Captive Markets

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Modern county jails have increasingly adopted policies to bill their inmates for some or all of the costs of their room and board. Statutes authorizing counties to implement these "pay-to-stay" programs are on the books in roughly seventy percent of states, yet the financial mechanism on which these programs typically rely is not well understood. Although the pay-to-stay obligation bears some resemblance to familiar citizen-state financial transactions—such as fines and penalties, restitution, taxes, and fees—it usually belongs to a distinct model that this Article calls the "government-imposed loan." This Article provides an overview of the landscape of pay-to-stay programs and an articulation of the imposed loan model. The Article also assesses the normative desirability of the imposed loan model, focusing primarily on pay-to-stay programs.

The imposed loan structure raises concerns in two primary areas: citizen privacy and governmental services. This model requires citizen-borrowers to disclose personal financial information—some of it with a dubious substantive link to the underlying issue for which a given service was provided—to the government on a long-term basis. It also creates some disincentive for these borrowers to work, thus increasing the likelihood that they will consume governmental services in addition to the one for which the loan was imposed. On balance, it does not appear that the familiar structure of a consumer loan translates well for use in captive markets, such as jail housing or emergency services, where citizens essentially have no choice but to consume services provided by the government through its police powers.
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INTRODUCTION

In states nationwide, many counties are charging jail inmates for their time in jail.¹ Through “pay-to-stay” programs, inmates are held

¹ See infra Part I.B. See generally Gary F. Cornelius, Jails, Pre-Trial Detention, and Short Term Confinement, in OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 389, 389–90 (Kevin R. Reitz & Joan Petersilia eds., 2012) (“Every jurisdiction in the United States—whether a city, county, or town—either operates a jail or has combined resources with other jurisdictions to have access to a jail... Jails are not prisons. A prison is defined as a correctional facility, administered by the federal government or a state government, that confines adult offenders who are sentenced to terms of
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financially responsible for some or all of the basic cost of their own incarceration, usually characterized as a "room and board," or other similar charges.² Pay-to-stay has been likened to a hotel.³ Although this metaphor is apt in some respects, overall it fails to capture the unique hardships of life behind bars.⁴ Just as guests in a hotel must pay all the costs not only for their hotel room, but also for their travel to and from the hotel and to participate in activities during their stay, inmates are increasingly saddled with many, even most, of the costs related to the process of convicting, detaining, and releasing them.⁵ In addition to basic room and board, inmates may be charged "a la carte" for costs related to their prosecution,⁶ judicial proceedings,⁷ criminal defense,⁸ bail,⁹ booking,¹⁰ parole or probation supervision,¹¹ electronic monitoring,¹² substance abuse treatment,¹³ medical care,¹⁴ and various other services.¹⁵

confinement for more than one year.... Jails are defined as locally funded and operated correctional facilities that are centrally located in a community."). This Article is about pay-to-stay programs in county jails, although similar programs in city jails or state prisons are occasionally mentioned. Some sources use the terms "jail," "prison," and similar labels in a general sense to refer to places where people are incarcerated pursuant to government authority, and many observations about one type of facility apply to others. See, e.g., WILLIAM J. STUPTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 1 (2011) ("For black males, a term in the nearest penitentiary has become an ordinary life experience.").

2. See infra note 176 and accompanying text; see also BARBARA KRAUTH & KARIN STAYTON, U.S. DEP'T OF JUSTICE, NAT'L INST. OF CORR., FEES PAID BY JAIL INMATES: FEE CATEGORIES, REVENUES, AND MANAGEMENT PERSPECTIVES IN A SAMPLE OF U.S. JAILS 15 (Connie Clem ed., 2005) (defining "[p]ay-to-stay" or 'per diem' fees [as being] for daily subsistence"). I use "inmates" to refer to those jail residents who have been determined to be guilty of a crime. Pre-trial detainees may also be charged under pay-to-stay, but the focus of this piece is on the obligations of current and former inmates.


5. See, e.g., ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 7 (2010) ("Across the country, individuals face an increasing number of 'user fees' as part of their criminal cases.").

6. See, e.g., id. at 8 (listing "[p]rosecution reimbursement fees" as potential debt imposed at sentencing stage of criminal case).


9. See, e.g., MULLANEY, supra note 7, at 7 (including "bail investigation fee" as potential economic sanction).

However, such costs typically complement, rather than replace, more familiar financial sanctions such as fines, penalties, and restitution to victims of crime.\textsuperscript{16} Inmates may find themselves with significant financial liability even for minor infractions. For example, in 2010, a young single mother of two sons was jailed in Michigan for failing to pay fines for traffic violations that she could not afford and was then billed for her room and board in the jail while she served time for the non-payment.\textsuperscript{17} Such results are common in what the pending revision of the Model Penal Code describes as “a part of the corrections world that has developed in a patchwork, irrational fashion. It has produced a milieu of absurd complexity and disparity of application to individual offenders.”\textsuperscript{18}

The core concept behind pay-to-stay—that inmates should bear financial responsibility for their own room and board—is not limited to basic jail accommodations. Having money or the means to earn it may make the inmates’ circumstances while serving their sentence better. In many jurisdictions, inmates authorized to participate in a work-release program—in which they have the liberty to leave jail to go to their regular jobs during the day and return at night or on the weekends—must pay some amount of their earnings to the jail.\textsuperscript{19} Recently,

\begin{thebibliography}{9}
\bibitem{11}See, \textit{e.g.}, \textsc{Mullaney, supra} note 7, at 8 (listing “parole supervision” and “probation supervision” as potential economic sanctions).
\bibitem{12}See, \textit{e.g.}, \textsc{Nat’l Inst. of Corr., U.S. Dep’t of Justice, Fees Paid by Jail Inmates: Findings from the Nation’s Largest Jails} 2 (1997) (describing “electronic monitoring” as fee-based program).
\bibitem{13}See, \textit{e.g.}, \textsc{id.} at 2 (describing such treatment as “rehabilitation program” for which fee may be charged).
\bibitem{14}See, \textit{e.g.}, \textsc{Krauth & Stayton, supra note 2}, at 15 (describing co-payments or other fees for medical services as one of “four major areas” of fees).
\bibitem{15}See, \textit{e.g.}, \textsc{id.} at 12–14 (listing other charges, such as GED testing). It is not unheard of for jails to charge for personal items. See, \textit{e.g.}, Heather Rutz, \textsc{Residents Question Putnam Sales Tax Hike Proposals}, \textsc{Lima News}, Aug. 25, 2008 (charging inmates for underwear).
\bibitem{16}\textsc{Cf.} Katherine Beckett & Alexes Harris, \textit{On Cash and Conviction}, \textit{10 Criminology & Pub. Pol’y} 509, 519 (2011) (explaining that “fees and fines in the United States are imposed largely at judges’ discretion; they also supplement rather than replace other criminal sanctions”).
\bibitem{17}\textsc{ACLU, supra} note 10, at 29–30 (“I just need a chance to do right,” said [the mother]. ‘It doesn’t make sense to jail people when they can’t pay because they definitely can’t pay while they’re in jail.”). See, \textit{e.g.}, \textsc{Bannon et al., supra} note 5, at 9 (showing county court docket sheet for “a Pennsylvania woman convicted of a drug crime [who] incurred 26 different fees, ranging from $2 to $345. When her financial obligations are added together, she faces $2,464 in fees alone, an amount that is approximately three times larger than both her fine ($500) and restitution ($325) combined”).
\bibitem{18}\textsc{Model Penal Code: Sentencing § 6.04 cmt. k.} (Preliminary Draft No. 8, 2012) (on file with Author). The course of development in the area of financial charges imposed on defendants to cover the government’s criminal justice costs has been a source of concern since the practice first gained traction. Roughly twenty-five years ago, the director of the National Institute of Corrections—an agency of the Federal Department of Justice—wrote: “Economic sanctions have proliferated more dramatically than any other form of criminal sanctions during this decade [the 1980s]... The bulk of this growth in economic sanctions appears to be unplanned, resulting from a wide variety of motivations.” \textsc{Mullaney, supra} note 7, at 5.
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Jurisdictions in California have gone a step further. In “pay-to-upgrade” programs, certain offenders pay a fee up front or contemporaneously with their sentence to serve time in a more desirable facility (or part of a facility) instead of county jail; the key difference from pay-to-stay is that those inmates who cannot afford to pay for the upgrade are almost always denied admission.

In pay-to-stay programs, no inmate is denied food or shelter due to inability or unwillingness to pay. For jails to do otherwise would run afoul of the constitutional prohibition on cruel and unusual punishment. Courts that have considered constitutional challenges to pay-to-stay programs have found it crucial that inmates are guaranteed basic necessities regardless of whether they can pay. Because inmates are allowed to stay in jail without ever paying, the financial transaction between the government and inmates does not fall neatly into familiar models of financial interactions between the government and its citizens. The typical pay-to-stay program actually functions as a loan imposed on the inmate by the government.

This Article identifies this type of transaction as the “government-imposed loan”: the government pays the up-front cost of incarceration, which the inmate must re-pay according to some schedule with certain terms. Other costs may be added over time, such as those of interest and late fees. Collection methods may include the use of private debt-collection agencies, the inclusion of the repayment obligation as a

to-stay flowed logically from laws requiring prisoners to pay copayments for medical care. That practice was adopted by states beginning in the 1970s and 80s and is now common. A related practice common in the majority of states is for correctional authorities to make deductions from money earned by inmates who are allowed to leave the penal facility on work release.


21. See Buchanan, supra note 20, at 61.
22. See infra notes 200–202 and accompanying text.
23. See id.; see also U.S. Const. amend VIII.
24. See, e.g., Tillman v. Lebanon Cnty. Corr. Facility, 221 F.3d 410, 416 (3d Cir. 2000) (observing that a jail inmate subject to pay-to-stay program “was never denied any basic human need”).
25. See infra Part II.B.
26. See infra Part I.B.2.e.
27. See infra Part I.B.2.c.
condition of probation or parole, and the reincarceration of released inmates for willful non-payment.

Not all jurisdictions with pay-to-stay programs use the imposed loan model. Even among those that do, there is tremendous variation among jurisdictions regarding the specifics of how this lending transaction occurs. For example, some jurisdictions permit repayment to be debited directly from an inmate's commissary account—the personal funds available to an inmate—while others require a court order and allow collection only through the standard means available to non-governmental creditors.

Courts have struggled with how to label the pay-to-stay transaction, and scholars have recognized—largely implicitly—that pay-to-stay defies easy categorization. To the extent that the topic has been considered in legal scholarship, it often has been part of a broader category that encompasses all or many types of financial obligations that are imposed on criminal defendants, rather than as a manifestation of a specific, familiar financial transaction between the government and its citizens. The legal scholarly literature on pay-to-stay and related topics...
is still in its infancy, however, so the financial modeling issue and many others have not yet been widely developed. Such analysis is timely, given the recent high-profile debate over when government may lawfully require citizens to enter into a marketplace, as well as the on-going challenge of funding a costly criminal justice system. The government-imposed loan model does not appear to have any inherent constitutional defects. Indeed, several Supreme Court Justices recently observed that state governments enjoy considerable latitude in imposing "purchase mandates" on citizens, as long as the good or service purchased does not itself pose constitutional problems. A loan is a means of purchasing a good or service and, given the current resource constraints facing local and state governments, such loans are likely to be an increasingly appealing method for governments to impose on their citizenry.

This Article has two goals, the first descriptive and the second normative: (1) to highlight the underexplored "captive market" that exists in pay-to-stay jail housing through government-imposed loans, and (2) to assess whether the government-imposed loan model should be used where similar stealth lending markets exist for services provided by analyzing pay-to-stay programs and the financial costs imposed on criminal defendants more broadly. See, e.g., BANNON ET AL., supra note 5, at 4 (referring to "charg[ing] defendants for everything from probation supervision, to jail stays, to the use of a constitutionally-required public defender" as ""user fees,"" a part of "criminal justice debt" more broadly); ACLU, supra note 10, at 5 (defining "legal financial obligations (LFOs)" as "a general term that includes all fines, fees, and costs associated with a criminal sentence"). In addition, sociologists have made important contributions to our understanding of pay-to-stay programs and the broader phenomenon of imposing costs on criminal defendants. See, e.g., Beckett & Harris, supra note 16, at 509-10 ("Fees are intended mainly to recoup criminal justice costs and may not be statutorily defined as penalties. By contrast, fines are intended as criminal penalties. Nonetheless, we treat both fees and fines as monetary sanctions," which are also referred to as "LFOs [legal financial obligations].") This Article draws on some sociological studies, while remaining grounded in legal academic discourse.

36. See MODEL PENAL CODE: SENTENCING § 6.04 cmt. a (Preliminary Draft No. 9, 2013) (on file with Author) ("It is an understatement to observe that research and policy debate have not kept stride with these major trends in sentencing law and policy [including governmental reliance upon pay-to-stay and similar programs], and the changes in their social and economic context, over the past several decades.").

37. See, e.g., JEFFREY TOOBIN, THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT 275-77 (2012) (excerpting oral argument before the Supreme Court in the Affordable Care Act litigation involving the "broccoli question": when can the government make citizens purchase a product?).

38. See Allegra M. McLeod, Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law, 100 GEO. L.J. 1587, 1587 (2012) (identifying the "exorbitant associated costs" of incarceration as one of the "causes for alarm" in the "widely decried crisis confront[ing] U.S. criminal law").


local or state governments pursuant to their core police powers. The argument that markets exist generally within criminal law and procedure is well established. The assertion that they exist within jails has also been explored, albeit in a much more limited fashion. This Article contributes to the discussion by focusing on a specific jail housing market—pay-to-stay—that is built upon a specific financial transaction: the government-imposed loan. It also provides a more broadly applicable analysis of the largely unacknowledged type of lending transaction between the government and its citizens that the jail housing market presents.

Part I offers a general overview of the landscape of pay-to-stay programs nationwide, providing a description of their recent history, and analyzing trends in their use. Part II considers the familiar financial models of punishment and government revenue-generation into which pay-to-stay could fall—fines and penalties, criminal restitution, taxes, and fees—then argues that it is properly understood as a manifestation of a distinct model: the government-imposed loan. Borrowing is mandatory. However, even if inmates do not pay their debt, they still receive the services (room and board) covered by the loan. The imposed loan mechanism thus offers the government a way of requiring all inmates to pay their own room and board, and of not running afoul of the Eighth Amendment prohibition on denying basic shelter and sustenance to those in state custody.

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41. See infra Part III.A.
43. See, e.g., Weisberg, supra note 20, at 55 (referring to "forms of currency exchanged in the market for punishment" in context of pay-to-upgrade programs). Weisberg also argues that courts have "recognized the role of market-style transactions in criminal justice." Id. at 56. The most recent draft of the revised Model Penal Code refers broadly to "marketplaces" of economic sanctions, terminology that was adopted after reporters saw a draft of this Article. See MODEL PENAL CODE: SENTENCING § 6.04 cmt. a (Preliminary Draft No. 9, 2013) (on file with Author).
44. Others have observed that criminal defendants may become debtors as the result of pay-to-stay or similar obligations, but their analysis has depicted the underlying credit arrangement in broad terms rather than identifying the specific type of transaction involved in pay-to-stay as a loan imposed by the government. See infra notes 259-260 and accompanying text. And at least one law review article has noted a type of loan at work in a context similar to pay-to-stay—public defender reimbursement—and remarked on its implications for representing indigent defendants, although the focus was not on developing the loan model. See Anderson, supra note 8, at 371 ("But, as the right to counsel at public expense evolves into a loan rather than a gift, withholding the right to counsel of choice appears more and more untenable."). This Article's identification and exploration of the government-imposed loan model thus engages a nascent dialogue within existing literature.
45. See infra Part II.A.
46. See infra Part II.A.4.
47. See infra notes 200-202 and accompanying text. Alexander Volokh proposed a "thought experiment" in which "instead of assigning a prisoner to a particular prison bureaucratically, we gave the prisoner a voucher, good for one incarceration, to be redeemed at a participating prison." Volokh,
Part III argues that the imposed loan model currently exists in limited contexts beyond pay-to-stay programs and could be used more broadly. With proper attention to any applicable constitutional and legal restrictions, the government could transform the provision of services it is obligated to provide through its core police powers into an occasion for loan origination to service recipients. Such a transformation of citizens into mandatory borrowers raises ethical issues, which will be the subject of future work. This Part offers a normative analysis of the structure of imposed loans, identifying structural concerns related to two primary areas: citizen privacy and effective provision of governmental services. The imposed loan model aims to promote individual responsibility but it appears more likely to increase governmental involvement in citizens’ lives, and governmental expenditures. In general, the translation of the basic consumer loan for use in captive markets does not appear to be smooth, and this Article raises some potential ways in which the imposed loan mechanism itself is likely to be transformed going forward.

I. LEGAL LANDSCAPE

A. PAY-TO-STAY IN HISTORICAL CONTEXT

This Part aims to situate pay-to-stay programs in a very general historical context; it does not endeavor to provide a historiographical account of today’s programs, their predecessors, or the origins of this type of practice. The underlying principle of pay-to-stay is not at all new, but the programs currently in effect are of recent vintage.

First, the concept that jail inmates could be made to pay some type of room and board or confinement cost has deep roots in the Anglo-
American legal tradition. In the United States, versions of this general requirement have been imposed on inmates since the Colonial Era. A particularly insidious application existed in the Jim Crow South. In what was essentially a de facto return to slavery, mass numbers of African American men were arrested for non-violent offenses, and then leased to companies that had paid their criminal justice costs, such as room and board, to work off the debt. Although its roots run deep, the counties' ability to impose a room and board or similar cost requirements on inmates does not appear to be grounded in common law. Typically, statutory authorization has been necessary for the county to impose this obligation. How explicit this authorization must be today is not entirely clear.

