbell Cty., 439 F. Supp. 2d 751 (E.D. Ky. 2006); Dean v. Lehman, 18 P.3d 523 (Wash. 2001).

programs. Section II illustrates the framework of a typical Ohio pay-to-stay program, in order to provide a point of reference for analyzing the applicable constitutional challenges.[17] Part III discusses the two most plausible doctrines which establish the programs' unconstitutionality: The Due Process Clause of the Fourteenth Amendment, and the Excessive Fines Clause of the Eighth Amendment.[18]

II. A TYPICAL ILLUSTRATION: THE CORRECTIONS CENTER OF NORTHWEST OHIO'S "PAY-FOR-STAY™" PROGRAM

As illustrated above, pay-to-stay programs vary in their specific fees and requirements. As a basic illustration and point of reference, the hypothetical constitutional challenges explored by this paper operate in response to programs similar to those instituted at the Corrections Center of Northwest Ohio (CCNO). According to the American Civil Liberties Union of Ohio (ACLU Ohio), this multi-county correctional facility is one of "the worst offenders" in the realm of corrections cost recovery programs, as it charges the highest daily fee in the state of Ohio.[19] CCNO has enacted a program under the name "Pay-For-Stay™."[20] The program's stated policy, similar to many pay-to-stay programs', is to "offset the costs associated with the housing of [offenders]," and was enacted in recognition of "the importance of offender accountability," "the cost of incarceration," and "its increasing tax burden on the citizens of Northwest Ohio."[21]

The program is run by the Ohio-based technology firm Intellitech. All refunds for improperly assessed feeds, or fees assessed to pre-trial detainees later found not guilty, must be reimbursed via filing documentation not with a county court or CCNO itself, but rather directly through Intellitech.[22] Intellitech's Pay-for-Stay™ program—which is available for purchase by prisons and jails statewide— is designed to eliminate the need for personnel who oversee the cost recovery programs, as well as to simultaneously maximize collection rates from prisoners.[23] The fee schedule at CCNO includes a $100 booking fee, which is taken from the inmate's personal property upon booking—if available—or is removed from the inmate's account until the booking fee is paid in full.[24] Should the individual not

17. *See infra* Part II.
18. *See infra* Part III.
19. *In Jail & In Debt*, *supra* note 3, at 3.
20. *Pay-For-Stay™ Program*, CORRECTIONS CENTER OF NORTHWEST OHIO, http://www.ccnoregionaljail.org/payforstay.htm (last visited July 29, 2018).
21. *Id*.
22. *Id*.
23. *County Wide Collections*, INTELLITECH CORPORATION, http://www.intellitechcorp.com/county-wide-collections.htm (last visited Apr. 16, 2017).
24. *Pay-For-Stay™ Program*, *supra* note 20.

have $100 at the time of entry into the facility, "a negative balance will be placed in their inmate account and any funds placed into their inmate account will be applied towards the $100."[25] In addition to this one-time booking fee, a daily pay-to-stay fee of $72.67 is imposed each day until the inmate is released.[26] It stands to reason that many inmates begin with a negative balance, as seventy percent of the criminal defendants in Ohio are considered indigent, meaning that they are within 125 percent of the federal poverty line.[27] This daily fee has continued to rise, as CCNO continually increases their estimated cost per day of housing inmates.[28] A limited number of prisoners are excepted from the per diem fees, including those granted work release, as they are already required to provide payment as part of the program, and those eligible and participating in the Helping Inmates Through Training Program (HITT).[29]

Upon an inmate's release is where the program becomes particularly problematic. Any remaining balance above and beyond $25 is confiscated from the inmate's account and applied toward any outstanding Pay-for-Stay™ balance.[30] This outstanding balance follows the inmate upon their release and is subject to actions by collections agencies upon default. This seems to contravene the stated policy of teaching inmates fiscal responsibility, as it inhibits reentry into society and nearly guarantees that any inmate will leave CCNO with no more than $25 in his or her pocket. According to the ACLU of Ohio:

> These fees are insidious: loading formerly incarcerated people with increasing amounts of debt that make it nearly impossible for even the most well-meaning person to become a productive member of society. While incarcerated, the fees are usually taken from a prisoner's commissary fund, which is often funded by their family to allow their loved one to purchase phone cards or small comforts to make their stay more bearable. Once released from jail, the debts are often handed over to collections agencies that hound the person until they pay. If they cannot pay, the debt is reported to the credit

25. *Id*.
26. *Id*.
27. John Futty, *Providing poor with defense attorney varies by county*, THE COLUMBUS DISPATCH (March 23, 2013), http://www.dispatch.com/content/stories/local/2013/03/23/providing-poor-with-defense-lawyer-varies-by-county.html; *Frequently Asked Questions*, OHIO LEGAL SERVICES, http://www.ohiolegalservices.org/ohio_legal_services_delivery_system/faq#*Eligibility* (last visited Apr. 16, 2017).
28. *In Jail & In Debt*, *supra* note 3, at 3.
29. *Pay-For-Stay™ Program*, *supra* note 20.
30. *Pay-For-Stay™ Program*, *supra* note 20.

> agency, effectively making it impossible to gain employment, housing, transportation, and so much more.[31]

This point illustrates that pay-to-stay fees hinder rehabilitation, and are nonresponsive to the government's stated interest in assessing them. Similar to CCNO's claimed purpose of bolstering offender accountability, the government interest alleged in much of the constitutional litigation surrounding pay-to-stay fees is teaching prisoners "financial responsibility."[32] Section III, below, discusses how this stated interest can be particularly problematic in the context of asserting a constitutional challenge to pay-to-stay programs.

III. CONSTITUTIONAL CHALLENGES TO PAY-TO-STAY: PROCEDURAL DUE PROCESS

The Fourteenth Amendment to the United States Constitution provides that no state "shall deprive any person of life, liberty, or property, without due process of law."[33] Procedural due process claims require a two-step analysis: (1) "whether there exists a liberty or property interest which has been interfered with by the State," and (2) "whether the procedures attendant upon that deprivation were constitutionally sufficient."[34] The Supreme Court has consistently held that deprivation of a property interest requires some form of hearing, the fundamental guidepost of which is to be "heard 'at a meaningful time and in a meaningful manner.'"[35] In assessing pay-to-stay programs, it has never been contested that inmates have a clear property interest in their monetary accounts at their respective institutions.[36] The second element—whether the afforded process was sufficient to satisfy inmates' procedural due process rights—is more troublesome.

The starting point for answering the question of what process is due was first articulated in *Matthews*.[37] The *Matthews* Court provided a three-factor test, which requires reviewing courts to balance:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or

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31. *In Jail & In Debt*, *supra* note 3, at 1.

32. *See, e.g.*, *Tillman*, 221 F.3d at 415 (state provided that Cost Recovery Program "was not intended to punish, but rather to rehabilitate by teaching inmates financial responsibility. . .").

33. U.S. CONST., amend. XIV, § 2.

34. Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 460 (1989).

35. Matthews v. Eldridge, 424 U.S. 319, 333 (1979) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

36. *Tillman*, 221 F.3d at 421; Reynolds v. Wagner, 128 F.3d 166, 179 (3rd Cir. 1997); Mahers v. Halford, 76 F.3d 951, 954 (8th Cir. 1996).

37. *See generally, Matthews*, 424 U.S. 319.

> substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.[38]

This balancing test provides courts with little guidance as to the importance of each factor, and has been criticized as relegating the individual's interest in due process as secondary to quantifiable factors such as the cost to the government.[39] In light of this, it stands to reason that courts—who are acutely aware of cash-strapped correctional facilities nationwide—may be persuaded under *Matthews* that the financial consequences to state budgets of forcing them to provide an adequate remedy for pay-to-stay challengers is simply too great. Furthermore, cases addressing prisoners' procedural due process rights have dealt largely with liberty interests, as opposed to the property interest deprivation posed by pay-to-stay programs.[40] Because of this, it is difficult to predict where courts may next turn in deciding the constitutionality of pay-to-stay. The best argument for striking down these programs under the Due Process Clause is two-fold: (1) that prior holdings addressing these schemes have not provided an adequate remedy under the relevant precedent—i.e., they have relied on the *wrong* precedent, and (2) that the standard of review traditionally articulated in prison cases is inappropriate for pay-to-stay challenges. Each of these theories is explored in turn below.

A. The (In)adequacy of Postdeprivation Remedies

Despite the clear procedural due process requirement for an inmate to be heard "at a meaningful time and in a meaningful manner,"[41] several cases challenging corrections costs recovery programs have chipped away at the requirement for a remedy, narrowing the procedural due process required of the state to nearly nothing.[42] *Tillman* is considered the seminal case in pay-to-stay litigation; it is instructive largely due to the fact that the petitioner

38. *Id*. at 335 (citations omitted).

39. *See generally* Jerry Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Matthews v. Eldridge*: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

40. *See, e.g.*, Olim v. Wakinekona, 461 U.S. 238 (1983); Hewitt v. Helms, 459 U.S. 460 (1983); Meachum v. Fano, 427 U.S. 215 (1976); Montanye v. Haymes, 427 U.S. 236 (1976); Wolff v. McDonnell, 418 U.S. 539 (1974) (all addressing procedural due process in the context of prisoners' liberty interests).

41. *Armstrong*, 380 U.S. at 552.

42. *See generally*, *Montanez,* 773 F.3d 472; Slade v. Hampton Rds. Reg'l Jail, 407 F.3rd 243 (4th Cir. 2005); *Tillman*, 221 F.3d 410; *Sickles*, 439 F. Supp. 2d 751.

raised every plausible constitutional argument against corrections costs.[43] Petitioner Leonard Tillman brought a §1983 claim, alleging that a Pennsylvania correctional facility violated his constitutional rights.[44] Tillman was incarcerated on parole violations for approximately seven months, during which he was assessed thousands of dollars in fees pursuant to a Corrections Cost Recovery program that charged inmates a per diem fee.[45] Pursuant to the program:

> [W]hen a prisoner lacks sufficient funds to pay the assessments, a negative account balance is created. Authorities may then take half of any funds, from any source, sent a prisoner in order to satisfy the negative balance. . .. If there is still an outstanding negative balance upon a prisoner's release from jail, any funds remaining in his or her inmate account are put towards the debt. If any debt still remains unpaid upon release, the ex-prisoner remains responsible for the debt as a civil liability. The prison attempts to work out a payment plan, but if the debt remains unpaid after release, the account may be turned over to a collection agency.[46]

Tillman also had preexisting debts from a prior term of incarceration, and upon his recommitment, corrections officers seized half of the money in his possession.[47] The confiscated money was not enough to satisfy the roughly $4,000 debt, which was ultimately turned over to a collection agency following his release.[48]

The Court rejected Tillman's procedural due process claim, holding that the county had provided an adequate postdeprivation remedy sufficient to satisfy the process required under the Fourteenth Amendment.[49] This determination was based on the Court's interpretation of *Parratt*.[50] They found *Parratt* to stand for the proposition that the Due Process Clause's predeprivation notice and hearing requirement is not applicable where "the State must take quick action, or where it is impractical to provide meaningful predeprivation process."[51] If this is the case, a postdeprivation

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43. Eisen, *supra* note 8, at 335; *But see*, Joshua Michtom, *Making Prisoners Pay For Their Stay: How a Popular Correctional Program Violates The Ex Post Facto Clause*, 13 B. U. PUB. INT. L. J. 187 (While the petitioner in *Tillman* never raised an Ex Post Facto Argument, Michtom argues in this article that this is another potential argument against pay-for-stay programs that has yet to be tested).