Second, the current wave of pay-to-stay programs in county jails has been a feature of the national legal landscape for roughly twenty-five years. Related measures, such as charging inmates for medical co-pays and requiring inmates on work-release to contribute to their room and

52. See, e.g., Bradley v. State, 69 Ala. 318, 319 (1881) (discussing how the then-current statute made meal costs while in jail part of costs of criminal case that defendant could be ordered to work off). Cf. Note, State Reimbursement for Prisoners' Maintenance, 45 YALE L.J. 1301, 1302 n.3 (1936) (explaining that "[a] few states [in United States] a century ago [1830s] tried a system of individual accounting with each prisoner, charging him with maintenance costs and crediting his account with the proceeds of his labor, any adverse balance remaining a charge upon his property after his release").

53. See, e.g., Souza v. Sheriff of Bristol Cnty., 918 N.E.2d 823, 829 n.9 (Mass. 2010) (concluding that, throughout Massachusetts history, "[t]here is no dispute that, by statutory authorization, sheriffs, at various time, were authorized to charge certain fees"); see also MASS. PROVINCE LAWS 1692-1693, c. 37, § 1 (authorizing fees "ffor diet").

54. See Michelle Alexander, The New Jim Crow, 9 OHIO ST. J. CRIM. L. 7, 10–11 (2011); see also Alexes Harris et al, Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States, 115 AM. J. SOC. 1753, 1758 (2010) (explaining the "imposition of monetary sanctions was the foundation of the convict lease system in the southern United States through the 1940s").

55. See, e.g., Souza, 918 N.E.2d at 828-29 ("While the sheriff provides support for the proposition that his authority to manage and control county jails derived from common law, he does not cite to any authority providing that, under common law, sheriffs were permitted to charge fees, which we conclude is a distinct function not subsumed in his custodial duties.").


57. A leading case in the area of pay-to-stay programs, Tillman v. Lebanon Cnty. Corr. Facility, 221 F.3d 410, 423 (3d Cir. 2000), found no infirmity with such a program implemented in the absence of an authorizing statute on point. However, given the prevalence of statutes explicitly authorizing pay-to-stay programs, it is likely that most counties and the institutions within them are proceeding—or attempting to—pursuant to specific statutory parameters. See infra Part I.B.1.

58. There does not appear to be a definitive account of where and when the first of these contemporary programs was implemented, although conventional wisdom seems to be that it was in Macomb County, Michigan in 1985. See, e.g., Sheila McLaughlin, Pay-to-Stay Mantra Nixed for Jails, CINCINNATI ENQUIRER, Feb. 14, 2010, available at http://news.cincinnati.com/article/AB/20100213/NEWS0121403455 (quoting Macomb County Sheriff as saying that his "program was the first in the nation and he still gets calls from out-of-state sheriffs who want to know how he does it").
board, have been in place longer.\textsuperscript{59} Outside of limited contexts such as work release, however, up until the early 1970s, fees charged to offenders were rare.\textsuperscript{60} But beginning in the 1970s and then accelerating during the 1980s, these practices changed dramatically.\textsuperscript{61} Room and board fees proliferated, beginning in roughly the second half of the 1980s, picking up steam in the 1990s, and continuing in the twenty-first century.\textsuperscript{62} This growth has been part of a broader shift in criminal justice toward placing many costs of the system on defendants through fees and other required payments.\textsuperscript{63} In addition, during roughly the same time period, the role of other economic sanctions in criminal sentencing, such as the more familiar fine, has expanded.\textsuperscript{64} Today, monetary sanctions, also referred to as legal financial obligations ("LFOs"), "include the fees, fines, restitution orders, and other financial obligations that may be imposed by the courts and other criminal justice agencies on persons accused of crimes" and are the norm rather than the exception because research indicates that they are "imposed on a substantial majority of the millions of people convicted of crimes in the United States annually."\textsuperscript{65} The recent expansion and current ubiquity of these sanctions typically have been less remarked upon than another contemporaneous development: the "imprisonment boom, dating back to the mid-1970s, that is without parallel in any other industrialized country."\textsuperscript{66}

Taken together and considered on the broadest level, these three trends—pay-to-stay, monetary sanctions, and imprisonment—suggest that criminal defendants in the twenty-first century are more likely to pay for their incarceration (and for other matters related their criminal case)

\footnotesize{\textsuperscript{59} See Mitchom, supra note 19, at 188 (explaining that "[p]ay-to-stay flowed logically from laws requiring prisoners to pay copayments for medical care. That practice was adopted by states beginning in the 1970s and 80s and is now common. A related practice common in the majority of states is for correctional authorities to make deductions from money earned by inmates who are allowed to leave the penal facility on work release").}

\footnotesize{\textsuperscript{60} Fahy G. Mullaney, The Fee Fad: Punishment Without Public Policy, PERSP. 6, 6 (Fall 1988) [hereinafter Mullaney, The Fee Fad]. It had long been common to use some form of labor by inmates—performed within or under the control of the carceral facility—to help "defray some of the costs of their confinement." See MULLANEY, supra note 7, at 1.}

\footnotesize{\textsuperscript{61} Mullaney, The Fee Fad, supra note 60, at 6.}

\footnotesize{\textsuperscript{62} See, e.g., Philip P. Pan, Pr. George's Considers Fee for Jail Food; Correction Chief's Plan Troubles Local ACLU, WASH. POST, June 1, 1988, at B01 ("The idea of charging inmates for services is one that has swept the nation since the late 1980s, beginning with small fees for doctor visits and evolving more recently to full-blown plans that bill inmates for the cost of room and board."); Sara B. Miller, Is It Fair and Legal For Inmates to Foot Their Room and Board?, CHRISTIAN SCI. MONITOR, July 21, 2004, at 2 ("'Pay to stay' fees have soared in popularity across the nation in the past 15 years.").}

\footnotesize{\textsuperscript{63} See generally supra notes 5-16 and accompanying text.}

\footnotesize{\textsuperscript{64} See Harris et al., supra note 54, at 1758–59 ("[I]n recent years, a number of observers have noted that the range of monetary sanctions potentially imposed in criminal cases has continued to proliferate since the early 1970s").}

\footnotesize{\textsuperscript{65} Id. at 1756, 1753.}

than defendants were before the 1970s. The specific trends of pay-to-stay are discussed in more detail below; the point here is that these programs should be understood as part of a fairly recent shift within the criminal justice system toward requiring defendants to pay more money for more reasons.

B. PAY-TO-STAY TODAY: TRENDS AND THE CURRENT LANDSCAPE

1. Trends in Pay-to-Stay

The impetus for county pay-to-stay programs has generally flowed from one or more of the following three considerations, depending on the particular implementing body or official: (1) budget constraints, (2) political pressures, and (3) criminal justice objectives. The first consideration, budget constraints, comes into play when the intersection of mounting incarceration costs with shrinking government coffers (more strapped at some points than others) has left county officials searching for new sources of revenue in the area of corrections and criminal justice.

67. As has been extensively explored in the literature on mass incarceration, jail and prison inmates today tend to be poor—with men of color disproportionately represented among their ranks—who have limited to no access to money, employment, or education. See, e.g., STUNTZ, supra note 1, at 1 (stating that today “for black males, a term in the nearest penitentiary has become an ordinary life experience, a horrifying truth that wasn’t true a mere generation ago”); Harris et al., supra note 54, at 1760 (“Poor people, people of color, and men are more likely to be involved in the criminal justice system.”); McCormack, supra note 35, at 228 (“All of the available data suggests that people in the criminal justice system have limited education, and limited employment histories and opportunities. Approximately 75% of defendants charged with misdemeanors are indigent.”); Kirsten D. Levingston & Vicki Turetsky, Debtors’ Prison—Prisoners’ Accumulation of Debt as A Barrier to Reentry, 41 CLEA J. 187, 187-88 (2007) (“Our nation’s prison population is overwhelmingly poor—a critical factual backdrop to any discussion of debt accumulation during a prison stay.... Prison inmates are also, overwhelmingly, people of color.... Among young black men, up to 30 percent has a history of incarceration.”).

68. I identified these three elements based on analysis of a variety of sources, and then I subsequently discovered that an early report from the U.S. Department of Justice, National Institute of Corrections, identified similar versions of the first and second considerations in the imposition of economic sanctions in the criminal justice system more generally. But the report had a different third factor: “The taxpayer revolt, as it was called, [which] expressed a general and growing resistance to taxes in the 1970s. One remedy was to expand the practice of assessing user fees on the grounds that those who use various publicly funded services ought to bear a larger part of the cost.” MULLANEY, supra note 7, at 1-2. I am inclined to see the “taxpayer revolt” as background that informs all of the considerations that this Article identifies.

69. These decisions have often been rather ad hoc as opposed to debated fully on any potential ground. See id. at vi.

70. See, e.g., Matthew J. Parlow, The Great Recession and Its Implications for Community Policing, 28 GA. ST. U. L. REV. 1191, 1205-08 (2012) (“[W]ith the financial downturn that the United States—and the world more generally—has experienced in the past several years, localities experienced severe reductions from virtually all of their revenue sources that dramatically impacted their budgets,” including “public safety budgets.”). This Article notes that a few counties are using “pay-to-stay” as a non-traditional revenue source but offers a limited sample, noting programs in just three states. Id. at 1215-16.
more broadly. Pay-to-stay programs have offered one such opportunity. Second, political pressures arising in the face of limited financial resources has allowed officials to justify billing inmates for their room and board in response to the sentiment that it is unfair for criminals to get a free ride while blameless citizens may go without housing and food. Third, some officials have argued that pay-to-stay is not solely a financial matter, but is also grounded in rehabilitation or deterrence—the primary objectives of criminal justice. Others have questioned the desirability, or even legitimacy, of using pay-to-stay, or other charges levied against criminal defendants, to further goals of or related to punishment given their potential to lengthen sentences so that they become disproportionate to the offense, to limit or prohibit rehabilitation and reintegration post-release, and to disproportionately

71. See, e.g., Butterfield, supra note 34, at A1 (stating that “grappl[ing] with soaring prison populations and budget pressures” has led “more local governments” to resort to “more frequently billing inmates for their room and board.”); see also Parlow, supra note 70, at 1213–16 (describing attempts in some localities to find new sources of revenue for jails and police departments).

72. See, e.g., KRAUTH & STAYTON, supra note 2, at 15 (“A few survey respondents [jail administrators] noted that their per diem charges are actually a result of political pressure from the public.”); Butterfield, supra note 34, at A1 (quoting then Sheriff of Macomb County, Michigan as saying that “the public loves [pay-to-stay programs]. . . . What we say is, 'Why should we as taxpayers have to pay the whole cost of incarcerating these people who break the law?'”). Indeed, “increasingly prison researchers dismiss . . . ‘pay-to-stay’ plans as political grandstanding, citing the difficulty and expense of actually collecting anything from inmates and the ethics of such practices.” Julia Silverman, Inmates Charged Again—For Stay, MEMPHIS COM. APPEAL, May 23, 2004, at A24. While I agree that political pressures may exert significant influence on the decision to institute pay-to-stay programs, I do not agree that implementation is mere posturing, given the significant consequences that such programs may have on inmates’ lives, among other reasons. See infra Part I.B.2.e.

73. See, e.g., DALE PARENT, NAT’L INST. OF JUSTICE, DEP’T OF JUSTICE, RECOVERING CORRECTIONAL COSTS THROUGH OFFENDER FEES 2 (June 1990) (“Some practitioners have suggested that [correctional] fee payment has a therapeutic effect . . . offenders demonstrate accountability and responsibility to the victim and to the criminal justice system.”); see also Amy Sherman, Inmates’ Jail Fee Yields Little Green: ‘Pay-to-Stay’ Program Was to Offset Counties’ Cost, ST. PAUL PIONEER PRESS, Sept. 14, 2003, at C1 (“During the past year, at least one-quarter of Minnesota counties started charging for room and board [in jail] . . . [T]he purpose was two-fold: bring in money to help offset ever-rising jail costs and send a message to criminals that ‘if you do the crime, you pay to do the time.’”). But see Pan, supra note 62, at B01 (quoting county corrections chief as explaining “I’m not here to punish the offender any more . . . I just want them [inmates] to pay what’s reasonable and sound for the taxpayers”).

74. See, e.g., McCormack, supra note 35, at 239 (“The moral culpability of the offender requires that he or she be punished, but only as far as is deserved. With . . . [economic] sanctions [including costs related to the criminal case], most people pay a lot more than an eye for the eye.”); see also Mullaney, The Fee Fad, supra note 60, at 7 (identifying “some undesirable and unanticipated consequences [of correctional fees] that concern probation and parole officials [as including]: Punishment of offenders at a level above that intended by the legislatures when originally instituting a system of sanctions”).

75. See, e.g., BANNON ET AL., supra note 5, at 27 (“In all of the fifteen states studied, criminal justice debt [which may include pay-to-stay] and related collection tactics pose severe hurdles in virtually every area of life” during defendants’ “reentry and rehabilitation” post-conviction).
impact low-income and minority individuals. Debate over the role of pay-to-stay has itself become part of popular political dialogue, showing that these three factors may overlap.

As for the question of how many counties today have implemented pay-to-stay, there does not appear to be a comprehensive or definitive account of the prevalence or nature of such programs nationwide. Three reports reflecting results from surveys from a sample of jails nationwide appear to come closest: one from the National Institute of Justice in 1990 and two from the National Institute of Corrections in 1997 and 2005. Examining these reports in conjunction with information from other sources reveals the contours of an overall nationwide trend toward the use of pay-to-stay over the last several decades.

At the time of the 1990 report, twenty-six states had laws imposing some type of fee on jail inmates. Among survey respondents, room and board fees comprised almost all types of correctional fees that were collected. However, room and board charges by jails were primarily levied against work-release inmates as opposed to those serving "straight

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76. See, e.g., Harris et al., supra note 54, at 1789–91 (explaining that "monetary sanctions create additional mechanisms by which criminal conviction contributes to the reproduction of poverty and inequality . . . monetary sanctions may contribute to, and help to explain, racial inequality in household wealth").

77. See, e.g., Editorial, Fees for Jail Service, AKRON BEACON J., Jan. 4, 2011, at A6 (criticizing sheriff’s "controversial proposal to make inmates pay for their stays in the county jail . . . [because] broader questions about fairness must be considered").

78. See Butterfield, supra note 34, at A1 (“There are no national data on how much is being collected [from inmates], reflecting the patchwork of policies, but fees are being levied for . . . room and board.”).

79. See generally Parent, supra note 73.

80. See generally Nat’l Inst. of Corr., supra note 12; see also Krauth & Stayton, supra note 2. The National Institute of Corrections also issued a report on economic sanctions in 1987 based on thirty-five interviews with various constituencies and a literature review. See generally Mullaney, supra note 7. For various reasons, it does not offer that helpful a basis of comparison for the three subsequent survey reports because it does not tie its descriptions of practices to specific jurisdictions.

81. But see Margo Schlanger, Inmate Litigation, 116 HARV. L. REV. 1555, 1607 n.148 (2003) (“[S]ome [prison and jail] facilities are authorized by state law to charge inmates for the costs of their own incarceration. Many facilities rarely exercise this authority for inmates who are not on work release or working in relatively high-paying ‘prison industries’ jobs.”). Schlanger’s observation is not necessarily in tension with my claim that—from a nationwide perspective—pay-to-stay programs in county jails specifically are more common today than they were prior to the 1980s. I believe that she is correct in that many jails or state prisons in parts of the country likely do not charge inmates for their incarceration; however, in other jurisdictions, many county jails in fact do. See, e.g., Rick Armon, Sheriff Revives Proposal to Levy Jail Fees, AKRON BEACON J., Jan. 2, 2011, at A1 (“In 2007, the Buckeye State Sheriffs’ Association in Columbus [Ohio] estimated that 60 counties had a pay-to-stay program.”). Ohio has eighty-eight counties total. Ohio Sec’y or State, Ohio by the Numbers, http://www.sos.state.oh.us/SOS/ProfileOhio/numbers.aspx (last visited Oct. 31, 2013).

82. See Parent, supra note 73, at 1.

83. There is no claim that this group constituted a representative sample. Id. at 3.

84. Id. at 6.
time." The report concluded that the use of correctional fees in general was likely to accelerate, meaning that "the question of primary interest appears not to be whether to use fees, but how to realize their potential benefits."

The prediction that the use of correctional fees was all but inevitable seemed to be validated by the 1997 report, which "confirmed that the charging of [incarcerated] inmate fees is both prevalent and increasing among the agencies surveyed." According to survey results, "at least 41 states have passed legislation authorizing assessment of inmate fees for jail services and operations," a significant increase from less than a decade before. Sixteen of those statutes authorized a "per diem" charge, and an additional two provided for the "general costs of incarceration," so eighteen states (over thirty percent) permitted or required inmates to pay some or all of the cost of their time in custody. Thirteen jails (ten percent of the total surveyed) across nine states charge inmates all or a portion of the daily cost of their incarceration. Average program revenue generated $125,000 per year for the relevant county's general fund. Here, the report again predicted further growth in fee use.