44. *Tillman*, 421 F.3d at 413.

45. *Id*. at 413-14.

46. *Id*. at 414.

47. *Id*.

48. *Id*.

49. *Tillman*, 221 F.3d at 422.

50. *Id*. at 421.

51. *Id.*

remedy is sufficient to satisfy due process.[52] Applying this to pay-to-stay fees, it is "impractical" to expect a prison to provide a predeprivation remedy, as the "assessments and takings pursuant to the program involve routine matters of accounting, with a low risk of error."[53] Here, the prison provided Tillman with a handbook that included a description of their grievance procedure, which was updated to include the Cost Recovery Program information; the Court found this to be an adequate postdeprivation remedy, should Tillman have wanted to voice his concerns as to the program.[54]

The issue with the *Tillman* holding in regard to the due process claim is that their reliance on *Parratt* is severely misguided. *Parratt* involved a § 1983 claim brought by a Nebraska inmate, in which he alleged that the prison deprived him of a property interest without due process when a staff member negligently lost a hobby kit he had purchased via mail order.[55] Aside from the fact that Tillman was also a prisoner bringing a § 1983 claim on due process grounds, the similarities end there. There, the Court found that Parratt insufficiently alleged a due process violation, because the deprivation of his property interest did not result from an established state procedure, but rather through the prison's negligence.[56] There was no possibility for a predeprivation remedy in that instance because "the State cannot predict precisely when the loss will occur."[57] As such, state tort law was an adequate postdeprivation remedy for Parratt's loss.[58] The same reasoning applied in *Bonner v. Coughlins*,[59] in which a state prisoner alleged that several prison guards were negligent in leaving his cell unlocked, causing his trial transcript to be stolen by other inmates:

> It seems to us that there is an important difference between a challenge to an established state procedure as lacking in due process and a property damage claim arising out of the misconduct of state officers. In the former situation the facts satisfy the most literal reading of the Fourteenth Amendment's prohibition against 'State' deprivations of property; in the latter situation, however, even though there is action 'under color of' state law sufficient to bring the amendment into play, the state action is not necessarily complete. For in a case such as this the law of Illinois provides, in

52. *Id.*
53. *Id.* at 422.
54. *Tillman*, 221 F.3d at 422.
55. *Parratt*, 451 U.S. at 529.
56. *Id*. at 543.
57. *Id*. at 541.
58. *Id*. at 543.
59. 517 F.2d 1311 (7th Cir. 1975).

> substance, that the plaintiff is entitled to be made whole for any loss of property occasioned by the unauthorized conduct of the prison guards.[60]

The holding in *Parratt* has also been extended to apply to intentional losses of property, such as where a prison guard enters an inmate's cell and purposefully destroys property.[61] Hypothetically, if *Parratt* and its progeny were taken to an extreme, there is the potential to defeat all due process claims provided the state provides an adequate postdeprivation remedy.[62] In recognition of *Parratt*'s potential for abuse, the Supreme Court has taken preventive measures in order to make clear that its holding is "limited to situations when a random and unauthorized act of a government official causes a deprivation of liberty or property, and the plaintiff is seeking only a postdeprivation remedy."[63] This limiting principle has been clearly articulated in subsequent cases.[64] The *Zinermon* Court held that *Parratt* was not an exception to the standard due process balancing test of *Matthews*, but rather is an "application of that test to [an] unusual case."[65] Justice Blackmun went to great lengths to exclude *Parratt*'s application to deprivations of constitutional rights, reasoning that to allow that case to control would essentially permit state actors to evade § 1983 liability merely by characterizing their acts "unauthorized."[66] Other cases have explicitly held that *Parratt* does not "reach. . . a situation" where a litigant alleges that "the state system itself destroys [his or her] property interest."[67]

The Third Circuit's denial of Tillman's due process claim under *Parratt* is nothing less than a perversion of the case's reasoning, and can only be characterized as a misapplication of the law. Pay-to-stay challenges are clearly brought in response to the statutory scheme—i.e., the "state system itself"[68]—authorizing the collection of corrections fees, and thus are not subject to *Parratt*. The fees imposed pursuant to the Ohio Revised Code do not constitute a negligent act of corrections officials.[69] In fact, they are precisely the opposite. Because pay-to-stay due process claims are brought in response to an established statutory scheme which authorizes the assessment and collection of such fees, there is no reason to believe they

60. *Id.* at 1319.
61. Hudson v. Palmer, 468 U.S. 517, 534 (1984).
62. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND Policies 566-67 (Vicki Been, et. al., eds., 4th ed. 2011).
63. *Id*. at 567.
64. *See, e.g.*, Zinermon v. Burch, 494 U.S. 113, 130-31 (1990).
65. *Id*. at 130.
66. *Id*. at 135-140.
67. Logan v. Zimmerman Brush Co., 455 U.S. 422, 435-36 (1982).
68. *Id*.
69. OHIO REV. CODE ANN. § 2929.37 (West 2017).

should be excepted from the standard procedural due process requirement of a predeprivation hearing.[70] While the requirement for a predeprivation hearing is not absolute,[71] the misapplication of precedent in previous pay-to-stay litigation is an open door for future procedural due process challenges.

B. The Turner Standard and its inapplicability to Pay-to-Stay

The oft-cited standard of review involving prison regulations provides that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to a legitimate penological interest."[72] The *Turner* Court justified this break from the traditionally applied standards of scrutiny on the grounds that "subjecting the day-to-day judgements of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems. . .."[73] One of the main considerations of the reasonableness of a prison regulation is the impact of the regulation on the guards and other inmates.[74] As the prison environment is "necessarily closed," "few changes will have no ramifications on the liberty of others or on the use of the prisoner's limited resources in preserving institutional order."[75]

This standard has repeatedly been cited in subsequent cases.[76] For example, in *Shaw*, the Supreme Court held that an inmate did not have First Amendment protection in providing legal assistance to other inmates under *Turner*.[77] *Shaw* provides that allowing prisoners additional First Amendment protections for legal correspondence between one another presented inmates with the opportunity to pass contraband among themselves or to "communicat[e] instructions on how to manufacture drugs or weapons."[78] Inmate to inmate communications also present the danger of

70. *Matthews*, 424 U.S. at 333 (citing Wolff v. McDonnell, 418 U.S. 539 (1974)) (noting that the Supreme Court has consistently "held that some form of hearing is required before an individual is finally deprived of a property interest").

71. *See, e.g.*, *Matthews*, 424 U.S. at 333-48.

72. Turner v. Safley, 482 U.S. 78, 89 (1987).

73. *Id*.

74. *Id*. at 90.

75. *Id*.

76. *See generally, e.g.,* Florence v. Bd. of Chosen Freeholders of Cty. of Burlington, 566 U.S. 318 (2012) (prison's safety concerns justified invasive strip searches of inmates); Beard v. Banks, 548 U.S. 521 (2006) (upholding Pennsylvania DOC policy which banned restricted prisoners from accessing media; government interest in incentivizing dangerous prisoners' good behavior was sufficient justification); Shaw v. Murphy, 532 U.S. 223 (2001) (upholding prison's ban on legal communications between inmates); Washington v. Harper, 494 U.S. 210 (1990) (upholding prison policy allowing committee to determine whether inmate should be treated with antipsychotics against his will).

77. *Shaw*, 532 U.S. at 231.

78. *Id*. at 231.

"jargon or codes"[79] which would prevent corrections officers' detection of harmful messages, or allow "clearly inappropriate comments which may be expected to circulate among prisoners" despite the prison's attempts to protect other inmates from their content.[80]

Turner provided its deferential standard of review in light of safety concerns, and the need to give prison officials the ability to protect inmates and employees, and these examples show that it has been subsequently interpreted as such. Taking the *Turner* standard of review to an extreme, there is a dangerous possibility for courts to use it *carte blanche* to permit violations of prisoners' constitutional rights. To cite this toothless standard of review without contextualizing it, however, seems a perversion of *Turner*'s reasoning. Pay-to-stay programs are enacted pursuant to a structured administrative scheme designed to supplement correctional facility budgets.[81] Disguising pay-to-stay challenges as "prison cases" subject to *Turner* is arguably incorrect. Even stretching the potential state interests in corrections cost recovery, they cannot be said to implicate safety within the walls of a jail or prison. The mere fact that an individual is currently an inmate does not completely negate the fact that he or she still has rights.[82] There is no "iron curtain" which exists to strip prisoners of constitutional rights, including the right to due process of law.[83] Furthermore, deprivations of property rights at the hands of pay-to-stay programs may exist long after an individual is no longer an inmate. Civil collections actions to recover unpaid fees do not even begin until the individual is released and has defaulted on payments. In light of these realities, future pay-to-stay challengers would be wise to argue for a stricter standard of review.

The *Tillman* Court acknowledged the notion that pay-to-stay is somewhat anachronistic in regard to standard of review.[84] It noted that the *Turner* standard applies in reviewing prison regulations, and *stare decisis* would likely command its application to Tillman's claim.[85] In dictum, however, it also recognized the distinguishability of pay-to-stay challenges: "[w]e share the Magistrate Judge's skepticism over whether the *Turner* standard is applicable to the Cost Recovery Program, which by its own title might be more properly understood as a transfer of funds than a way to

79. *Turner*, 482 U.S. at 84.

80. *Shaw*, 532 U.S. at 231 (quoting Thornburgh v. Abbott, 490 U.S. 401, 412 (1989)).

81. Justin Rohrlich, *Plugging the Deficit: How Low Can States Go?*, MINYANVILLE (Mar. 14, 2011, 3:30 p.m.), http://www.minyanville.com/businessmarkets/articles/public-employee-unions-deficit-collective-bargaining/3/14/2011/id/33348#ixzz2U4Op76SR.

82. *Wolff*, 418 U.S. at 556.

83. *Id*.

84. *Tillman*, 221 F.3d at 417.

85. *Id*.

regulate prison behavior."[86] Ultimately, the Court passed on the issue of whether the *Turner* standard controlled, based on the fact that none of Tillman's constitutional claims had merit, and affirmed the decision of the District Court granting the correctional facility's motion for summary judgment.[87] However, the fact that this argument was acknowledged is encouraging. If pay-to-stay challenges can be taken out from under this extremely deferential standard of review, the possibility of success on the merits skyrockets.

The Supreme Court recently recognized the uniqueness of the state's retention of conviction-related assessments.[88] In *Nelson v. Colorado,* the Court struck down Colorado's Exoneration Act on procedural due process grounds.[89] The Act required defendants to prove their innocence in a civil proceeding in order to be refunded costs, fees, and restitution assessed as the result of a wrongful conviction.[90] Justice Ginsburg held the three-factor balancing test of *Matthews* applied to the alleged property deprivation because "no further criminal process is implicated."[91] While the state of Colorado argued for a different standard of review, Justice Ginsburg found *Matthews* controlling in light of the fact that The Act worked a continuing deprivation of property.[92] While Colorado's Exoneration Act is not a one-to-one match with Ohio pay-to-stay programs, *Nelson*'s reasoning is far more analogous to pay-to-stay than cases such as *Parratt*. Pay-to-stay fees look like those in *Nelson* for two main reasons: (1) the criminal process is no longer implicated by pay-to-stay, as they are only assessed after a full criminal adjudication—whether by trial or by plea—, and (2) because they work a continuing deprivation of property even after the inmate has been incarcerated and subsequently released. As a result, *Nelson* now stands to be a powerful tool in arguing pay-to-stay challenges into the stricter standard of review of *Matthews*.