The 2005 report supported the claim of a trend toward imposing financial charges on inmates. This most recent report found that thirty-

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85. Id. at 7.
86. Id. at 1, 2. Not all researchers saw the same capacity for fees imposed on criminal defendants to have a positive societal impact: In 1988, a researcher affiliated with the National Institute of Corrections called for a "moratorium on fee development. Unguided by principles of coherent operating policy, we are creating a Frankenstein capable of bludgeoning its creators." Mullaney, The Fee Fad, supra note 60, at 6.
87. NAT'L INST. OF CORR., supra note 12, at 2.
88. Id. at 1 (explaining that survey was representative but "not intended as a comprehensive scan of fees charged by the nation's 3,200-plus jails"). It seems unlikely that any city jails were included among survey recipients. See id. at 9 (referring to per diem fees going to "the county general fund"). But to the extent any might have been, it does not seem likely that they would represent a significant portion, given the focus on larger facilities.
89. Id. at 2.
90. Id. at 3, 6.
91. The states involved in the survey were Arizona, California, Florida, Michigan, New Jersey, South Dakota, Texas, Washington, and Wyoming. See id. at 8.
92. Specifically, thirteen jails—across nine states—were doing it out of 130 total surveyed. Id. at 1, 7, 9. It is possible that this number might under-represent the number of jurisdictions where inmates were paying toward their confinement costs, as it is not clear whether the survey given to jails asked whether only the jails were collecting these costs or whether another entity—such as a court clerk—might have been collecting them instead.
93. Id. at 9. It is unclear if this figure represents gross or net revenue, the latter of which would presumably account for such costs as running the program and collecting from inmates.
94. Id. at 18. The report noted some tension surrounding pay-to-stay: "Since the expense of housing and caring for prisoners has traditionally been viewed as a public responsibility, charging inmates is somewhat controversial." Id. at 7.
95. The survey did not reflect a representative national sample. KRAUTH & STAYTON, supra note 2, at 4. It seems more likely that city jails were included here than in the 1997 survey, given that this survey was sent to "small jails (inmate population less than 50)," not just large facilities. Id. at 2.
eight percent of responding jails imposed some type of “pay-to-stay” fee, for housing, meals, or both. This is more than triple the number of jails that reported doing so in 1997. The most common housing and meals fee for inmates was twenty dollars. Jails in eleven states reported using pay-to-stay, and one other state considered the practice, a small increase from the number of states reporting pay-to-stay in the 1997 survey. However, this number under represents the prevalence of pay-to-stay programs; since 2000, jails in at least half of all states have adopted or have considered adopting these programs.

This report did not offer a prediction about the trajectory of fee usage, although it offered guidance on implementation.

Unfortunately, there does not appear to be a definitive empirical conclusion on whether fee use has proliferated nationwide since 2005 and, if it has, whether it will continue to do so. There is a well-supported sense among those who have studied the levying of financial charges

However, “raw data” from the survey is presented according to county, which could suggest that only county facilities were studied. See id. at app. B. Even if some local facilities are included in these numbers, it is only another reason to regard existing data as inadequate for establishing a definitive number of counties nationwide that have pay-to-stay programs.

96. Id. at 29. Charging for both is most common: sixty-seven jails out of seventy-seven. Id.; see also Miller, supra note 62, at 2 (“Prison researchers estimate that a third of the nation’s 3,000-some county jails levy room and board fees.”).

97. See supra note 92; Krauth & Stayton, supra note 2, at 8.

98. Krauth & Stayton, supra note 2, at 29 (referring to regular, non-work-release inmates).

99. Compare Nat’l Inst. of Corr., supra note 12, at 7, with Krauth & Stayton, supra note 2, at app. B. In 2005, states reporting pay-to-stay programs in jails (listed by county so likely county-level facilities) were Florida, Indiana, Michigan, Minnesota, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, Virginia, Washington, and Wisconsin. Illinois was considering it. See Krauth & Stayton, supra note 2, at app. B. Id.

100. This figure is based on the 2005 survey, as well as other sources (which are not intended to be comprehensive). Case law reveals that counties in states not listed in the 2005 report also currently have pay-to-stay or have had it since 2000. See, e.g., Iowa v. Bogdan, No. 10-1156, 2011 WL 666609 (Iowa Ct. App. Dec. 21, 2011) (Pottawattamie County, Iowa); State v. Fleming, No. 104,944, 2011 WL 6413629 (Kan. Ct. App. Nov. 23, 2011) (Mitchell County, Kansas) (holding ordinance imposing per diem for jail stay to be invalid for failing to comply with statutory requirements); Brown v. Hickman, No. 10-3052, 2011 WL 436893 (W.D. Ark. Aug. 25, 2011) (Boone County, Arkansas); Sicks v. Campbell Cnty., 439 F. Supp. 2d 751 (E.D. Ky. 2006) (Campbell and Kenton Counties, Kentucky); Souza v. Sheriff of Bristol Cnty., 455 Mass. 573 (2010) (Bristol County, Massachusetts) (striking down county room and board fee due to lack of authorizing state statute). Newspaper reports expand the list of states with pending, current, or recent (since 2000) programs. See, e.g., Laura Bauer, Some Inmates Pay for Their Crimes and Jail Stays, KAN. CITY STAR, Apr. 24, 2009, available at www.jocosheriff.org/modules/showdocument.aspx?documentid=47 (Maricopa County, Arizona, and Taney County, Missouri); Manny Gonzales, Bexar Inmates to Find That Freedom Isn’t Free; Some Will Be Getting Bills for Their Time Behind Bars, SAN ANTONIO EXPRESS-NEWS, Sept. 5, 2003, at A01 (Bexar County, Texas); Medina, supra note 3, at A15 (Riverside and other counties, California); Ken O’Brien, Pay-to-Stay Jail Plan Projections Released, Chi. TRIBUNE, Mar. 9, 2005, at 4 (Will County, Illinois); Arthur Raymond, County Oks Charging Inmates, DESERET MORNING NEWS, Apr. 1, 2009, at B01 (Salt Lake County, Utah); Matt Wilson, Brief: Hamilton County Commission Raises Jail Fee to $52, CHATTANOOGA TIMES, Apr. 16, 2008 (Hamilton County, Tennessee).

101. Krauth & Stayton, supra note 2, at 40.
against criminal defendants that the general practice will continue to grow.\textsuperscript{103} It at least seems reasonable to apply this intuition to pay-to-stay specifically, after comparing the three reports described above. But even looking at the three surveys together does not yield unimpeachable evidence of an upward trend from 1988 to 2005 in the number of jails across the country using pay-to-stay.\textsuperscript{109} It is thus difficult—if not impossible—to draw conclusions about the trend in pay-to-stay implementation just by comparing the three. A comparison of the number of states where jails reported pay-to-stay in 1997 and 2005 does at least suggests at least that the practice of pay-to-stay grew around the turn of the century.

The proliferation of state statutes promoting pay-to-stay programs is perhaps the most definitive indicator of their prevalence. The 1997 report stated that eighteen states had some type of pay-to-stay statute in place, which appears to have been a slight underreporting of the real number.\textsuperscript{104} Nevertheless, it is clear that more pay-to-stay laws are on the books in states today than were in effect at the close of the twentieth century. Currently, statutes in more than thirty states require or permit the imposition of some type of pay-to-stay arrangement on jail inmates by some governmental entity.\textsuperscript{105} Because this figure is an increase from...
the reported 1997 numbers, it follows that the number of jails authorized to impose such a charge has increased over the last couple of decades. Not all jails in the states that permit the charge avail themselves of this opportunity; indeed, it is possible in some of these states that a majority of jails do not. The available information outlined above, however, suggests that the trend has been toward rather than away from using pay-to-stay programs.

2. Variety of Pay-to-Stay

"Pay-to-stay" statutes—as well as the county-level legislation, policies, and practices that they enable—are far from uniform. Among the many differences within the body of pay-to-stay legislation, regulation, and implementation, some variants are particularly salient for understanding the basic contours of the lender-borrower relationship—loan origination, loan repayment, and loan delinquency or default—created between counties and inmates. These distinctions include which institution or individual has the authority to impose the pay-to-stay obligation; whether repayment while incarcerated is mandatory or voluntary; what collection methods are available to the county (or its designee) after an inmate has been released; whether mitigating factors exist in the imposition or collection of reimbursement; and what the potential consequences for non-payment are. These distinctions could


106. See, e.g., Amy Sherman, *Jail to Charge Inmates for Bed/Board* Dakota County Sets Fee at $20 a Day, *St. Paul Pioneer Press*, July 17, 2002, at A1 (citing editor of *American Jails* magazine for proposition that "most jails...don't charge boarding fees").

107. See NAT'L INST. OF CORR., supra note 12, at 8; BUREAU OF JUSTICE ASSISTANCE, COUNCIL OF STATE GOV'TS JUSTICE CTR., *REPAYING DEBTS* 11 (2007). This heterogeneity has been true of fees imposed on criminal defendants since the current movement toward the use of such fees began in the 1970s. See, e.g., MULLANEY, supra note 7, at 2, 5 ("[V]irtually all of these [economic] sanctions are subject to local state variance.").
significantly shape the administration of the program by officials and the experience of inmates. The descriptions that follow aim to provide a general overview of the variety between—and sometimes within—jurisdictions rather than a fifty-state survey of all relevant legislation, regulation, policies, or practices that compose this complex terrain.

a. Imposing Authority

Depending on the jurisdiction, any of the government’s branches could be responsible for imposing the pay-to-stay obligation. The judicial and executive branches possess this authority more often, however, than the legislative branch. The variety among which individual or entity has the authority to impose the obligation is reflected in the scattering of pay-to-stay provisions among criminal or criminal procedure codes in some jurisdictions as opposed to civil codes in others. Even when such authority lies with the court, some states impose this obligation during sentencing or related proceedings in the underlying criminal case.

108. Compare, e.g., KRAUTH & STAYTON, supra note 2, at 37 (reporting that one jail administrator said the “daily subsistence fee is successful because it is taken from the inmate’s account on a daily basis. Even though approximately three-quarters of our inmates are indigent, this fee raises significant funds.”), with id. at 39 (quoting a report by another administrator that it “is very difficult to collect the per diem fees because many inmates are indigent”).

109. Indeed, information about pay-to-stay and related topics often proves opaque even to practitioners or officials within a given jurisdiction. See, e.g., BUREAU OF JUSTICE ASSISTANCE, supra note 107, at 12 (recommending that policymakers convene working groups to “elicit key information about how collections [of debts arising from incarceration] are made pursuant to existing laws and policies” and cautions that “veteran court or probation staff may be unable to list, for example, all of the fines, fees, and surcharges in a given city, county, or state”).

110. Several states require a court order for the obligation to attach to individual inmates: see, e.g., ARIZ. REV. STAT. ANN. § 13-804.01(A) (requiring court orders for the reimbursement of incarceration costs); COLO. REV. STAT. § 18-1.3-701(1)(a) (authorizing the court to render judgment against offender for cost of care); LA. REV. STAT. ANN. § 15:703(A)(2)(b) (permitting the sheriff to collect reimbursement for room and board if approved by judge); ME. REV. STAT. ANN. tit. 17-A § 1341(1) (authorizing courts to assess room and board reimbursement). Sheriff or jail administrator can impose pay-to-stay obligation on individual inmates without initial court orders, although recourse to courts may be necessary in event of nonpayment: see, e.g., FLA. STAT. § 951.033(3) (“Chief correctional officer of a local subdivision may direct a prisoner to pay for all or a fair portion of daily subsistence costs.”); IOWA CODE ANN. § 356.7(1) (authorizing a county sheriff to charge inmates for room and board); VA. CODE ANN. § 53.1-131.3 (permitting a sheriff or jail superintendent to establish a program to charge inmates per diem fee). Pay-to-stay obligation attaches to inmates solely due to legislative action establishing the general obligation. See, e.g., IND. CODE ANN. § 36-2-13-15(c), (e), (f) (establishing that an inmate “shall reimburse the county” at rate set by “county fiscal body” and collected by sheriff); KAN. STAT. ANN. § 19-1930(d)-(e) (“Board of county commissioners may provide by resolution that any inmate of the county jail... shall be required to pay to the county a fee... to defray the costs of maintaining such inmate in the county jail.”).


others, county officials or prosecutors must commence a separate civil proceeding if they wish to obtain a court order for repayment. 13

b. Repayment While Incarcerated

In many jurisdictions, an individual inmate’s pay-to-stay obligation remains in place during his time in jail, usually as the result either of his criminal sentence or of a program at the jail. 14 The inmate may thus be required to start making payments while still behind bars. 15 However, it is not always clear when repayment must begin, even when the pay-to-stay obligation is imposed during the course of the inmate’s custody. 16 Practically speaking, repayment may prove difficult to enforce against inmates, as their sources of income are generally limited or non-existent while they are incarcerated. 17 Some jurisdictions have sought to address this obstacle by incorporating inmates’ commissary accounts into pay-to-stay schema, either by providing the option for inmates to use them as a source of payment or by requiring that they do so. 18 In the latter

113. See, e.g., Mich. Comp. Laws § 801.87(1) (1984) (granting the county six years after inmate’s release to bring a “civil action to seek reimbursement from that person for maintenance and support of that person while he or she is or was confined in the jail”); Wis. Stat. § 302.372(6)(a) (1995) (granting a county one year after inmate’s release from jail to “commence a civil action in circuit court to obtain a judgment for the costs under sub. 2(a) [including daily maintenance] or be barred”).

114. See, e.g., Wash. Rev. Code § 9.94A.760(2) (requiring a judicial determination of reimbursement obligation made at sentencing); Va. Code Ann. § 53.1-131.3 (permitting a sheriff or jail superintendent to establish a program to charge inmates per diem fee).

115. See, e.g., Ala. Code § 14-6-22(b)(1) (1975) (requiring defendants ordered to pay housing and maintenance costs to do so “forthwith” unless court specifically authorizes payment plan); Fla. Stat. § 951.033(5) (permitting chief correctional officer in jail to “seek payment for the prisoner’s subsistence costs” from multiple sources, including “[t]he prisoner’s cash account on deposit at the [jail] facility”); Kan. Stat. Ann. § 19-1930(e)(3) (1983) (requiring an inmate to pay maintenance fee by cash, money order, or jail commissary account); Minn. Stat. Ann. § 641.12(3)(a) (West 1946) (“[C]osts may be collected at any time while the person is under sentence or after the sentence has been discharged.”). At least one jurisdiction, Montana, requires that confinement costs “must be paid [by inmate] in advance of confinement and prior to payment of any fine.” Mont. Code Ann. § 7-32-2245(1).

116. See, e.g., Minn. Stat. Ann. § 641.12(3)(a) (“[C]osts may be collected at any time while the person is under sentence or after the sentence has been discharged.”); Tex. Code Crim. Proc. Ann. art. 42.038(f) (West 1999) (authorizing sentencing court to “require a defendant to reimburse the county [for per diem cost of confinement] ... by paying to the sheriff the bill presented by the sheriff within a specified period or in specified installments”).

117. See, e.g., Parent, supra note 73, at 1 (“[O]pponents of correctional fees note that many correctional clients are indigent ... and even non-indigent offenders may be poor payment risks.”); see also ACLU, supra note 10, at 53 (quoting a sheriff of one Ohio county as saying that “his county’s plan to charge prisoners has been a ‘complete failure’ ... [w]hen it came time to collect the pay-to-stay, it ended up costing almost as much if not more to run the program” due to inmate indigency). Cf. Bannon et al., supra note 5, at 4 (explaining that “[c]riminal defendants are overwhelmingly poor”).

118. See, e.g., Fla. Stat. Ann. § 951.033(5) (permitting chief correctional officer in jail to “seek payment for the prisoner’s subsistence costs” from multiple sources, including the “prisoner’s cash account on deposit at the [jail] facility”); Kan. Stat. Ann. § 19-1930(e)(3) (requiring inmates to pay maintenance fee by cash, money order, or jail commissary account); Wis. Stat. § 302.372(5) (authorizing jailer to deduct reimbursement costs from inmate’s “institutional account ... for payment for items from canteen, vending or similar services” if inmate permitted to maintain such account).
scenario, then, the sheriff or other correctional officer is typically authorized to debit the account directly for payment. Given the relatively small number of statutes specifically authorizing it, direct debit does not appear to be the dominant approach for facilitating pay-to-stay reimbursement. However, other statutes give judicial, county, or correctional officials considerable discretion to set the terms of repayment, which suggests that direct debit could potentially have a role in jurisdictions other than those in states where statutory provisions explicitly authorize it.

One company has played a particularly significant role in facilitating the use of direct debit for pay-to-stay obligations, as well as assisted counties with collection more broadly: Intellitech, a private corporation based in Ohio. Like a typical collection agency, Intellitech generally keeps a percentage of the amount it receives from an inmate. The percentage is meant to be linked to difficulty of recovery: the more difficult the recovery, the greater the company’s compensation. In some contracts, Intellitech’s cut of funds collected from incarcerated inmates is thirty percent, with the figure more than doubling to seventy

119. See, e.g., Fla. Stat. Ann. § 951.033(5); Wis. Stat. § 302.372(5); Krauth & Stayton, supra note 2, at 37 ("[D]aily subsistence fee is successful because it is taken from the inmate’s account on a daily basis. Even though approximately three-quarters of our inmates are indigent, this fee raises significant funds." (internal quotation marks omitted)).


122. About Us, INTELITECH, www.intellitechcorp.com/about.htm (last visited Oct. 31, 2013). In 2007, it was estimated that roughly sixty counties in Ohio had pay-to-stay in place and reported that “[m]any of the[s]e jails contract with the same company . . . Intellitech Corp. of Poland, Ohio.” Carol Biliczky, Summit Sheriff Wants Inmates to Pay, Akron Beacon J., July 26, 2007, at A1.

123. In the words of the director of finance for the Summit County Sheriff’s office, which hoped to work with Intellitech: “When the inmates leave the county jail . . . Intellitech becomes basically a collection agency.” Ed Meyer, Pay-for-Jail-Stay Plan Opposed, Akron Beacon J., July 31, 2007, at B2.

124. See Board Meeting: April 25, 2012, Corrs. Ctr. of Nw. Ohio (Aug. 7, 2013), available at www.cnoregionaljail.org/prbdq42512.htm (“An Intellitech representative told [Corrections Center of Northwest Ohio] board members that the higher revenue is needed to cover staff and legal costs as well as deal with poor creditors [sic., seems to have meant debtors].”).
percent for post-release inmates. 125 One academic study concluded that Intellitech was a costly option. 126 But many counties in Ohio have seen and continue to see it as necessary. 127 Intellitech has also provided its trademarked “Pay-For-Stay” services in at least eight states other than Ohio and has been involved in legislative reform efforts in at least six or so others. 128 These numbers are significant. Intellitech has been involved in pay-to-stay (in some capacity) in at least thirty percent of all states. 129 This statistic suggests that pay-to-stay programs are providing fertile ground for collaboration between the criminal justice system and the private sector.

c. Post-Release Collection

Once an inmate has been released, counties can try to collect any outstanding pay-to-stay debt using methods that tend to fall into one of two broad categories: (1) those means available to all creditors, and (2) those available to counties by virtue of their status as government creditors collecting a specific financial obligation. Within a given jurisdiction, both may be available. 130 Counties—or their designated subdivisions, officials, or other agents 131—typically may use any means that a

125. Id. (describing jail contract where jail “is entitled to 70 percent of any jail reimbursement funds collected while the inmate remains incarcerated.... once released, collection revenues are reduced with CCNO [jail] only getting 30 percent while Intellitech maintains 70 percent”).


127. See supra note 122.

128. As of 2003, the “company is involved in the legislation process in about 6 more states, and has installations in nine states now” according to Bruce Foster, VP of Sales at Intellitech. Donna Rogers, The Automation Revolution, CORRECTIONS F., Mar. 1, 2003 at 86.

129. Id.

130. See, e.g., MICH. COMP. LAWS §§ 801.87-801.83 (2013) (authorizing civil suit against inmate for reimbursement and authorizing court to make reimbursement a condition of probation); OKLA. STAT. ANN. tit. 22, § 979a(C) (West 1990) (“Costs of incarceration shall be a debt of the inmate owed to the municipality, county, or other public entity responsible for the operation of the jail and may be collected as provided by law for collection of any other civil debt or criminal penalty.”).

131. See, e.g., IDAHO CODE ANN. § 20-607(5)(a) (West 1997) (authorizing county representative to bring civil suit for reimbursement within one year of inmate's release); 730 ILL. COMP. STAT. § 125/20(a) (West 2013) (allowing the county board to request that “State's Attorney of the county in which [the] jail is located” bring civil suit against the inmate to recover incarceration expenses). Sometimes court officials are tasked with some, part or all of the collection effort, but funds collected as pay-to-stay repayment typically go to the county. See, e.g., WASH. REV. CODE § 9.94A.750(11)(a) (2013) (“[T]he administrative office of the courts shall mail individualized periodic billings to the address known by the office for each offender with an unsatisfied legal financial obligation” and the billings “shall direct payments... to the county clerk”). However, there may still be opportunities for the judicial system to collect monies for itself related to such repayment, such as fees or interest. See, e.g., COLO. REV. STAT. § 16-11-101.6(1)-(2) (2012) (requiring defendant responsible for paying for cost of jail care also to pay the court clerk at least one “time payment fee” and one or more “late penalty fees” if applicable; these fees are “credited to the judicial collection enhancement fund... in the state treasury”). Sometimes, defendants may be charged with pay-to-stay obligations both to the county and the state. See, e.g., N.C. GEN. STAT. § 7A-304(a)-(a)(2b) (2013) (requiring all defendants found
garden-variety private creditor operating in that jurisdiction could use to obtain money owed to it. These methods may involve non-judicial intervention, such as requesting the money through phone calls, letters, or other communication. It is not uncommon for counties, like many private creditors, to hire private collection agencies to perform this and other functions. The inmate may be held responsible for any cost incurred by the government's use of the collection agency. But collection costs are assessed not only when a private entity is involved; an inmate may be billed for them regardless of whether the collector is a public or a private party.

Collection methods may also involve judicial intervention if an inmate fails to pay voluntarily. Here again, counties frequently undertake a process similar to that of other creditors: obtaining and recording a civil judgment against an inmate and executing the judgment through one or more means. Depending on the jurisdiction, counties may need to bring a collection suit against the inmate in the appropriate civil court, as would ordinary creditors. Once counties have obtained a civil judgment, there are several generally available ways that they can elect to execute it, including placing liens on, garnishing, or attaching certain property belonging to the inmate.

 criminally culpable "in every criminal case in the superior or district court" be charged fee for "maintenance of misdemeanors in county jails... to be remitted to the Statewide Misdemeanor Confinement Fund in the Division of Adult Correct of the Department of Public Safety"); N.C. GEN. STAT. § 7A-313 (2013) (requiring pre-trial jail inmates pay per diem fee, unless found not criminally culpable in some fashion).

132. See, e.g., MINN. STAT. ANN. § 641.12(3)(a) (West 1946) (authorizing "[county] board, or local correctional agency or sheriff with authority over the jail... to use any available civil means of debt collection in collecting costs" of room and board from inmates).

133. See, e.g., WASH. REV. CODE § 9.94A.760(11)(a)-(b) ("[The] administrative office of the courts shall mail individualized periodic billings to the address known by the office for each offender with an unsatisfied legal financial obligation" and the billings "shall direct payments... to the county clerk.").


135. See, e.g., COLORADO REV. STAT. § 16-11-101.6(3) (permitting fees and costs of collection agent to be up to twenty-five percent of the underlying amount collected from the inmate); OHIO REV. CODE ANN. § 2929.37(D) (authorizing reimbursement coordinator to contract with private vendor to collect unpaid judgment and may "collect costs associated with enforcement of the judgment").


137. See, e.g., ILL. COMP. STAT. § 125/20(a) (West 2013).

138. See, e.g., id. (granting the county board authority to require inmate reimbursement for incarceration expenses and may request that "State's Attorney of the county in which the jail is located" bring civil suit against the inmate to recover these expenses); IOWA CODE § 356.7(1)–(2) (1994) (authorizing the sheriff, municipality, local prosecutor, or attorney for municipality to bring reimbursement suit against inmate in district court if an inmate does not pay room and board charges).

139. See, e.g., ALA. CODE § 14-6-22(c) (1975) (allowing sentencing court's assessment of costs of housing and maintenance against inmate to "be collected by any means authorized by law for the enforcement of a judgment"); COLORADO REV. STAT. § 18-1.3-701(a) (permitting judgment for cost of care...
use such techniques, as these methods come with their own financial cost that might be greater than the outstanding amount inmates owe.\textsuperscript{140}

In addition, counties often have specific techniques available when collecting pay-to-stay obligations that typical private creditors do not. This category may be subdivided further into those methods that do not require judicial intervention and those that do. For example, in at least a handful of states, counties do not need to involve the court to engage in some forms of “self-help,” such as taking funds from the commissary account (or wallet) of a former inmate who is placed back in jail custody on new charges but still has a previous outstanding pay-to-stay obligation.\textsuperscript{141} The more important difference arises with respect to court involvement, as some jurisdictions do not require counties to bring civil collection suits against inmates to obtain the equivalent of a civil judgment. The imposition of the pay-to-stay obligation by the sentencing court serves that function.\textsuperscript{142} With the sentencing court’s judgment in hand, counties may be able to proceed with typical civil collection measures, albeit sometimes under the continued jurisdiction of the criminal court.\textsuperscript{143}

Enforcing the pay-to-stay obligation against an inmate in criminal rather than civil proceedings offers counties tools that are unavailable to ordinary private creditors. It is of perhaps of greatest significance that sentencing courts are often required or have the option to make pay-to-stay reimbursement a condition of an inmate’s supervised release, be it parole or probation.\textsuperscript{144} Given the potential for a violation of these terms assessed against defendant to “be enforceable in the same manner as are civil judgments”); Tenn. Code Ann. § 41-11-107(d) (LexisNexis 2012) (authorizing court to attach inmate’s property to satisfy civil judgment for reimbursement for jail support and maintenance costs); Wyo. Stat. § 7-13-109(b) (1996) (permitting the sheriff or prosecutor to request that “clerk of the sentencing court . . . issue execution against any assets of the defendant[,] including wages subject to attachment, in the same manner as in a civil action”).

140. See, e.g., Office of the Sheriff, Macomb Cnty., Mich., Inmate Reimbursement “Pay-to-Stay” Program 3 (listing techniques including garnishing “wages, bank accounts, and tax refunds”).

141. See, e.g., Fla. Stat. § 951.033(6) (1996) (providing that “chief correctional officer may place a civil restitution lien against the prisoner’s cash account or other personal property . . . [this] lien may continue for a period of 3 years and applies to the cash account of any prisoner who is reincarcerated within the county in which the civil restitution lien was originated”).

142. See, e.g., Ala. Code § 14-6-22(c) (allowing sentencing court’s assessment of costs of housing and maintenance against inmate to “be collected by any means authorized by law for the enforcement of a judgment”); Okla. Stat. tit. 22, § 979a(C) (1990) (“Costs of incarceration shall be a debt of the inmate owed to the municipality, county, or other public entity responsible for the operation of the jail and may be collected as provided by law for collection of any other civil debt or criminal penalty.”).

143. See, e.g., Mo. Rev. Stat. § 221.070 (2013) (allowing the inmate’s property to “be levied on and sold, from time to time, under the order of the court having criminal jurisdiction in the county, to satisfy such expenses” to satisfy inmate support obligation).

to result in re-incarceration, this measure exerts considerable pressure on inmates to repay. The sentencing court may permit counties to access inmate funds—perhaps by intercepting an inmate's state income tax refund—when a standard creditor would not have such access. Other times, the effect of this jurisdiction may not be so different from that of a civil court. For instance, following a reimbursement order entered by the sentencing court, the court may modify the order following a review hearing and other authorized officials may modify payment terms.

Once payments are collected, it appears that they are most likely to go into the county's general fund, regardless of the means employed. The fund may require further allocation, such as designating a certain amount for criminal justice operations. It is not always clear whether pay-to-stay collections are intended to supplement or to replace more traditional forms of criminal justice funding. However, at least at the outset of the current phase of using pay-to-stay and other jail-related charges, it appears that jail administrators believed the intention was the former.

d. Mitigation or Elimination of Pay-to-Stay Obligation

There are two main ways in which the pay-to-stay obligation may be reduced or eliminated: inmates’ inability to pay, or proof of their innocence. First, many jurisdictions have provisions to ensure that inmates are not saddled with pay-to-stay obligations they cannot
afford. The general presumption animating this consideration appears to be that the obligation should be waived for indigent inmates and reduced for those who are not indigent but have limited means. Ability-to-pay determinations may be required or permitted at the imposition phase, the collection phase, or both. While the relevant governmental official or body must render a decision on the inmate's ability-to-pay, responsibility for commencing such assessment does not necessarily rest with the imposing or collecting authority. The inmate himself might need to raise the issue. The dominant approach seems to consider the defendant's financial circumstances, but this is by no means uniform. Indeed, the American Bar Association Journal recently stated

151. See Nat'l. Inst. of Corr., supra note 12, at 9 (finding that "[a]bility to pay is considered in most state laws that authorize charging inmates for costs of incarceration").

152. See, e.g., KRAUTH & STAYTON, supra note 2, at 40–41 (reporting jail administrators' belief that "fee policies must take into account the fact that many inmates do not have the resources to pay fees and, in fact, are often indigent... several respondents noted, 'Some revenues from fees are better than none."). But see Office of the Sheriff, Macomb Cnty., Mich., supra note 140, at 2–4 (establishing a program that does not implement a sliding per diem cost to zero).

153. See, e.g., Cal. Penal Code § 1203.12(a) (West 1982) (permitting the court to impose pay-to-stay obligation following a hearing at which ability-to-pay is determined and to require defendant on probation to appear before county officer for further consideration of ability-to-pay); Idaho Code § 20-607(5)(a) (1997) (authorizing county to bring civil suit for reimbursement "only after determining from the financial status form... that sufficient assets are available to justify further recovery efforts and that further action to collect the daily expense for maintaining the sentenced person by the county jail will not cause the sentenced person or his dependents to qualify for public assistance"); W. Va. Code § 7-8-14(b) (LexisNexis 2010) (providing that "court may not sentence a defendant to pay his or her costs of incarceration unless he or she is or in the reasonable future will be able to pay them").

154. Compare Tenn. Code Ann. § 41-11-107(c) (LexisNexis 2012) (requiring court, prior to issuing reimbursement order, to "take into consideration any legal obligation of the defendant to support a spouse, minor children or other dependents and any moral obligation to support dependents to whom the defendant is providing or has in fact provided support"), with Minn. Stat. Ann. § 641.12(3)(b) (West 1946) (requiring sheriff or head of local correctional agency to waive pay-to-stay obligation upon a determination that the inmate has no ability-to-pay but not specifying that sheriff or agency head initiate investigation of the issue).

155. See, e.g., Minn. Stat. Ann. § 641.12(3)(b) (requiring sheriff or head of local correctional agency to waive pay-to-stay obligation upon determination that the inmate has no ability-to-pay but not specifying that sheriff or administrator initiate inquiry).

156. See, e.g., Idaho Code Ann. § 20-607(5)(a) (1997) (permitting county to bring civil suit for reimbursement "only after determining from the financial status form... that sufficient assets are available to justify further recovery efforts and that further action to collect the daily expense for maintaining the sentenced person by the county jail will not cause the sentenced person or his dependents to qualify for public assistance"); Ind. Code Ann. § 36-2-13-15(c)(3)–(d)(2) (1998) (charging inmate "direct cost" of investigating indigent status but, if found to be indigent, inmate does not have to pay investigation or per diem cost); S.D. Codified Laws § 24-11-45 (1995) (sentencing judge "may waive all or part of the payment for the costs of the inmate's confinement" based on various factors of the inmate's financial situation, including "number of dependents"); Tenn. Code Ann. § 41-11-107(e) (requiring court, prior to issuing reimbursement order against inmate, to "take into consideration any legal obligation of the defendant to support a spouse, minor children or other dependents and any moral obligation to support dependents to whom the defendant is providing or has in fact provided support"); W. Va. Code Ann. § 7-8-14(b) (requiring sentencing court to make ability to pay determination before issuing reimbursement order and providing that "court may not
that although the “Supreme Court has unambiguously held that criminal defendants can’t be jailed for inability to pay through no fault of their own . . . state courts across the country routinely ignore that command and send people to jail without the required hearing to determine whether a defendant is indigent.” In addition, many reports by advocates suggest that certain courts and officials ignore inmates’ personal financial circumstances—including indigence—in imposing and collecting debts related to criminal cases, such as pay-to-stay. Even when low-income defendants are permitted to pay according to a schedule that is more feasible for them, their inability to pay the full amount owed initially may cost them more money over time. And defendants who initially have limited or no means but later obtain jobs or other sources of income may find themselves pursued for repayment at that time by counties, provided the applicable statute of limitations has not yet run.

Second, if defendants are not found guilty of the alleged crime—as a result of jury verdict, the exercise of prosecutorial decision not to proceed with the case, or other means—some jurisdictions do not need to pay for time spent in jail as a result of pre-trial custody. However, even where only convicted inmates may be charged, the bill may encompass time spent in pre-trial custody. To the extent that there has been movement on the issue of charging pre-trial detainees, it appears to have been away from the practice of doing so.

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sentence a defendant to pay his or her costs of incarceration unless he or she is or in the reasonable future will be able to pay them”). But see Okla. Stat. tit. 22, § 979A(D) (1990) (prohibiting court from waiving “costs of incarceration in their entirety”).


158. See ACLU, supra note 10, at 5–10; Bannon et al., supra note 5, at 13 (concluding that “none of the [fifteen] states studied . . . have adequate mechanisms to reduce criminal justice debt based on a defendant’s ability to pay”).

159. See, e.g., N.C. Gen. Stat. §§ 7A-304(a)(2b), 7A-304(f) (2013) (requiring that a defendant wishing to repay “monetary obligations”—including fee for “maintenance of misdemeanors in county jails”—using installment plan must “pay a one-time setup fee of twenty dollars ($20.00) to cover the additional costs to the court of receiving and disbursing installment payments”); Ohio Rev. Stat. § 2929.28(F)(3) (West 2013) (allowing offenders to be charged a “reasonable fee” when they choose “payment plan rather than lump sum payment of any financial sanction”).

160. See, e.g., Office of the Sheriff, Macomb Cnty., Mich., supra note 140, at 6 (stating that civil judgment against inmate is “good for ten years” and can be extended for another ten); Miller, supra note 62, at 2 (quoting veteran administrator of the Macomb County jail program as explaining “[w]e started out small . . . Now we’re real [sic.] aggressive with our collection techniques”).

161. See, e.g., Nat’l Inst. of Corr., supra note 12, at 8 (stating that “[m]ost state statutes addressing per diem charges to not distinguish between pretrial and post-conviction inmates” but mentioning several where only the latter must repay).


163. See, e.g., ACLU, supra note 10, at 53 (noting that Ohio state law “now allows jails and prisons to charge [fees, including room and board to] only those prisoners who have been convicted of crimes” due to “several long-running federal lawsuits”); Minnesota Supreme Court Ruling Cuts Charge for
Those current or former inmates who fail to fulfill their pay-to-stay obligation may face one or more adverse consequences, depending on the jurisdiction. At their most severe, these consequences may involve the loss of liberty, property, the right to vote, access to public benefits, access to employment, and other significant losses in key areas of life. An inmate may be incarcerated for willful failure to fulfill his obligation if doing so was a condition of probation. There is also the potential for nonpayment to result in an extension of supervision. Probation revocation is not the only path to re-incarceration. The court can hold the inmate in contempt for willful failure to follow the court’s pay-to-stay order and re-incarcerate him on those grounds. Loss of an
inmate’s property may also occur through more than one mechanism, such as garnishment or attachment to enforce a judgment obtained by the county.\textsuperscript{173}

Inmates who default on repayment may also find it difficult to obtain employment. In some jurisdictions, non-payment of a pay-to-stay obligation may be reported to credit bureaus.\textsuperscript{174} Employers increasingly use credit reports in their hiring decisions.\textsuperscript{175} Deleterious information typically remains on a credit report for seven years.\textsuperscript{176} Given the length of post-release time that some counties have to pursue inmates for pay-to-stay debt, as well as the duration of any resulting judgment, a former inmate who is delinquent in repaying could have adverse information on his credit report for several decades after completing his jail sentence.\textsuperscript{177} Such information may result in his being unable to find employment,\textsuperscript{178} which limits his ability to earn money to pay his and his family’s expenses as well as his debt to the county.