Alternatively, even if the lax *Turner* standard were to apply, there is potential in the argument that the Pay-For-Stay™ Program implemented at CCNO—or programs like it—does not pass constitutional muster. Justice O'Connor broke down the deferential standard articulated in *Turner* into four distinct factors: (1) whether there is a valid and rational relationship between the prison regulation and a legitimate government interest, (2) whether there are alternative means for inmates to exercise the

86. *Id*. at 417.
87. *Id*. at 413, 417.
88. *See generally*, Nelson v. Colorado, 137 S. Ct. 1249 (2017).
89. *Id*. at 1255.
90. *Id*.
91. *Id*.
92. *Id*.

constitutional right at issue, (3) the "ripple effect" that accommodating the constitutional right will have on guards and other inmates, and (4) the absence of ready alternatives.[93] This fourth consideration is not the "least restrictive alternative" requirement typically associated with strict scrutiny; rather, "if an inmate can point to an alternative that fully accommodates the prisoner's rights at a de minimis cost to valid penological interests," this may be sufficient to show that the regulation does not meet the reasonable relationship standard.[94] Furthermore, if the inmate can show that the "asserted goal is arbitrary or irrational, then the regulation fails, irrespective of whether the other factors tilt in its favor."[95]

If Ohio's pay-to-stay regulations can be proven "arbitrary or irrational," [96] then the entire regulation must fail. This caveat is a powerful weapon in eliminating pay-to-stay programs statewide, because it would render the authorizing statutory scheme wholly inoperative, as opposed to piecemeal attacks via an onslaught of as-applied challenges. CCNO's stated interests in the Pay-For-Stay™ Program are to foster inmate accountability, and to reduce the tax burden on Ohio citizens.[97] Both of these interests can be attacked on the alternative grounds permitted by Justice O'Connor in *Turner*: (1) that they are arbitrary and irrational, and (2) that they do not meet the reasonable relationship standard, because alternatives exist to pay-to-stay that both accommodate inmates' due process rights at a de minimis cost to the state.

First, pay-to-stay fees do not foster inmate accountability:

> The suggestion that pay-to-stay serves a rehabilitative purpose because it teaches inmates fiscal responsibility is. . .without empirical grounding. No studies have been conducted to determine whether inmates in pay-to-stay facilities manage their money more responsibly during or after incarceration. In fact, it is difficult to understand how an involuntary taking, standing alone, teaches anything about financial management, in light of the fact that all the other financial variables in their lives (income and expenses) are fixed and beyond their control. Just as when a parent tells a wayward child 'I'm going to teach you a lesson!' she intends not to educate but to punish, the 'teaching' explanation for pay-to-stay is in truth, punitive.[98]

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93. *Turner*, 482 U.S. at 89-91.
94. *Id*. at 90-91.
95. *Shaw*, 532 U.S. at 229-30 (internal quotations omitted).
96. *Id*. at 229.
97. *Pay-For-Stay™ Program*, *supra* note 20.
98. Michtom, *supra* note 43, at 200.

Arguably, this "interest" is a mere political tool which exists to mask the punitive nature of pay-to-stay. The practice of fostering inmate accountability via saddling inmates—who already face barriers to reentry into society—with exorbitant debts appears to run directly counter to the goal of holding individuals financially accountable.

Furthermore, reasonable alternatives exist which would better serve to impart inmates with a sense of accountability at "de minimis" cost to the state.[99] Imposing community service in lieu of fees also fosters inmate responsibility without also hampering their ability to re-establish themselves as productive members of society.[100] Community service as an alternative to financial sanctions is not prohibited under the Revised Code, and is commonly done in other contexts, such as payment of fines and court costs.[101] There is also evidence to suggest that alternatives such as community service reduce recidivism rates.[102] In turn, reducing recidivism in Ohio also serves the state's interest in reducing the tax burden on Ohio residents, by reducing the overall costs of housing inmates.

Pay-to-stay programs also fail to conserve taxpayer money, as they generally have extremely low collection rates.[103] Four out of five inmates are indigent, and therefore are unlikely to even have the *ability* to make good on pay-to-stay debts.[104] Because of this, higher pay-to-stay fees do not translate into better collection rates, and aggressive means of enforcement such as the utilization of collection agencies have also proven ineffective.[105] In fact, "low-income people are no more likely to pay their fees when collection agencies are used."[106] In the face of negligible collection rates, collection agencies only impose an additional cost to jails, which further defeats the purpose of alleviating the tax burden on the general population.[107] Ohio Sheriffs have acknowledged the programs' overall failure at raising revenue. Former Clermont County Sheriff A.J. Rodenberg found the county's pay-to-stay program to be more trouble than it is worth: "[a] complete failure is the best way to describe it," he observed, "[w]hen it came time to collect the pay-for-stay, it ended up costing almost as much if

99. *Turner*, 482 U.S. at 91.
100. *In Jail & In Debt*, *supra* note 3, at 16-17.
101. *Id*. at 17.
102. *Id*.
103. *See generally*, *Adding It Up*, *The Financial Realities of Ohio's Pay-to-Stay Policies,* ACLU of Ohio (June 2013), http://www.acluohio.org/wp-content/uploads/2013/06/AddingItUp2013_06.pdf.
104. *Id*. at 2.
105. *Id*. at 3.
106. *Id*.
107. *Id*.