Less severe consequences of failing to repay the obligation on time may include financial penalties such as interest or late fees. The former—which may also apply to a non-delinquent pay-to-stay obligation repaid over time—is not uncommon.\textsuperscript{179} It appears often to be imposed as a matter of statutory provisions that apply to debts owed to the government from civil or criminal proceedings as opposed to measures within pay-to-stay

\textsuperscript{173} See supra Part I.B.2.c. One type of property interest deserves its own mention: government benefits. When pay-to-stay has been made a condition of probation or parole, non-payment may render an inmate ineligible for benefits he has or may disqualify him if he applies. See\textit{ Bannion et al.}, supra note 5, at 28 ("[U]nder federal law, individuals who violate a term of their probation or parole are ineligible for federal Temporary Assistance to Needy Families (TANF) funds, as well as Food Stamps, low-income housing and housing assistance, and Supplemental Security Income for the elderly and disabled.").

\textsuperscript{174} See, e.g., \textit{Bannion et al.}, supra note 5, at 27 (explaining that civil judgments—which may include pay-to-stay—are "filed with the county clerk just like any other judgment and becomes public information available for credit reporting agencies. And at least four states [all of which have pay-to-stay] affirmatively report delinquent defendants to credit agencies in some contexts, typically via private vendors contracted to help collect delinquent debt"); \textit{see also Office of the Sheriff, Macomb Cnty., Mich., supra note 140, at 3 (explaining that pay-to-stay accounts continued to appear on credit reports even after people paid them off).}

\textsuperscript{175} See \textit{Bannion et al.}, supra note 5, at 27.


\textsuperscript{177} For example, in Michigan, an inmate may be pursued in civil court for pay-to-stay debt for six years post-release, and the resulting judgment may remain in effect for one ten year term. See\textit{ Mich. Comp. Laws § 801.87(1) (2013); Office of the Sheriff, Macomb Cnty., Mich., supra note 140, at 3.}

\textsuperscript{178} See, e.g., \textit{Bannion et al.}, supra note 5, at 27 ("By damaging credit, criminal justice debt functions as ... [an] application hurdle for jobseekers.").

\textsuperscript{179} See, e.g.,\textit{ id.} at 17 (identifying practice of or authority for imposing interest on criminal justice debt—which may include pay-to-stay—in Illinois, Louisiana, North Carolina, Ohio, Pennsylvania, and Virginia). But cf. Gibeaut, supra note 157, at 54 (describing measure brought by Washington State legislators in 2011 to "allow inmates to petition to eliminate or reduce the 12 percent interest on most fines and [criminal justice] fees that accrue during incarceration. They acted after hearing horror stories such as the tale of one inmate who entered prison with a $35,000 debt that ballooned to more than $100,000 by the time he was released").
schema specifically.\textsuperscript{180} Late fees are also common.\textsuperscript{181} This device, as well as charging inmates with any collection costs,\textsuperscript{182} may cause an inmate's obligation to increase significantly over time. The next Part takes up the issue of the nature of this underlying obligation.

II. PAY-TO-STAY OBLIGATION AS GOVERNMENT-IMPOSED LOAN

The typical pay-to-stay obligation is not an easy fit into a familiar category of financial transactions between the state and its citizenry. What is the government doing and, in turn, making inmates do when it requires them to pay for the "service" of incarceration? Whether the payment is described by the relevant statute or other authority as being for room and board, a per diem, confinement, or by another label,\textsuperscript{183} the essence of the requirement is the same and the terms are therefore essentially interchangeable: inmates must pay some or all of the basic costs of being maintained in the county's custody. That is, inmates are paying for a space in a secure facility where they are constitutionally required to receive a minimally decent standard of sustenance and lodging.\textsuperscript{184} To be sure, there is a punitive air about pay-to-stay programs. The space provided to the inmates is in a carceral facility to which they have been sentenced, and being forced to pay to stay, is hardly equivalent to choosing to pay for accommodations elsewhere.\textsuperscript{185} Indeed, existing literature has frequently discussed pay-to-stay as part of a broader

\textsuperscript{180} See, e.g., 730 ILL. COMP. STAT. §§ 5/5-9-3(e), 125/20(a) (2012) (imposing nine percent annual interest rate on defaulted payments [including confinement costs] required by criminal defendants); N.C. GEN. STAT. §§ 24-1, 7A-304(6)(2b) (2013) (fixing eight percent annual interest rate as legal rate, which applies to civil judgment entered against criminal defendant for, \textit{inter alia}, costs imposed by sentencing court, which include fee for "maintenance of misdemeanors in county jails"); see also \textit{Bannon \textit{et al.}, supra note 5}, at 17 n.89.

\textsuperscript{181} See, e.g., \textit{Bannon \textit{et al.}, supra note 5}, at 17 (identifying practice of or authority for assessing financial penalties for late or delinquent payments on criminal justice debt—including pay-to-stay—in Arizona, California, Illinois, Michigan, Missouri, North Carolina, Ohio, and Texas).

\textsuperscript{182} See \textit{supra} notes 135–136 and accompanying text.

\textsuperscript{183} See, e.g., ME. REV. STAT. tit. 17-A, § 1341(1) (2012) (room and board); IND. CODE § 36-2-13-15(e) (2013) (per diem); COLO. REV. STAT. 18-1-703(1)(a) (2013) (cost of care); N.H. REV. STAT. ANN. 30-B:19(II) (2013) (costs of incarceration); TEX. CODE CRIM. PROC. ANN. art. 42.038 (2011) (confined expenses). \textit{But cf. Mont. CODE ANN. § 7-32-2245(1) (2013) (defining confinement costs broadly as including "actual medical costs"). To the extent that a term encompasses a financial obligation beyond pay-to-stay, the analysis in this Article should be understood as referring only to the pay-to-stay portion, unless otherwise indicated.}

\textsuperscript{184} See Rhodes \textit{v. Chapman}, 452 U.S. 337, 347 (1981) (holding that the Eighth Amendment guarantees prisoners "minimal civilized measure of life's necessities"); see also \textit{Tillman v. Lebanon Caty. Corr. Facility}, 221 F.3d 410, 418 (3d Cir. 2000) ("[W]hen the government takes a person into custody against his or her will, it assumes responsibility for satisfying basic human needs such as food, clothing, shelter, medical care, and reasonable safety.").

\textsuperscript{185} \textit{Cf. Tillman}, 221 F.3d at 424 (Rendell, C.J., concurring in part and dissenting in part) (referring to pay-to-stay obligation as a "sentencing consequence").
category of payments made by criminal defendants, such as monetary
sanctions or legal financial obligations, the implication being that any
payment made as the result of a criminal proceeding or conviction has a
punitive or at least unique quality. While such categorization is valid
and the resulting implications have merit, they do not offer a specific
answer to the question of what financial mechanism is at work in the pay-
to-stay transaction. Not even firmly concluding that pay-to-stay constitutes
punishment would fully answer that question in light of the various forms
that financial punishment may take.

As the aim of this analysis is to identify the financial transaction
implicated in pay-to-stay, this Part proceeds by assessing how pay-to-stay
fits into the most logically applicable familiar categories of citizen-state
financial transactions—both punitive and non-punitive—before arguing
that a new category is in fact the best fit. It should be noted that the state
and federal courts that have analyzed pay-to-stay programs have by no
means reached consensus on—or necessarily even considered explicitly—
the financial mechanism behind pay-to-stay, although they have typically
held such programs to be constitutional. This is due not just to the
complexity of the question but also to the variety of pay-to-stay
programs. The analysis that follows considers the financial mechanism
behind the typical pay-to-stay arrangement; its conclusions should not be
construed as applying to all such programs nationwide.

A. FAMILIAR FINANCIAL CATEGORIES

1. Fines and Penalties

At first glance, the pay-to-stay charge might appear to be a fine.
Fines are “extract[ed] payments, whether in cash or in kind, as
punishment for some offense.” Typically, the payments are set amounts
tied to both the severity of the offense and to the offender’s financial
circumstances, although judicial discretion also informs the amount
imposed. Other financial penalties may be the functional equivalent of

186. See supra note 35.
187. See, e.g., Wright v. Riveland, 219 F.3d 905, 914 (9th Cir. 2000) (quoting United States v.
Halper, 490 U.S. 435, 447-48 (1989)) (“Punishment, as we commonly understand it, cuts across the
division between the civil and the criminal law.”).
188. See Mitchom, supra note 19, at 188. But see Butterfield, supra note 34, at A1 (“In a few cases,
courts have sided with the inmates on specific [constitutional] issues.”). Cf. Tillman, 221 F.3d at 416
(“Courts have consistently found that there is no constitutional impediment to deducting the cost of
room and board from a prisoner’s wages.”).
189. See supra Part I.B.2.
190. Wright, 219 F.3d at 914 (internal quotations marks omitted); see Beckett & Harris, supra note
16, at 509 (“[F]ines in the United States are imposed largely at judges’ discretion; they also supplement
rather than replace other criminal sanctions.”).
192. See Beckett & Harris, supra note 16, at 514.
fines—payments imposed explicitly as punishment—but bear a different label. The Eighth Amendment limits the scope of such punitive payments, requiring that they be proportional to the severity of the underlying offense; although the precise status of the Excessive Fines Clause on states remains unclear, courts have frequently assumed that it is binding or have relied on other legal authorities for the same general principle. Pay-to-stay programs thus have been challenged on this Eighth Amendment ground, under the assumption that the pay-to-stay obligation is a fine, penalty, or similar measure. The Ninth Circuit concluded that a pay-to-stay program for Washington state prison inmates—in which a percentage of certain deposits into an inmate’s commissary account was deducted for confinement costs—was subject to this proportionality requirement of the Excessive Fines Clause but did not violate it because “[b]y definition, it seems that a fine based on a criminal’s cost of incarceration will always be proportional to the crime committed.” However, the Washington Court of Appeals did not agree that the Excessive Fines Clause even applied to this particular statutory scheme because its purpose was not punitive. Other federal circuit courts that have considered Excessive Fines Clause challenges to county

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193. See, e.g., Harris et al., supra note 54, at 1759 (listing financial “penalties” as among the potential consequences for criminal wrongdoing in California).

194. “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII. See Estelle v. Gamble, 429 U.S. 97, 102–03 (1976); McDonald v. City of Chicago, 130 S. Ct. 3020, 3035 n.13 (2010); Wright, 219 F.3d at 916; see also Nicholas M. McLean, Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause, 40 HASTINGS CONST. L.Q. 845, 872–75 (2013) (“[L]ack of clarity even on the basic question of whether the Excessive Fines Clause has been incorporated against the states.”). The Eighth Amendment is not the sole source of proportionality limitations on fines or criminal punishment generally, however; other authorities, including state common law and constitutions, contain a proportionality principle. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 133, 181 (8th ed. 2007).

195. Another potential category of financial transaction could fall under the Eighth Amendment’s protection against Excessive Fines: nominally civil measures—such as civil forfeiture—that function at least in part to punish. See Austin v. United States, 509 U.S. 602, 621–622 (1993). Under this rationale, even if the pay-to-stay obligation was found to be civil in nature, it potentially still could be construed as punishment for Eighth Amendment purposes. It should be noted that pay-to-stay is distinct from civil forfeiture in a number of ways, notably that the latter is a proceeding brought against property, not people. See BLACK'S LAW DICTIONARY 722 (9th ed. 2009). More generally, Professor McLean recently offered an argument for re-conceptualizing Excessive Fines jurisprudence to encompass considerations of the abilities of those charged punitive payments to earn their livelihoods, which offers a potential avenue for challenging the general category of criminal justice debt as applied to indigent and low-income defendants. McLean, supra note 194, at 885–93.

196. Wright, 219 F.3d at 917 (concluding—without addressing incorporation issue—that the Excessive Fines Clause applied but was not violated).

pay-to-stay programs have tended to reject them, but have typically punted on the question of the nature of the underlying obligation.\textsuperscript{198} In most jurisdictions, the underlying obligation does not amount to a fine or a penalty because it is explicitly structured as reimbursement.\textsuperscript{199} The county has the legal obligation to provide a minimally decent standard of sustenance and lodging to inmates in its custody.\textsuperscript{200} Thus, regardless of whether the inmate ever pays for his stay, he is entitled to receive room and board while under the county's control.\textsuperscript{201} That is, the county bears initial responsibility for paying for the inmate's stay.\textsuperscript{202} This arrangement runs counter to the fundamental premise of fines and penalties, which are the sole responsibility of the criminal defendant.\textsuperscript{203} Certainly, the county does not pay them. Of course, the proceeds of any fine or penalty assessed could be applied toward the county's costs in operating a jail without changing the nature of the fine or the penalty.\textsuperscript{204}


\textsuperscript{199}See, e.g., ARIZ. REV. STAT. § 13-804.01(A) (2012) (requiring misdemeanant to "reimburse the political subdivision that is responsible for the costs of the person's incarceration for the incarceration costs"); COLO. REV. STAT. § 18-1.3-701(4) (2013) (providing when "any person is sentenced to a term of imprisonment, whether to a county jail or the department of corrections, the court shall order such person to make such payments toward the cost of care as are appropriate under the circumstances"); IDAHO Code § 20-607(1) ("The county sheriff shall seek reimbursement [from inmates] for any expenses incurred by the county in relation to the charge or charges for which a person was sentenced to a county jail."); ME. REV. STAT. tit. 17-A, § 1341(1) (2012) ("[T]he sentencing court shall consider and may assess as part of the sentence a reimbursement fee to help defray the expenses of the offender's room and board [in county jail]"); TEX. CODE CRIM. PROC. art. 42.038(a) (2011) ("In addition to any fine, cost, or fee authorized by law, a court that sentences a defendant convicted of a misdemeanor to serve a term of confinement in county jail and orders execution of the sentence may require the defendant to reimburse the county for the defendant's confinement at a rate of $25 a day.").

\textsuperscript{200}See Rhodes v. Chapman, 452 U.S. 337, 347 (1981). The room and board requirement is often contained in state statutes as well. See, e.g., IDAHO Code §§ 20-612, 20-607(1) (2013) (establishing "duty of the board of county commissioners to furnish all persons committed to the county jail with necessary food, clothing and bedding" and requiring sheriffs to seek reimbursement for these expenses from inmates).

\textsuperscript{201}See Tillman, 221 F.3d at 419 (holding no Eighth Amendment violation by county pay-to-stay program where prisoner "cannot show that basic human needs were left unsatisfied. He was never denied room, food, or other necessities, regardless of his failure to pay the fees") (citing Rhodes, 452 U.S. at 347); see also Krauth & Stayton., supra note 2, at 15 ("Jails do not deny services to inmates who cannot pay" non-program fees, which are defined as "those that are assessed in relation to everyday facility operations and services.").

\textsuperscript{202}Montana offers an exception to this general rule; its pay-to-stay statute provides that "[c]onfinement costs, other than actual medical costs, must be ordered by the court and must be paid in advance of confinement." MONT. CODE ANN. § 7-32-2245(1) (2013).

\textsuperscript{203}See, e.g., Austin v. United States, 509 U.S. 602, 620 (1993) (referring to a fine as a "'traditional criminal sanction'"); see also Model Penal Code § 6.03 (Official Draft 1962) (establishing a fine as a potential sentence for a "person who has been convicted of an offense").

\textsuperscript{204}Any such scheme would need to ensure that no impermissible incentive is created for the decisionmaker to assess the fine. See Harmelin v. Michigan, 501 U.S. 957, 979 n.9 (1997) ("There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out
Indeed, a handful of jurisdictions have such a setup for their pay-to-stay programs. However, the far more common approach is to establish the statutory pay-to-stay obligation as distinct from a fine or a penalty, either by explicitly distinguishing it or by simply using different terminology, such as "reimbursement" or "repayment." It is tied instead to repaying the specific amount the county spent on the custody of an individual inmate, rather than being tied directly to the underlying criminal act committed by the inmate as a fine or a penalty would be. It is therefore generally not a fine.

2. Restitution

These payments are also not typically restitution. In the context of criminal cases, "[r]estitution refers to a payment by the offender to the victim for financial losses." Statutes in every state provide for restitution. There is certainly a plausible argument to be made that criminal restitution could provide a basis—or at least an analogy—for the pay-to-stay obligation; just as the inmate who commits assault must pay the medical costs incurred by his victim, so too must he pay some or all of the cost to the county of incarcerating him due to his crime, which by extension relieves the burden borne by its taxpayers. In this type of view, although the pay-to-stay "compensation scheme is obviously not the same as restitution, it . . . [is] a similar type of sentencing consequence." Indeed, a small number of state statutes explicitly include pay-to-stay within the auspices of their criminal restitution schemes in some fashion. It is far more common, however, to see this obligation defined

of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment, and even capital punishment cost a State money; fines are a source of revenue.

205. See, e.g., Ark. Code Ann. § 16-17-129(a)(1)(A), (C) (2012) (providing that "the governing body in which a district court is located may by ordinance levy and collect an additional fine not to exceed twenty dollars from each defendant . . . to be deposited into a fund to be used exclusively to help defray the cost of incarcerating prisoners").

206. Some statutes are quite explicit that the pay-to-stay obligation is distinct from a fine. See, e.g., W. Va. Code § 7-8-14(a) (2013) ("[I]n addition to any fine . . . a person so convicted and incarcerated in a regional jail by virtue of said conviction may be assessed the costs of up to thirty days of his or her incarceration."). Even absent such exclusionary language, references to reimbursement, repayment, or the like imply a distinction between the pay-to-stay obligation and a fine. See supra note 199.