not more to run the program."[108] A similar observation was made by a Fairfield County Ohio sheriff: "Pay-for-stay is like spitting in the wind. It doesn't even make a dent."[109]

Furthermore, there are reasonable alternatives that would satisfy Justice O'Connor's burden of proof to defeat *Turner*'s reasonable relationship standard. Decreasing jail populations, as opposed to increasing the revenue flowing into jails, also decreases the costs to the state in running correctional facilities.[110] Fewer incarcerated bodies equates to a lighter tax burden. Diverting criminal offenders away from prisons and jails, and into programs such as community service (or other viable alternatives such as intervention in lieu of conviction, diversion programs, or substance abuse treatment via drug court programs) also fosters inmate accountability, by requiring that offenders work to better the communities which they have harmed.

In conclusion, there are various attacks on the standard of review applied in past pay-to-stay litigation available to future litigators. First, the reasonable relationship standard should not apply. In the alternative, *Turner's* highly deferential standard is not met even if found to apply.

IV. ALTERNATIVE CONSTITUTIONAL THEORIES: THE EXCESSIVE FINES CLAUSE

Procedural due process is the best argument in challenging the constitutionality of pay-to-stay programs. However, some litigants have also argued that the challenged corrections cost recovery program is unconstitutional under the Excessive Fines Clause of the Eighth Amendment.[111] The Eighth Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."[112] The Constitution gives no guidance on what forced payments occasioned by the government constitute a fine, nor as to what would qualify as excessive. Furthermore, the Supreme Court of the United States has rarely applied the clause in practice. From what little jurisprudence exists, it is clear that the Excessive Fines Clause may be violated only if the challenged payments are established as both a "fine" and as "excessive."[113] The touchstone principle of the Excessive Fines Clause is

108. David Reutter, *Pay-to-Stay Jails Unsuccessful in Ohio*, PRISON LEGAL NEWS (Sept. 15, 2010), *available at* https://www.prisonlegalnews.org/news/2010/sep/15/pay-to-stay-jails-unsuccessful-in-ohio/.

109. Rohrlich, *supra* note 81.

110. *In Jail & In Debt*, *supra* note 3, at 17

111. U.S. CONST., amend. VIII.

112. *Id*.

113. U.S. v. Bajakajian, 524 U.S. 321, 327-34 (1998).

proportionality, in that the "amount of the forfeiture must bear some relationship to the gravity of the offense it was designed to punish."[114] However, in order to reach the proportionality issue, a court must first establish that pay-to-stay fees are indeed fines.

A. Establishing Pay-to-Stay fees as "Fines:"

The Supreme Court's leading case interpreting the Excessive Fines Clause interpreted it in the forfeiture context.[115] In *Bajakajian*, Hosep Bajakajian attempted to exit the United States in possession of over $357,000 in U.S. currency without first claiming it at customs.[116] Pursuant to a federal statute governing the failure to report, the District Court ordered a forfeiture of all the seized cash in excess of the $10,000 limit.[117] The Supreme Court, however, found that the forfeiture of the nearly $350,000 was punitive in nature, and therefore was a fine under the Eighth Amendment.[118] They had "little trouble" establishing the forfeiture as a fine, noting that the "statute direct[ed] a court to order forfeiture as an additional sanction," "require[d] conviction of an underlying felony," and could not be "imposed on an innocent owner of unreported currency."[119] The Supreme Court also found a forfeiture to be a fine subject to the Excessive Fines Clause in *Austin*, noting that the innocent owner defense provided for in the statute at issue made the forfeiture "look. . . like punishment."[120]

All of these factors can be found within the statutory scheme authorizing pay-to-stay programs in Ohio and in the guidelines of CCNO's "Pay-for-Stay™" Program. The Ohio Revised Code, in addition to permitting recovering the costs of incarceration from inmates,[121] specifically authorizes judges to order the repayment of corrections costs at sentencing.[122] In both misdemeanor and felony sentencing, the court is permitted to sentence the offender to any financial sanction or a combination thereof, including "reimbursement," which includes "all or part of the costs of confinement."[123] Misdemeanor offenders' liability is broader

114. *Id*. at 334.
115. *See generally, Id*.
116. *Id*. at 324-25.
117. *Id*. at 325-26.
118. *Bajakajian*, 524 U.S. at 328.
119. *Id.*
120. Austin v. U.S., 509 U.S. 602, 619 (1993).
121. OHIO REV. CODE ANN. § 2929.37(A) (West 2017).
122. OHIO REV. CODE ANN. § 2929.18 (West 2017) (outlining permissible financial sanctions for felony offenses); OHIO REV. CODE ANN. § 2929.28 (West 2017) (mirrors the language of R.C. § 2929.18; outlining permissible financial sanctions for misdemeanor offenses).
123. OHIO REV. CODE ANN. § 2929.18(A)(5)(a)(ii) (West 2017) (reimbursement for offenders is limited by the caveat that such costs may not "exceed the total amount the offender is able to pay as

than that of felony offenders, and includes, but is not limited to reimbursement by the inmate for "a per diem fee, room and board, the costs of medical and dental treatment, and the costs of repairing property damaged by the offender while confined."[124] Just as the punitive forfeiture discussed in *Bajakajian*, Ohio courts are statutorily permitted to order "additional sanction[s]" in addition to fines, court costs, jail time, restitution, and the like.[125] It makes no difference, functionally, whether the General Assembly labels the fees "reimbursement[s]" as opposed to fines.[126] *Bajakajian* explicitly uses the word "sanction," and the Revised Code specifically titled each of the applicable sections "Financial Sanctions."[127]

The *Bajakajian* Court next considered the fact that the forfeiture at issue there (1) could not be imposed without a conviction for an underlying offense, and (2) could not be imposed on an innocent owner of the property in question.[128] CCNO expressly excludes inmates who are later found not guilty from Pay-For-Stay™ liability, providing that those individuals are eligible for reimbursement from Intellitech for both booking and per diem fees.[129] The fees are not imposed without a finding of guilt, which tends to show that the fees are in fact punitive. For these reasons, a court ought to have "little trouble" in finding that pay-to-stay fees are fines, despite their artificial label as reimbursements by the Ohio General Assembly.[130]

These parallels to the forfeiture in *Bajakajian* tend to show that pay-to-stay fees are punitive forfeitures that must fall under the purview of the Excessive Fines Clause. However, this comparison rests on the notion that pay-to-stay fees assessed in Ohio jails would be classified as "forfeitures," and thus subject to the *Bajakajian* analysis. Under Ohio law, a fine, in the "broadest sense" is any forfeiture *or* penalty that can be recovered in a civil action.[131] This definition is narrowed by "legal phraseology" to mean "a sum of money exacted of a person guilty of a criminal offense, the amount which may be fixed by law or left to the discretion of the court."[132] Speaking directly to the "assessments and confiscations" challenged under a Pennsylvania pay-to-stay program, the Third Circuit noted that the fees

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determined at a hearing and shall not exceed the actual cost of the confinement"); OHIO REV. CODE ANN. § 2929.28(A)(3)(a)(ii) (West 2017).

124. OHIO REV. CODE ANN. § 2929.28(A)(3)(a)(ii) (West 2017).

125. *Bajakajian*, 524 U.S. at 328.

126. OHIO REV. CODE ANN. § 2929.18(A)(5) (West 2017); OHIO REV. CODE ANN. § 2929.28(A)(3) (West 2017).

127. OHIO REV. CODE ANN. § 2929.18 (West 2017); OHIO REV. CODE ANN. § 2929.28 (West 2017).

128. *Bajakajian*, 524 U.S. at 328.

129. *Pay-For-Stay™ Program*, *supra* note 20.

130. *Bajakajian*, 524 U.S. at 328.

131. 28 Ohio Jur. 3d *Criminal Law: Procedure* § 1823 (2017) (emphasis added).

132. *Id*. (citing Toledo, C & O R. R. Co. et. al. v. Miller, 108 Ohio St. 388, 140 N.E. 617 (1923)).

would be considered "fines" under the Eighth Amendment if they served in part to punish offenders, "even if they may also be understood to serve remedial purposes."[133] Conversely, a "'forfeiture' is the loss of a right or privilege as a penalty for the commission of an illegal act," i.e., a scenario whereby an individual loses all of his or her interest in the property subject to forfeiture.[134]

It would seem, that under CCNO's fee system, the costs imposed under Pay-For-Stay™ constitute a fine-forfeiture hybrid, depending on *when* the monetary obligation is collected. They are a forfeiture in that, upon booking, funds already possessed by the inmate are forfeited and applied toward the initial $100 booking fee.[135] Similarly, upon release, funds in the individual's inmate account in excess of $25 are also seized and applied to all outstanding—both booking and per diem—fees.[136] However, as noted in *Tillman*, one only needs a threshold showing of a punitive purpose—whether or not it is the *only* purpose—to establish an assessment as a fine.[137] At CCNO, the unpaid portion of the pay-to-stay debt which has not been forfeited from the inmate's property while incarcerated is assessed and collected by Intellitech following his or her release.[138] This aspect of the program constitutes a fine, because, as discussed below, Pay-For-Stay™ is generally designed to be punitive in nature. The Seventh Circuit observed that Federal Sentencing Guidelines "call for longer sentences as the harm caused by the offense rises; longer sentences. . . are more costly; thus the costs of confinement rise with the seriousness of the crime, and a fine based on these costs therefore reflects the seriousness of the offense."[139] The length of time an individual is incarcerated "is a function of the seriousness of the crime," and "fines imposed for each day of incarceration are inexorably linked to the seriousness of the crime and the statutorily required punishment."[140] Any attempt by proponents of pay-to-stay programs to disguise them as non-punitive must fail; the fees must be considered fines subject to the Excessive Fines Clause of the Eighth Amendment. Once an assessed monetary obligation has been deemed a fine, it must then be established that it is excessive.

133. *Tillman*, 221 F. 3d at 420.
134. 28 Ohio Jur. 3d *Criminal Law: Procedure* § 1823 (2017).
135. *Pay-For-Stay™ Program*, *supra* note 20.
136. *Id*.
137. *Tillman*, 221 F. 3d at 420.
138. *Pay-For-Stay™ Program*, *supra* note 20.
139. U.S. v. Turner, 998 F. 2d 534, 536 (7th Cir. 1993).
140. Michtom, *supra* note 43, at 200.