207. Ruback & Clark, supra note 35, at 756; see also Beckett & Harris, supra note 16, at 510.


210. See, e.g., State v. Bogdan, No. 10-1156, 2011 WL 6666093, at *1 (Iowa Ct. App. Dec. 21, 2011) (describing how sheriff sought room and board cost "as part of a restitution plan" from inmate); Utah Code § 76-3-201(6)(a) (2013) ("In addition to any other sentence the court may impose . . . the defendant shall pay restitution to the county for the cost of incarceration and costs of medical care provided to the defendant while in the county correctional facility before and after sentencing.").
with the general language of reimbursement, costs, or repayment rather than labeling the requirement restitution. Thus by their own terms, state laws generally seek to distinguish pay-to-stay from restitution. This is not to say that the chosen label is dispositive of the substance of the transaction, but to observe that state statutes seem to be attempting to establish pay-to-stay using a mechanism other than restitution.

More fundamentally, the typical pay-to-stay program does not fit with the underlying principles of criminal or civil restitution. With respect to criminal prosecution, it is a stretch to say that the county or the general public is an additional victim of every crime that results in incarceration to the extent they deserve restorative payment. And it is also a stretch to say that it is a loss for the county to be required to fulfill its legal obligation to provide those individuals in its custody with basic room and board, although of course there is an expenditure of funds in doing so.

Turning to civil restitution, the concepts at play are of course quite complex and the subject of much debate. Broadly speaking, restitution in this context concerns preventing unjust enrichment by prohibiting an individual from benefitting from his own misconduct. Given the county's constitutional responsibility for providing room and board to inmates,

211. See supra note 199. Other scholars have defined the categories of economic sanctions in criminal cases to separate restitution from "costs and fees [which] refer to court-imposed orders to reimburse the jurisdiction (local, county, state) for the administrative cost of operating the criminal justice system." Ruback & Clark, supra note 35, at 755. I do not think pay-to-stay is a fee, and I see the label "cost" as more descriptive than substantive, a starting point for analyzing the nature of the transaction that occurs in pay-to-stay. But I agree with Ruback and Clark that restitution in the criminal context is generally different from pay-to-stay and other charges levied against defendants for the costs associated with their criminal prosecution and sentence.

212. See Emerson College v. City of Boston, 462 N.E.2d 1098, 1104-05 (Mass. 1984) ("[T]he intention of the Legislature, as it may be expressed in part through its characterization [of the charge]... deserves judicial respect." Ultimately, however, the nature of a monetary exaction 'must be determined by its operation rather than its specially descriptive phrase.") (citations omitted).

213. See Ruback & Clark, supra note 35, at 756 (explaining that "[r]estitution is aimed at doing justice by having the offender compensate a victim for damages caused by the crime"). Of course, a defendant that commits an offense against the county directly—such as vandalizing county property—may be said to have victimized the county. Cf. Kadish et al., supra note 194 (quoting John L. Mackie, Retributivism: A Test Case for Ethical Objectivity, in PHILOSOPHY OF LAW 678 (Joel Feinberg & Hyman Gross eds., 1991) ("[S]urely the central notion [of retribution] is not that the criminal repays a debt, pays something back to society, but that someone else pays the criminal back for what he has done."); see also Timothy D. Lytton, Should Government Be Allowed to Recover the Costs of Public Services from Tortfeasors?: Tort Subsidies, the Limits of Loss Spreading, and the Free Public Services Doctrine, 76 Tul. L. Rev. 727, 733 (2002) (describing body of case law in which government unsuccessfully brought tort suits against criminal defendants for cost of "their capture and incarceration...[t]he principle established by these cases is that the affront to governmental authority entailed by the commission of a crime does not itself constitute a tort").


216. The existence of a duty to perform a service on another's behalf does not in and of itself render restitution unavailable to the provider; to the contrary, a "claim for emergency medical services rendered in the absence of contract is one of restitution's paradigms." Id. § 20, cmt. a. The key
as well as the dubious nature of the claim that inmates benefit in any real way from incarceration, general restitution principles do not seem to offer a strong basis for most pay-to-stay programs.

3. Taxes

Pay-to-stay is also not usually understood as a tax. In general, taxes are “an enforced contribution to provide for the support of government.” Typically, such contributions are assessed on the basis of an action that an individual has undertaken or failed to undertake, such as living or working in a state, buying cigarettes, or not having health insurance in certain circumstances. As the proceeds of pay-to-stay programs appear to be directed typically toward a county’s general fund, an inmate’s financial obligation shares taxation’s function of supporting the government. Indeed, the Supreme Court of Hawaii held that a $250 so-called “service fee” for prosecution and related costs imposed on all defendants convicted of a crime in Hawaii’s first circuit was a local tax—and an impermissible one at that—rather than a legitimate fee. Although the program in question was not of the pay-to-stay variety, it is a decent analogue in one key respect: it assessed costs for the criminal justice system against defendants based on their presence in the system. The program did not assess costs based on the specifics of defendants’ individual circumstances, which pay-to-stay programs generally do by seeking reimbursement for some or all of the costs of an inmate’s actual confinement.

At least one state appellate court has specifically rejected the notion that a pay-to-stay program amounts to taxation, explaining that an inmate “is charged under the reimbursement statute his share of his jail stay. He is then taxed along with the rest of the citizens of the State to

difference between this paradigmatic scenario and pay-to-stay is that the former falls under “general principles that justify compensation for nonbargained [sic.] benefits voluntarily conferred,” whereas the existence of benefits to the inmate is dubious in the latter scenario. Id.

217. See id. § 62 (setting forth defense to restitution that “some or all of the benefit conferred did not unjustly enrich the recipient when the challenged transaction is viewed in the context of the parties’ further obligations to each other”); see also State v. Medeiros, 973 P.2d 736, 744 n.8 (Haw. 1999) (responding to government’s argument that criminal punishment benefits the criminal by footnoting passage from George Orwell’s novel Nineteen Eighty-Four).


219. See, e.g., MASS. GEN. LAWS ch. 62C, § 6(a) (2012) (establishing filing requirements for Massachusetts income taxes); MASS. GEN. LAWS ch. 64C, § 1 (defining tobacco products for taxation purposes); Sebelius, No. 11-393 slip op. at 35-37 (describing “[s]hared responsibility payment as a tax” that will be due for those required to have health insurance who do not have it).

220. See supra Part I.B.2.c.

221. See Medeiros, 973 P.2d at 742; see also In re Pers. Restraint Petition of Metcalf, 963 P.2d 911, 921 (Wash. Ct. App. 1998) (responding to challenge by state prisoner to statutory scheme requiring deductions from prison wages and all outside monies deposited into account by stating that “deductions operate essentially like a tax on prisoners, not as a punishment”).
pay for any inmates that are unable to pay reimbursement for their stays.\footnote{222} In other words, the pay-to-stay obligation is predicated on what the inmate has received from the government, whereas taxation is grounded in what contribution the inmate owes to the government based on some general heuristic.\footnote{223} That pay-to-stay revenue winds up in the general fund does not, in and of itself, establish the basis for levying the obligation. The distinction between reimbursement and a general support obligation thus argues for declining to view the typical pay-to-stay reimbursement arrangement as a form of taxation.\footnote{224}

4. \textit{Fees}

Among the types of familiar financial transactions, pay-to-stay programs seem most likely fall under the fees category. On a formal level, judicial decisions approve of the fee language for pay-to-stay programs.\footnote{225} Some state statutes also use the term,\footnote{226} although the more common

\begin{footnotes}
\item[222] State v. Bogdan, 810 N.W. 2d 25, *2 (Iowa Ct. App. 2011) (citing S.P. Conboy, Note, Prison Reimbursement Statutes: The Trend Toward Requiring Inmates to Pay Their Own Way, 44 Drake L. Rev. 325, 327 (1996)); cf. Wright v. Riveland, 219 F.3d 905, 911 (9th Cir. 2000) (holding that state prison reimbursement scheme—in which a percentage of some deposits into inmate trust accounts was deducted for inmate maintenance—was not a tax for purposes of the federal Tax Injunction Act); State Reimbursement for Prisoners’ Maintenance, supra note 52, at 1305 (describing requirement that state prisoner pay reimbursement for his maintenance costs as “not a tax at all, but merely payment for a special, if somewhat peculiar, service which the prisoner receives”).
\item[223] Whether a taxpayer receives any service from a local tax levy is irrelevant to whether the levy complots with the uniformity principle, an important limit on local taxation. See Laurie Reynolds, Taxes, Fees, Assessments, Dues, and the “Get What You Pay For” Model of Local Governance, 50 Fla. L. Rev. 373, 383–84 (2004).
\item[224] This is not to say that the commonalities between pay-to-stay and taxes—namely, that they go to raise general revenue—are entirely irrelevant. See Bannon et al., supra note 5, at 30 (“Concerns arise . . . when courts are used to collect fees that go to . . . general revenue,” including that “clerks . . . [turn] into general ‘tax collectors’”); see also McCormack, supra note 35, at 239 (“Misdemeanor [economic] sanctions often instead [of just punishment] resemble an ad hoc occasion for excessive county taxation.”).
\item[225] See, e.g., Slade v. Hampton Roads Reg’l Jail, 407 F.3d 243, 254 (4th Cir. 2005) (citing United States v. Sperry Corp., 493 U.S. 52, 63 (1989)) (stating that “a strong argument can be made that the charge at issue [county pay-to-stay program] is a ‘reasonable user fee’ and not a taking,” but not whether the court accepted this argument); Sickles v. Campbell Cnty., 439 F. Supp. 2d 751, 754 (E.D. Ky. 2006) (referring to county pay-to-stay charges as fees and noting that courts have “uniformly recognized that the imposition of such fees is valid”); cf. Waters v. Bass, 304 F. Supp. 2d 802, 809 (E.D. Va. 2004) (citing Tillman v. Lebanon Cnty. Corr. Facility, 221 F.3d, 410 420 (3d Cir. 2000)) (finding that room and board charge in city jail was a non-punitive fee that was not “excessive” in any realistic or constitutional sense”). But cf. Medalinos, 973 P.2d at 745 (holding that so-called “service fee” for prosecution and related costs levied against defendants was not a valid fee based on modified Emerson College test).
\item[226] See, e.g., Kan. Stat. § 19-1930(e) (2012) (permitting board of county commissioners to require a jail inmate “to pay to the county a fee . . . to help defray the costs of maintaining such inmate in the county jail”); Va. Code § 53.1-131.3 (2013) (permitting sheriff or jail superintendent to “charge [jail] inmates a reasonable fee . . . to defray the costs associated with the prisoners’ keep”). Some statutes speak both of reimbursement and of fees, characterizing the reimbursement as taking the form of a fee. See, e.g., Ky. Rev. Stat. Ann. § 534.045(1) (West 2013) (permitting court to assess against
\end{footnotes}
approach is to use language of reimbursement or repayment. And on a substantive level, categorizing the pay-to-stay obligation as a fee makes sense. The inmate is required to pay for some or all of the costs of his time in jail; that is, he is paying the county for something the county is doing related to him. In general, fees have been described as a "pay for play" set-up: to receive a service, good, license, permission, or similar item from the government, the recipient must pay. Fees are typically classified as either user fees or regulatory fees; the former are "charges levied by the government in exchange for citizen use of government services or property," while the latter "are based more broadly on the government's police powers and are imposed on a regulated individual . . . in order to offset the cost of the regulation." Pay-to-stay seems like it could fall into either category: the inmate is using the jail facility, and the government is regulating him at no small cost itself. Upon closer inspection, however, pay-to-stay charges are not actually either type of fee but a distinct type of "transfer of funds.

Valid user or regulatory fees require, inter alia, that the payor somehow benefit from that for which he pays, be it from a service directly to him or from a more general regulatory scheme. Here again, it is difficult to contend that an inmate-payor is benefitting from his time in jail; that he receives secure accommodations and basic sustenance—as opposed to being handcuffed by the sheriff in the middle of a county park, for example, without access to food or drink—does not mean he is benefitting so much as being kept from the harm that could befall him when he is unable to provide for himself due to his custodial status. Indeed, in response to an argument from a local government that criminal defendants enjoy some degree of benefit from being punished

misdemeanants sentenced to county jail "a reimbursement fee to help defray the expenses of the prisoner's room and board"). Such configuration seems to suggest that the legislature was attempting to set up a distinct mechanism from a typical fee. For a typical fee, the government would not pay the fee first itself then get reimbursed.

See supra note 199.

See Reynolds, supra note 223, at 376 n.14.

Id. at 407.

Tillman, 221 F.3d at 417 (reserving question of whether pay-to-stay obligation in county jail was fee or fine).

See Reynolds, supra note 223, at 410. Voluntary payment—generally absent in pay-to-stay schema—has traditionally been another requirement for a valid fee; however, I do not focus on this factor because it has eroded in recent years. See, e.g., State v. Medeiros, 973 P.2d 736, 741-42 (Haw. 1999) (discussing erosion of voluntariness requirement for valid fees). But see Mitchom, supra note 19, at 200 ("[I]f pay-to-stay is to be characterized as a simple administrative fee . . . it is radically different than other such fees" because payment is not voluntary).

While I recognize that philosophical arguments could be made that the absence of harm is itself a benefit, I seek to make a more commonsensical observation: being incarcerated is not generally understood to be a positive experience for the inmate, even if it could be worsened. And even within philosophical discourse, common sense does have a role to play. See SHELLEY KAGAN, NORMATIVE ETHICS 25 (1998) (identifying "common moral outlook which we might call common sense morality").
(the goal of the prosecution for which they were being charged the so-called “service fee” at issue in the case), the Supreme Court of Hawaii simply dropped a footnote to a passage from the novel *Nineteen Eighty-Four.* While the Court’s manner may have been somewhat snarky, the underlying point is serious: the carceral experience cannot generally be called positive—or even humane.

With respect to user fees, not paying the fee generally makes the would-be user ineligible for the good or service in question. For instance, an individual wishing to visit a county zoo must pay for admission. In contrast, non-payment of the pay-to-stay obligation should never render an inmate ineligible for jailhouse room and board. Thus, pay-to-stay

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233. *Medeiros*, 973 P.2d at 744 n.8 (depicting dystopian future of totalitarian government). But cf. *Wright v. Riveland*, 219 F.3d 905, 911 (9th Cir. 2000) (describing reimbursement scheme for state prison inmates as “more akin to a regulatory fee than a tax” because it “is used to defray the cost of incarcerating the inmates”). Versions of this debate have played out across the country in non-judicial arenas. See, e.g., *Sherman*, supra note 73, at *n* (“Some county officials view the inmate fees like any other charge for service—people who rent county park shelters pay a fee, so why shouldn’t they pay when they are sleeping over at the jail? Others say that’s a faulty analogy because people choose to rent a park shelter while they typically don’t ask to go to jail.”).

234. See Jeannie Suk, *Redistributing Rape*, 48 AM. CRIM. L. REV. 111 (2011) (“Prison is hell.”); see also Alexandra Napolitoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1322-23 (2012) (explaining how “jails are functionally similar to prisons” in exposing inmates to threats of rape and disease). It should be noted that an actual benefit is not always necessary to sustain a regulatory fee; instead, such a fee “will be upheld if it is levied in ‘reasonable relationship to the social or economic ‘burdens’ that [the fee-payer’s] operations generated.’” *Reynolds*, supra note 223, at 417. Certainly, the cost imposed by a typical pay-to-stay program bears a “reasonable relationship” to maintaining an inmate, but whether it is a burden for a county to maintain the inmate—given that the government has chosen to hold him in custody and thus has a constitutional duty to give him room and board—is less clear. Even if maintaining the inmate constitutes a burden, however, another general principle of valid fees (of both types) would tend to keep pay-to-stay from being construed as a valid regulatory fee: “local governments . . . [must] carefully segregate fee revenues and spend the proceeds solely on the endeavor assessed for the fee.” *Id.* at 413. Revenue from typical pay-to-stay programs does not appear to be segregated but goes to county general funds. See *supra* note 148 and accompanying text. And the typical pay-to-stay program does not cover rehabilitation costs, which may be assessed separately. See *supra* note 13.

235. Cf. *Medeiros*, 973 P.2d at 741 (describing user fees as “based on the rights of the [governmental] entity as a proprietor of the instrumentalities used”). Proprietors and providers do not tend to give away goods or services for free, although some may in certain circumstances, such as health care professionals required by law to provide care regardless of a recipient’s ability to pay. See Nat’l Ass’n Indep. Bus. v. Sebelius, No. 11-392, slip op. at * (S. Ct. June 5, 2012) (Ginsburg, J., concurring in part and dissenting in part) (“Unlike markets for most products . . . the inability to pay for [health] care does not mean that an uninsured individual will receive no care.”). With respect to regulatory fees, payment is generally necessary to continue to engage lawfully in the activity being regulated, but other conditions attach as well. See, e.g., *United Bus. Comm’n v. City of San Diego*, 154 Cal. Rptr. 269, 269 (Cal. Ct. App. 1975) (citation omitted) (“In general . . . where the fee is imposed for the purpose of regulation, and the statute requires compliance with certain conditions in addition to the payment of the prescribed sum, such sum is a license proper, imposed by virtue of the police power; but where it is exacted solely for revenue purposes and its payment gives the right to carry on the business without any further conditions, it is a tax.”).

236. *See Medeiros*, 973 P.2d at 743-44.

237. *See supra* notes 184, 201.
programs are in tension with the “pay for play” nature of fees in a fundamental way: inmates actually never need to pay to in order to stay.

B. GOVERNMENT-IMPOSED LOANS

Inmates have a constitutional right to receive room and board regardless of whether they fulfill their pay-to-stay obligation, but those inmates who pay all charges contemporaneously with their custody do not pay directly for their maintenance. Rather, the government provides the room and board—entering into all necessary arrangements, contractual and otherwise, with the relevant providers. The inmates then reimburse the government for its expenditures, which will be made regardless of whether or not an inmate is paying for his stay. The government is thus the initial payor, essentially advancing funds to inmates to cover room and board.