B. Excessive Fines and The Proportionality Requirement

Assuming, *arguendo*, an inmate successfully argues his or her pay-to-stay debts are indeed punitive in nature under the framework established under Part A of this Section, the court must next find it is grossly excessive. *Bajakajian* is also the leading case in establishing the excessiveness of a fine.[141] A fine is unconstitutional if, after "compar[ing] the amount of the forfeiture to the gravity of the defendant's offense," the court finds it to be "grossly disproportional."[142]

The *Tillman* Court rejected the Petitioner's excessive fines argument.[143] The Court noted in dicta that a factual question may exist as to whether the Cost Recovery Program at issue constituted a fine.[144] However, they did not reach the issue, holding that even if the Cost Recovery Program was designed to be punitive in nature, the fees imposed were not excessive.[145] Using the *Bajakajian* standard, the Third Circuit found:

> The plaintiff's underlying offenses included a conviction for possession with intent to distribute approximately 29 grams of cocaine in violation of 35 P.S. § 78-113(a)(30), which allows for a fine not to exceed $100,000.00. Here, the plaintiff accumulated a debt of roughly $4,000.00. It can hardly be said that a sum that is less than one-twentieth the legally permissible fine is 'grossly disproportional to the gravity of a defendant's offense.'[146]

They held that this ratio could not be excessive under the Eighth Amendment as a matter of law.[147] However, the Court further commented that they would "not speculate on the result we would reach where the offense was significantly less serious, or where the daily fees or total debt were significantly higher."[148]

Under that reasoning, *Tillman* has essentially opened the door to as-applied challenges to pay-to-stay fees, particularly when the maximum statutory fine for the offense is substantially less than the total amount of fees imposed. For example, a misdemeanor OVI charge in Ohio carries a maximum fine of $1,075, with up to a six month jail sentence for first-time offenders.[149] Under CCNO's current rates, this could result in a first-time

141. *See generally*, *Bajakajian*, 524 U.S. 321.
142. *Id*. at 336-37.
143. *Tillman*, 221 F.3d at 420-21
144. *Id*. at 420.
145. *Id*.
146. *Id*. at 420-421.
147. *Id*. at 421.
148. *Tillman*, 421 F.3d at 421.
149. OHIO REV. CODE ANN. § 4511.19(G)(1)(a)(iii) (West 2017).

drunk driver being sacked with $13,180.60 in pay-to-stay fees.[150] While there is no precise multiplier offered for what may constitute a "grossly disproportional" [151] fine under *Bajakajian*, a ratio of 12:1 assessed in response to a minor infraction such as a first-time OVI offense may very well be argued to meet that standard. Post-*Tillman*, the Excessive Fines argument remains plausible, despite its rejection in that case. This theory has yet to be tested in Ohio, as subsequent reported cases in the state have proceeded solely on grounds of Due Process.[152]

The lack of a bright-line rule makes *Bajakajian*'s proportionality requirement highly fact-specific and subjects it to arbitrary administration. Lower courts have grappled with the application of proportionality, creating a "little–noticed" but important circuit split.[153] The First Circuit has interpreted *Bajakajian* to include the defendant's inability to pay a fine as relevant to an excessive fines analysis.[154] This consideration of the defendant's economic status, deemed the Eighth Amendment's "economic survival" or "livelihood protection" norm, dates back as far as the Magna Carta.[155] While the First Circuit is the only circuit to have embraced this doctrine, the majority approach of disregarding the burden placed on the payor has been criticized in three respects:

> First, it is simply not correct to regard Bajakajian's holding as compelling a lower court to disregard a defendant's personal circumstances when undertaking an Excessive Fines Clause analysis. Second, the majority approach is arguably inconsistent with the analytical frameworks the Supreme Court has adopted in other Eighth Amendment contexts. Third, attempts to justify the majority approach on historical grounds have relied upon an incomplete and selective reading of the historical record.[156]

This theory is persuasive in light of the fact that up to eighty percent of criminal defendants are considered indigent.[157] Neither the Sixth Circuit nor the Supreme Court of Ohio has considered the defendant's inability to pay as a factor in evaluating excessive fines. However, this case law from

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150. *Pay-For-Stay™ Program*, *supra* note 20 (calculated as 180 days of jail time multiplied by the $72.67 per diem fee, in addition to the $100 booking fee.)

151. *Bajakajian*, 524 U.S. at 337.

152. *See e.g.*, Berry v. Lucas Cty. Bd. of Comm'rs, 2010 WL 480981 at *5 (Feb. 4, 2010) (N. D. Ohio); Allen v. Leis, 213 F. Supp. 2d 819, 832 (S.D. Ohio 2002).

153. Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L. Q. 833, 834 (2013).

154. *Id*. at 835.

155. *Id*.

156. *Id*. at 847.

157. Eisen, *supra* note 8, at 328.

the First Circuit is compelling, and has the potential to bolster pay-to-stay challenges in Ohio.[158]

IV. CONCLUSION

Future pay-to-stay challenges face obstacles to their success, particularly in light of ample precedent upholding similar cost recovery schemes. However, as this article seeks to illustrate, there are holes in the established case law which present creative litigators with the opportunity for victory. Criticisms from high-profile organizations such as the ACLU of Ohio[159] offer hope for incarcerated individuals who are suffering at the hands of pay-to-stay policies. "Evolving standards of decency" dictate that pay-to-stay fees are unjust. [160] Inmates, who are deprived of their liberty involuntarily at the hands of prosecutors acting under color of the state itself, ought not to also pay for the same. But the argument that pay-to-stay programs are bad policy is not enough. The Due Process Clause and Excessive Fines arguments outlined above, however, are two such vehicles for abolishing a policy that is not just harmful to Ohio citizens, but is also impermissible under the Constitution.

158. *See, e.g.*, United States v. Levesque, 546 F.3d 78, 83-84 (1st Cir. 2008) ("[T]he notion that a forfeiture should not be so great as to deprive a wrongdoer of his or her livelihood is deeply rooted in the history of the Eighth Amendment"); United States v. Jose, 499 F.3d 105, 113 (1st Cir. 2007) (concluding that "[g]iven the history of the Excessive Fines Clause, it is appropriate to consider whether the forfeiture in question would deprive Jose of his livelihood.").

159. *See generally*, *In Jail & In Debt*, *supra* note 3.

160. Trop v. Dulles, 356 U.S. 86, 101 (1958) (noting changed societal understandings as a guidepost in interpreting the Eighth Amendment).