In many relevant respects, this arrangement resembles yet another familiar model of government-citizen financial transactions, albeit not usually on the local level: student loans. In the most general context, a loan is understood as a “thing lent for the borrower’s temporary use,” which when applied to finances is typically “a sum of money lent at interest,” although loans may be interest-free as well. In the context of educational debt, the student bears legal responsibility for all or part (if she receives scholarships or a tuition discount or waiver) of the cost of attending a given program. Typically, she cannot pay this cost up front, so she applies for assistance, at least part of which is likely to come from government loans. If she is approved, an assessment process that generally includes factors such as “financial need,” the government will loan her funds to cover part or all of her tuition and related costs up to

238. See supra note 201.
239. There are multiple student loan programs available to eligible students through both the federal and state governments. See Deanne Loonin, Nat’l Consumer Law Ctr., Student Loan Law §§ 1.4.1, 1.4.2 (3d ed. 2006 & Supp. 2009). Their details are quite complex. For purposes of this current analogy, this Article refers to the government student loan mechanism in the most general sense—the government originating or facilitating the origination by private lenders of funds to students for educational use—without analyzing details of any more specific model.
241. See id. at 1020.
243. Loonin, supra note 239, § 1.4.3. Notably, students seeking to borrow federal loans “do not have to prove creditworthiness.” Id. § 1.5.2.
The government transfers the money directly to the school, meaning that the student may never have it in her possession. The government transfers the money directly to the school, meaning that the student may never have it in her possession. After the student has completed her course of study, she must repay the government a specified amount, along a set timeline, with interest accruing. She may set up a direct debit arrangement from her bank account. If she does not make her regular payments in full and on time, she is subject to penalties, ranging from late fees to interception of her income tax refund to payment of collection costs to being sued. However, her non-payment does not strip the school of any loan funds that have already been transferred to it. Her payment status is likely to be reported to credit bureaus, which in turn impacts her credit score and her ability to borrow on good terms in the future. The effects of the loan thus can significantly outlast even the already long loan term. Typically, student debt may not be discharged using the bankruptcy process.

Pay-to-stay programs function in a surprisingly similar manner. The inmate is made legally responsible for the costs of his room and board. The government pays them initially then requires the inmate to reimburse it for all or part of its expenditure. Direct account debit may be used. Repayment terms are based on various factors, including the inmate’s ability to pay. Over the course of repayment or in the event of nonpayment, the inmate may be required to pay interest, late fees, collection costs, or be subject to penalties such as the garnishment of his income tax refund. Nonpayment does not mean that the relevant providers will not get paid for the maintenance that the inmate received. His payment status may be reported to credit bureaus, which carries consequences for his borrowing potential, as well as for his employment and other matters. The effects of the pay-to-stay obligation may be quite enduring, and bankruptcy does not usually offer relief.

244. See id. §§ 2.2, 2.6.
245. See id. § 2.6.
246. See id. §§ 2.7.2–3.
248. See Looini, supra note 239, §§ 4.4.1 (collection costs and late fees), 5.2.1 (tax refund interceptions), 4.3.4.2 (collection lawsuit).
249. See generally id. § 4.3.4.2.
251. See supra Part I.B.
252. See supra Part II.A.1.
253. See supra Part I.B.2.b.
254. See supra Part I.B.2.d.
255. See supra Part I.B.2.e.
256. See supra Part I.B.2.e.
257. See Lewandoski, supra note 250, at 205 (explaining that inmates’ “bills for prison room and board may come under § 523(a)(7)” of the Bankruptcy Code and be non-dischargeable as “penalties that
Still, there are important differences between the student loan and pay-to-stay models. Perhaps most crucial is that student loans are assumed voluntarily, whereas the pay-to-stay obligation is imposed by the government to recoup costs for which the government would otherwise bear responsibility. For this reason, the pay-to-stay obligation should be understood as a distinct type of loan: a government-imposed loan that results in mandatory borrowing by the debtor. While other scholars, as well as some advocates, have recognized that the pay-to-stay obligation results in a general debtor-creditor relationship between the inmate and the government—and at least one has recognized that public defender reimbursement amounts to a loan—it does not appear that they have articulated and explored a model of the debt specifically as a loan imposed on the inmate.

Upon first glance, this Article’s contribution, replacing the term creditor with that of lender, might seem to be a matter of semantics. It is common to think of the terms creditor and lender as synonymous; indeed, in many—but not all—contexts, they are. A creditor is the person to whom a debt is owed, whereas a lender is a person or entity from whom something is borrowed, often money. Borrowing is the receiving of money “with the understanding or agreement that it must be repaid,” usually with interest. While it seems fair to characterize all lenders as creditors, not all creditors are lenders; that is, not all creditors intend to remedy financial loss... [even] if compensation is not their primary purpose”) The specifics of the statutory scheme imposing the pay-to-stay obligation may be dispositive of the issue of non-dischargeability: “If a debt to the government is assessed in separate punitive and pecuniary components, some states allow the pecuniary component to be discharged under Chapter 7.”

See Beckett & Harris, supra note 16, at 517-18 (stating that “legal debt [which may include pay-to-stay] is an especially injurious type of financial obligation; unlike consumer debt, it is not offset by the acquisition of goods or property and might trigger an arrest warrant, arrest, and/or incarceration”)

258. See Beckett & Harris, supra note 16, at 517-18 (stating that “legal debt [which may include pay-to-stay] is an especially injurious type of financial obligation; unlike consumer debt, it is not offset by the acquisition of goods or property and might trigger an arrest warrant, arrest, and/or incarceration”)

259. See, e.g., Lewandoski, supra note 250, at 247 (“The role of local... governments as the ultimate creator or assignee of a large amount of debt [which may include pay-to-stay charges] burdening impoverished former criminals makes them unique as creditors.”). See generally Beckett & Harris, supra note 16; see also BANNON ET AL., supra note 5, at 27 (arguing that “states have not considered whether turning defenders into debtors is consistent with the need to reduce recidivism, reduce over-incarceration, and promote reentry”). At least one federal court of appeals has begun to explore how an inmate may assume the role of a debtor and the state a creditor in disputes involving inmate trust accounts. See Burns v. Pa. Dep’t of Corrs., 544 F.3d 279, 291 (3d Cir. 2008) (holding, for the first time among federal circuit courts, that “[t]hrough its assessment” of inmate’s trust account for costs resulting from harm inmate caused to another inmate, “the Department of Corrections attained a status akin to a Judgment Creditor”).

260. See Anderson, supra note 8, at 371.

261. BLACK’S LAW DICTIONARY 424 (9th ed. 2011).

262. Id. at 985.

263. Id. at 209. Interest is significant but not dispositive; interest free loans exist. See id.

264. See id. (providing a secondary definition of a creditor as “one who gives credit for money or goods”).
offer money to be borrowed. This distinction is subtle but may be meaningful in certain contexts. For instance, creditors may be owed debts by individuals or entities that are not grounded in the creditors' having made money available to them. Debts may arise from failure—by debtors—to fulfill a legal obligation unrelated to any type of loan agreement, such as paying criminal restitution or fines. Even traditional fee-for-service providers may become creditors when recipients of their services fail to pay, but it does not follow that they affirmatively enter into an agreement with these recipients to let them borrow money. In these and other scenarios, a creditor-debtor relationship exists, but it is not predicated on lending money. Identifying the pay-to-stay transaction as a government-imposed loan—rather than categorizing it more generally as a credit arrangement—thus provides a more specific model of the financial mechanism undergirding pay-to-stay programs than has been discussed to date. Furthermore, this understanding reveals that jail housing—in many jurisdictions— Involves a government-created marketplace grounded in loans imposed on inmates. The final Part of this Article discusses the normative implications and desirability of such an imposed loan market.

III. Assessing Government-ImposeD Loans

This Part offers an initial assessment of the desirability of employing government-imposed loans in connection with core services that state or local governments are legally obligated to extend—by constitutional,
statutory, or other sources of law—through their police powers.\textsuperscript{269} At its most general, an imposed loan may be defined as the requirement that citizens who receive government services reimburse the government for the cost of services based on their ability to pay. As with a familiar consumer loan—like the student loan—the repayment obligation takes place along a set timeline according to certain terms, such as the accrual of interest and late fees for missed payments.\textsuperscript{270} The government may report non-payment to credit bureaus or take other collection actions.\textsuperscript{271} Central to the model is that non-payment does not result in non-provision of services.\textsuperscript{272} This analysis centers on the use of imposed loans in the jail housing market but also considers other arenas in which they are or could be used.

This Part claims that the imposed loan could extend beyond the jail-housing context and has done so already in certain other areas where individuals receive services as a result of personal misdeed or misfortune.\textsuperscript{273} It continues by arguing that the use and potential expansion of the imposed loan raises concerns related to two main areas: citizen privacy and effective governmental service provision, both with respect to the service to which the loan is attached as well as others. Assuming for the moment that the loan mechanism is ethically acceptable\textsuperscript{274} it is still less desirable if the money it raises comes with

\begin{footnotesize}
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\item It is difficult to provide a comprehensive definition of such services, but one set of recent examples is those “vital functions of modern government—punishing street crime, running public schools, and zoning property for development, to name but a few . . . [provided under] this general [police] power of governing, possessed by the States.” Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2578 (2012).
\item See supra Part II.B.
\item See supra Part II.B.
\item See supra Part I.B.2.d. Without this constraint, this mechanism could be somewhat more vulnerable to constitutional challenge on Equal Protection grounds or, in the specific context of pay-to-stay, Eighth Amendment violations. See supra notes 184, 194. In general, governmental programs that treat people differently based on their financial means are subject only to rational basis review under the Equal Protection Clause of the Fourteenth Amendment. But see Harris v. McRae, 448 U.S. 297, 323 (1980) (stating that state anti-abortion programs discriminating against indigent women are subject only to rational basis). Thus there exists a wide range of services that government could provide using imposed loans—even with no ability-to-pay requirement—without running afoot of the Equal Protection guarantee. Conventional fees would likely pass muster as well. Cf. Douglas v. California, 372 U.S. 353, 361 (1963) (“Every financial exaction which the State imposes on a uniform basis is more easily satisfied by the well-to-do than by the indigent.”). Nonetheless, the imposed loan with an ability-to-pay requirement offers the government an advantage: it would be even more difficult for an Equal Protection claim to gain any traction.
\item See infra Part III.A.
\item Future work will examine ethical arguments regarding the normative desirability of the imposed loan model, with particular attention to considerations of consent (for example, whether inmates are implicitly consenting to imposed loans when they commit crimes; whether citizens are implicitly or explicitly consenting to their local or state government functioning as a voluntary creditor; and the like). If incarceration benefits society collectively—through incapacitation, for instance, or by fulfilling a moral requirement to mete out retribution—then perhaps the public should be paying the core costs of this shared benefit rather than creating a “captive market” of individual
\end{enumerate}
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significant consequences from an operational standpoint. Examination of the imposed loan model—with a focus on the real-world experience of pay-to-stay programs—suggests that such costs may be inherent in its structure. On balance, then, it does not appear that the basic consumer loan model translates smoothly into a loan imposed by the government on involuntary, captive borrowers.\textsuperscript{275}

A. BEYOND PAY-TO-STAY

Pay-to-stay programs are not the only existing manifestation of government-imposed loans.\textsuperscript{276} Versions of this model exist in certain other arenas, including juvenile justice, search and rescue, and emergency responder services.\textsuperscript{277}

1. Juvenile Justice

Many states have statutes requiring parents to pay for some or all of the costs related to delinquency proceedings brought against their children; such cases are triggered by alleged acts that would be criminal if the perpetrator were an adult.\textsuperscript{278} It is not uncommon for this obligation to be structured as an imposed loan with some type of ability-to-pay analysis: the government provides the service and then requires reimbursement—in some amount, with certain terms—by the parents.\textsuperscript{279} The parents' financial obligation may outlast the duration of the child's time in the state system.

\textsuperscript{275} This is not to say that citizens' choices have no impact on whether they incur an imposed loan, but that these loans are imposed regardless of whether or not citizens willingly and explicitly consent to the particular debt. Put another way, citizen-borrowers are likely not to want the debt (volition), not to know a given action will result in the imposition of a debt (cognition), and not to have readily means of disposing of the debt (exist).

\textsuperscript{276} This observation is particularly true with respect to criminal defendants. The imposition of certain costs associated with prosecution and punishment other than incarceration—such as bills for public defenders—may also follow more or less an imposed loan model wherein counsel is provided with the government paying the up-front cost and the defendant providing reimbursement. See supra notes 5–15 and accompanying text.

\textsuperscript{277} This list and the examples that follow are meant to be illustrative, not comprehensive.

\textsuperscript{278} See Eve M. Brank et al., Parental Responsibility Statutes: An Organization and Policy Implications, 7 J. L. & FAM. STUD. 1, 40–55 tbl.3 (2005) (listing state statutes which place various financial obligations on parents of delinquents, such as paying for court costs or for services provided to child).

or even the child's minority. Consequences for non-payment may be severe. For instance, "at least one Michigan court has gone so far as to jail a mother whose only crime was that she was too poor to pay for her son's incarceration at a juvenile hall," and then bill her for her own room and board while in jail.

2. Search and Rescue

Some state and local governments are legally permitted to bill recipients of search and rescue services: the service is supplied regardless of ability to pay, then—in certain circumstances—the government may seek reimbursement from the rescued party. The amount of reimbursement may be subject to negotiation, and ability to pay is often a factor. In New Hampshire (perhaps the national leader in seeking search and rescue reimbursement), imposing this financial obligation is the result of an individualized determination by a group of government officials. The service recipient's financial circumstances may play an important role, even if the statute does not explicitly require an ability-to-pay assessment. For example, an Eagle Scout stranded with a sprained ankle on a snow-covered mountain in New Hampshire was praised for "his personal heroics" by state officials following his rescue. The scout voluntarily sent $1000 to the state. Sometime later, New Hampshire sent him a bill: more than $25,000 for the cost of rescuing

280. See, e.g., N.H. REV. STAT. ANN. § 169-B:40.
281. ACLU, supra note 10, at 35 (reporting that the mother "was homeless and working part-time[,] ... [t]he judge found her in contempt for failing to pay and jailed her ... . [S]he was released for one day to work. She then picked up her $178.53 paycheck from work, hopeful that she now could pay the $104 [for her son's incarceration] to get out of jail. Upon her return to the jail that evening, however, the sheriff forced her to sign over her check to the jail to cover $120 for her [own] 'room and board'").
283. See id. at 1420-21.
285. See Search and Rescue FAQs, N.H. FISH & GAME, http://www.wildlife.state.nh.us/Law_Enforcement/sar_funding__FAQs.html (last visited Oct. 31, 2013) ("All cases are unique and not all will get billed."); see also Nina Keck, Schussing Down Slopes Can Snowball Into a Search-and-Rescue Bill, N.H. PUB. RADIO (Jan. 23, 2013) (transcript available at http://www.npr.org/2013/01/23/169522284/schussing-down-slopes-can-snowball-into-a-search-and-rescue-bill) (stating that New Hampshire has collected "only about two-thirds of the $85,000 they've billed in the past five years").
287. Love, supra note 284.
him. Eventually, he was found not liable for the cost, based in part on his inability to pay.

3. Emergency Response

In addition to search and rescue services, some local jurisdictions are using a version of the imposed loan in connection with emergency services more broadly: charging “fire and accident victims across the country ... for fire department services once funded solely through taxpayer money.” So-called “crash” or “accident” taxes are being imposed on “a growing number” of people nationwide. These so-called taxes are sometimes a straightforward user fee, where service will be denied for non-payment. However, in other instances, the mechanism at work is actually a type of imposed loan: services are provided up-front with no payment required, followed by bills to recipients, although it does not appear that an ability-to-pay assessment is a formal requirement in the process. Such a requirement could help alleviate mounting criticism of this practice, which at least several states now prohibit.

4. Imposed Loan Expansion

Currently, a version of the imposed loan model is employed in certain situations in which an individual requires specific governmental action on his behalf due to personal misdeed (criminal conduct, negligent hiking, lax parenting) or misfortune (lightning strike of a home, misconduct by a mentally ill child). In theory, then, as long as no legal impediment exists with respect to billing recipients for a specific service,
imposed loans could be extended in conjunction with a number of other services a state or local government provides to citizens that have committed or been subject to some type of bad or unfortunate act.\textsuperscript{296} Especially if budgetary constraints continue, such an option is likely to appeal to governments.\textsuperscript{297} Moreover, the imposed loan model would be consistent with a current spirit of innovation among some local governments with respect to charging recipients directly for the services they receive. For example, several years ago the government of Colorado Springs, Colorado, shut off access to many public services due to funding constraints but allowed interested individuals to pay directly to restore a particular amenity. During this time, “Colorado Springs became an unusual place, a city where the people who could afford streetlights paid for them, a la carte. Others lived in the dark. It was like the capital of some very snowy, unusually affluent third world country.”\textsuperscript{298} In some respects, using an imposed loan would have been better, as access would not have been denied for those who could not pay for the service. Imposed loans are likely to trigger other issues, however, which the next Subpart explores.

**B. Concerns about Imposed Loans**

The potential for additional revenue is arguably the strongest argument in favor of the imposed loan mechanism. Even if such a scheme makes money, which has not been the universal experience of counties using pay-to-stay programs,\textsuperscript{299} there are countervailing concerns about the impact of imposed loans on citizen privacy, as well as the dynamic effects of loan imposition on governmental service provision. Although not all instances of imposed loan use will encounter all or any of the potential difficulties discussed below, the very structure of the loan invites them.\textsuperscript{300}

\textsuperscript{296} For instance, imagine “pay-to-plow,” wherein unfortunate residents of snow-covered neighborhoods were required to assume an imposed loan for their share of gaining access to public streets.

\textsuperscript{297} See supra notes 70–71 and accompanying text.


\textsuperscript{299} See, e.g., News Section, CINCINNATI ENQUIRER, Feb. 14, 2010 (describing how Butler County, Ohio ended its pay-to-stay program because the “state auditor insisted ... because it [the program] wasn’t collecting any money” but “Macomb County, Mich., claims to be the granddaddy of all pay-to-stay programs, raking in more than $1 million a year”).

\textsuperscript{300} More familiar financial mechanisms are by no means devoid of structural issues; however, the goal of this analysis is to focus on such issues in the imposed loan model.
1. Privacy

In order to tailor the imposed loan's terms to an individual's financial circumstances the government will need to obtain a significant amount of information about her income, assets, expenses, and related areas. For example, the jail in Macomb County, Michigan requires inmates to complete a "financial history" form documenting all sources of income, including loans and debts, and the "type and value of personal property." New Hampshire courts may require individuals whose ability to pay an obligation—such as parental reimbursement—is at issue to complete a more extensive affidavit, which includes questions about expenses for alcohol and tobacco, pet food and care, and therapy and counseling. Of course, both of these groups—inmates and parents made parties to a delinquency case—are legally obligated to submit to all manner of government scrutiny, which makes the submission of financial details more of an insult upon a larger injury. However, for those mandatory borrowers not already subject to governmental monitoring, sharing such details is likely to be regarded as an injury in itself. That getting hurt on a hike or living in a home hit by lightning could trigger government review of personal financial information is a rather surprising consequence. Even if such review is not statutorily required for the reimbursement obligation to attach, it is likely to occur, at least for those individuals that cannot afford to pay and need to demonstrate their situation to the government.

Depending on the duration of the loan obligation—usually set by statute—mandatory borrowers could be required to share this information with government officials, agencies, or courts well past the duration of the service itself. To return to the previous examples, Macomb County presents itself as taking full advantage of all collection avenues available once an inmate has been released and notes that it can seek collection on judgments for up to twenty years after issue. And New Hampshire requires parents to submit annual financial information to the relevant court for up to four years after services to the child have ended so that

301. Cf. Ronald F. Wright & Wayne A. Logan, The Political Economy of Application Fees for Indigent Criminal Defense, 47 WM. & MARY L. REV. 2045, 2046 (2006) (explaining that "traditional 'recoupment' statutes [for costs of counsel appointed to indigent defendants] require a great deal of judicial effort to sort the truly indigent from those with more resources").
304. See Brank et al., supra note 278, at 11; see also Suk, supra note 234, at 111.
305. See supra Part III.A.3. Cf. Mary Fainsod Katzenstein & Mitali Nagrecha, A New Punishment Regime, 10 CRIMINOLOGY PUB. POL’Y 555, 564 (2011) (concluding that “nothing is ‘simple’ in assessing an individual’s ‘ability to pay’”).
306. See supra note 160 and accompanying text.
the court can determine an appropriate reimbursement amount.\textsuperscript{307} The imposed loan structure thus contemplates an ongoing, fairly long-term relationship between the government (or its agent) and the service recipient that may require the continued sharing of personal information—unless, of course, the recipient has the means to retire the debt immediately.

2. \textit{Governmental Service Provision}

An individual’s financial circumstances are likely to change over time. The imposed loan model not only captures information about these changes but potentially incentivizes such changes as well—and not necessarily positive ones, either for the individual or for the prospects of governmental service provision more broadly. Once subject to an imposed loan regime, borrowers who never sought the obligation may seek opportunities to avoid repayment. That consumer borrowers do this in other contexts—even when they have voluntarily entered into a loan\textsuperscript{308}—is all the more reason to suspect that they might do so when they never explicitly agreed to the loan in the first place. Indeed, in jurisdictions such as Macomb County that are vigilant about pursuing pay-to-stay debts after an inmate’s release, the government may create an incentive for former inmates not to work in order to keep their incomes below the threshold for repayment.\textsuperscript{309} The difficulty of finding post-incarceration employment may be exacerbated by the presence of debt associated with the criminal case.\textsuperscript{310} It seems misguided for the government to create an additional incentive—no matter how slight—to eschew gainful employment perhaps in favor of illegal means of making money.\textsuperscript{311}

The difficulty of calibrating the proper dollar amount to achieve maximum revenue from repayment, while not creating additional costs for the government, is not limited to the pay-to-stay context. In general, the imposed loan model puts the government in a tight spot; in order to raise revenue from the model, it must charge a reasonably high rate—one at least sufficient to offset its collection costs. As the rate is linked to


\textsuperscript{308} See, e.g., Aleatra P. Williams, Foreclosing Foreclosure: Escaping the Yawning Abyss of the Deep Mortgage and Housing Crisis, 7 NW J. L. & Soc. Pol’y 455, 460 n.24 (2012) (“Many [mortgage] borrowers are choosing to ‘strategically default’ when the property values have plummeted to levels far less than unpaid mortgage balances.”).

\textsuperscript{309} Sociological research has found this to be the case for the general category of debt associated with criminal cases. See Beckett & Harris, supra note 16, at 518 (explaining that “because the wages of the convicted (and their spouses) are subject to garnishment, legal debt creates a disincentive to find work.”); see also id. (finding that “unpaid legal debt—and the threat of criminal justice sanctions it engenders—encourage some to ‘go on the run’”).

\textsuperscript{310} See supra Part I.B.2. Former inmates are also likely to have difficulty accessing credit from the private market; see also Taja-Nia Y. Henderson, Note, New Frontiers in Fair Lending: Confronting Lending Discrimination Against Ex-Offenders, 80 N.Y.U. L. Rev. 1237, 1243-44 (2005).

\textsuperscript{311} See, e.g., Harris et al., supra note 54, at 1785.
borrowers' ability to pay, then borrowers may be incentivized to work less or not to work at all to avoid liability. That this quandary is quite familiar to debates about the proper income tax rate does not lessen its applicability here. To the contrary, it augments the concern. Given that taxation is unlikely to disappear as a funding mechanism—after all, some source of revenue is needed for the government to front the initial costs of core services to mandatory borrowers—it seems undesirable to have another mechanism in play subject to this same difficulty.

The consequences of setting loan amounts too high could result in increased costs to the government in various forms. Especially if mandatory borrowers have limited financial resources—as tends to be true for inmates—fulfilling their obligation might come at a cost to themselves and their families. This could require the government—and by extension the tax-paying public—to pick up yet another tab: costs of welfare or other programming for those facing difficult or emergency circumstances occasioned by paying back their imposed loans rather than fulfilling other financial commitments such as rent or grocery bills. Intra-family strain could lead to still more societal costs, such as those associated with an increased incidence of spousal abuse, which may occur during periods of financial stress. This avenue, and similar ones, could well result in spending money on other governmental services that would not have been necessary but for the initial loan imposition.

The government's collection efforts may affect this interplay between areas of service as well. Effective collection is central to the successful use of the imposed loan model, but it may also be quite costly. Collection

312. See supra note 309 and accompanying text.
314. See supra note 67 and accompanying text.
315. See, e.g., Fees for Jail Service, AKRON BEACON J., JAN. 4, 2011, at A6 (“Neil Hassinger, the Medina County [Ohio] sheriff, dropped a per-day charge ... [saying] that the charge merely shifted some families onto welfare.”); see also Beckett & Harris, supra note 16, at 517 (“[I]f debtors make payments, legal debt [which may include pay-to-stay] substantially reduces household income and compels people living on tight budgets to choose between food, medicine, rent, and child support. Even 'small' payments of, for example, $50 a month can consume a significant share of defendants' monthly income.”). State and local programs—that do not rely on federal dollars—might be particularly vulnerable for picking up this tab for former inmates, given that non-payment of a pay-to-stay obligation that was made a condition of parole or probation might result in disqualification of federal benefits. See supra note 173.
317. See, e.g., Julia Silverman, Inmates Charged Again—For Stay, MEMPHIS COM. APPEAL, MAY 23, 2004, at A24 (“‘If you go after people who owe you money on room and board or whatever, you will end up paying more money for the bill collector than you can ever collect from these people,’ said Ken Kerle, editor of American Jails magazine.”); see also Cammett, supra note 35, at 384 (“A true cost-benefit analysis of user fees [criminal justice cost recoupment] would reveal that costs imposed on
methods that seem particularly well-suited to captive markets may even be defeated. For example, inmates may ask relatives not to send money to their commissary accounts so as to protect it from direct debit programs for pay-to-stay charges. Proceeds from commissary purchases may go to fund programs for inmates, whereas pay-to-stay proceeds appear to go mostly to county general funds. Therefore, inmates' intentional underfunding of their accounts may result in fewer resources being available for intra-jail needs.

In the pay-to-stay context, a number of jurisdictions have sought to enhance collection results by contracting the task to private collection agencies. On one level, this decision is quite logical: governments frequently work with private entities in the corrections realm, and collection agencies have an expertise that could offer a more efficient collection process and profitable outcome. But it is by no means clear that such partnerships truly bring about an overall net gain to the government's bottom line. Collaboration with private providers may be

318. See Butterfield, supra note 34 (quoting a Kentucky jail official: "It's my experience that very few jails that charge a per diem make any money... inmates... quickly learn not to put money into their jail commissary accounts because the jail would debit the accounts to pay the fees").

319. See, e.g., Marilyn Miller, Deputies Stand Behind Proposal for Jail Fees, AKRON BEACON J., Sept. 3, 2001, at D1 ("Sheriff's officials say the money [from commissary purchases] goes into a special fund to purchase items for inmates, such as new mattresses, and recreational or educational equipment.").

320. See supra Part I.B.2.c.

321. See supra Part I.B.2.b. The choice of collection personnel and methods is key to the success of a pay-to-stay or any imposed loan program. If revenue does not exceed costs, then the program is unlikely to endure. See, e.g., Pay-to-Stay Mantra Nixed for Jails, CINCINNATI ENQUIRER, Feb. 14, 2010, ("'A complete failure is the best way to describe it [Clermont County, Ohio's pay-to-stay program],' [Sheriff] Rodenberg said. 'When it came time to collect the pay-for-stay, it ended up costing almost as much if not more to run the program."). Private agencies are also being used to collect imposed loans in the form of required reimbursement for fire department services or police response to car accidents. See Netter, supra note 290 ("Most municipalities and fire districts across the country that have turned to these types of service charges contract with billing companies who then take a cut of the collections.").

322. See Sharon Dolovich, State Punishment and Private Prisons, 55 DUKE L. J. 437, 439 (2005) (describing industry of private "entrepreneurs offering a range of services designed to appeal to the overtaxed prison administrator, including everything from the siting and building of new prisons to the day-to-day management of whole inmate populations"); see also PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION, at x (Tara Herivel & Paul Wright eds., 2007) ("The private interests that attach to prisons generally take the following forms... [including] corporate interests that vie to sell their wares or services to prisons.").

323. The term "debt collector" is susceptible to different definitions depending on the context. See ROBERT J. HOBBS, NAT'L CONSUMER LAW CTR., FAIR DEBT COLLECTION § 1.16 (6th ed. 2008 & Supp. 2010). It is used here to refer to for-profit businesses that collect debts owed to a creditor distinct from the business itself. See id. § 1.5.2 ("A collection agency is most likely to be hired by the creditor if the debt is not secured by collateral, is small... or if the consumer appears to be judgment proof. The most common type of collection agencies engage in the full range of collection activities permitted by law and charge a contingent fee, i.e., retaining a portion of the money collected.").
expensive and could well result in the government collecting a relatively small amount of the actual debt owed to it. To be sure, private collection agencies are capable of generating some amount of revenue for the government. But even in such instances, it is not clear that this amount would represent a net gain financially to the government or the general tax base, given the potential for borrower repayment to result in reliance on other forms of governmental assistance, at least for inmates. Thus even when collection techniques are successful, it may be that the government has succeeded in making borrowers do business with multiple government agencies or select private companies without any overall financial gain for the government or taxpaying public.

CONCLUSION

Just as consumer loan products have become more complex and varied in recent years, the likely trend for government-imposed loans may well follow a similar path as the search for new revenue streams continues. Not only could the imposed loan mechanism be used in conjunction with other existing governmental services, the mechanism itself could morph to reach new payors and new lenders. For example, new payors could be identified by directly billing inmates’ families for the inmates’ room and board instead of relying on families to provide the funds to repay the bills given to the inmates, which is already fairly common. There is also a rational—although unsympathetic—argument to be made for billing victims of crime (or victims’ estates or families) for the costs associated with the prosecution and punishment of the crime’s perpetrator: arguably, victims gain a distinct benefit from seeing the perpetrator brought to justice. Indeed, in some states, victims already are able to access or influence the use of a private prosecutor for a criminal case. Of course, victims often are blameless and likely already incur many costs as a result of the crime, justifications for not adding an

324. See supra notes 125-126 and accompanying text. In some circumstances, it may be more accurate to say that the government is using pay-to-stay to transfer inmates’ money to the private sector or to involve inmates in potentially long-term relationships with private companies rather than characterizing pay-to-stay as a means of raising revenue for the government treasury.
325. See supra note 127 and accompanying text.
326. See supra notes 314-316 and accompanying text.
328. See supra Part III.A.4.
329. See, e.g., Butterfield, supra note 34 (“The wife of one [Macomb County] inmate, a Chrysler truck factory worker who is serving half a year for drunk driving, dropped off a check for $7,212 this week to cover part of his bill.”).
additional financial burden. However, victims of a lightning strike that burned down their home are also innocent and have also incurred costs separate from governmental outlay—yet some jurisdictions could and would bill them for emergency response services. Thus, if the imposed loan model is accepted, placing loans on inmates' families or even victims of inmates' crimes should not be deemed outside the realm of possibility.

New lenders for imposed loan schema also might not be too difficult to locate in the private sector. In the realm of corrections, public-private partnerships are common fixtures. These arrangements include private companies that make a profit by collecting monies that former inmates are required to pay directly to them for probation services. And private debt-collection companies are already being used to collect pay-to-stay debts from inmates. It would be a small step for the government to require inmates to borrow money from a designated private lender to cover their room and board costs instead of borrowing from the government through existing pay-to-stay programs. Private lenders might not be interested in lending to a population with dubious repayment prospects; however, many private companies today are finding innovative and lucrative ways to lend to low-income borrowers with bad credit, as well as to supply versions of core public goods, such as private policing. It is conceivable that there would be bidders for

331. See supra Part III.A.3.
333. See supra note 322 and accompanying text. New private players in this realm continue to emerge. See, e.g., David W. Chen, Goldman to Invest in City Jail Program, Profiting if Recidivism Falls Sharply, N.Y. Times, Aug. 2, 2012, at A14 (identifying Goldman Sachs's investment in New York City jail as first American "test [of] 'social impact bonds,' also called pay-for-success bonds, which are an effort to find new ways to finance initiatives that might save governments money over the long term") Cf. Whitman, supra note 66, at 1214 ("The reign of market solutions in American policymaking dates to the same period as the incarceration boom: both are developments whose beginnings we can trace to the mid-1970s; and both accelerated in the 1980s and after.").
334. See, e.g., Ethan Bronner, Poor Land in Jail as Companies Add Huge Fees for Probation, N.Y. Times, July 2, 2012, at A1 (describing lawsuits against private probation companies).
335. See supra Part II.B.2.b.
336. In this scenario, it is unclear what the government would do with inmates who could afford to pay their room and board costs in full and up-front. Potentially, they could be allowed to do so, but they could also be required to incur the loan on non-need-based grounds, such as education about financial responsibility.
337. See supra note 314 and accompanying text.
338. See, e.g., Leah A. Plunkett & Ana Lucia Hurtado, Small Dollar Loans, Big Problems: How States Protect Consumers from Abuses and How the Federal Government Can Help, 44 SUFFOLK U. L. REV. 31, 31 (2011) ("In twenty-nine states, there are more payday lender stores than McDonald's restaurants."). That subprime small-dollar credit products abound does not necessarily mean they constitute desirable loan products. See id. at 31–32.
339. See, e.g., David A. Sklansky, The Private Police, 46 UCLA L. REV. 1165, 1168 (1999) ("The private security industry already employs significantly more guards, patrol personnel, and detectives than the federal, state, and local governments combined, and the disparity is growing.").
such a contract, especially if the government were to guarantee some minimum amount of repayment. An arrangement wherein inmates are forced to become liable to a private company for costs associated with their criminal prosecution and punishment certainly has historical precedent, although this previous incarnation—convict leasing—has been rightly condemned as “neo-slavery.”

When it comes to certain core public services—such as criminal justice and public safety—all citizens are, in some sense, inherently part of a captive market; such services are essential, and the government enjoys considerable latitude in setting the terms of their provision and payment. It may be tempting to write off the imposed loan mechanism as affecting only certain subsets of the population, such as criminal defendants. But the device sweeps more broadly and could go further still. It is worthy of recognition alongside other, more familiar citizen-state financial transactions, as well as careful scrutiny. Conditions remain propitious for its continued use and potential expansion.

340. DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 8 (2008). Cf. Blumenson & Nilsen, supra note 50, at 75 (“Writs of assistance [in colonial America] authorized customs officers to seize suspected contraband and to retain a share of the proceeds, often a third, for themselves and their informants.... [These writs] were among the key grievances that triggered the American revolution.”). There is also historical precedent for Western governments delegating a significant role to private companies in core citizen-state financial transactions outside the criminal justice system. See, e.g., Jeffrey L. Rensberger, ASBESTOS AND THE LIMITS OF LITIGATION, 44 S. TEX. L. REV. 1013, 1032 (2003) (“In pre-Revolutionary France, for example, the monarchy did not raise its own taxes. Rather it ‘leased’ the right to collect taxes to financial firms, who paid the government a sum up front and kept whatever taxes they raised.”). To put it mildly, these “tax-farming” programs were not well received by the public. Id.