MAKING PRISONERS PAY FOR THEIR STAY: HOW A POPULAR CORRECTIONAL PROGRAM VIOLATES THE EX POST FACTO CLAUSE.

INTRODUCTION

At the end of 2000, there were 1,310,190 people in state and federal prisons in the United States,[1] and over 621,000 in local jails.[2] The prison population in this country had increased by 76% since 1990.[3] As more and more people are incarcerated, corrections officials experiment with different models of prison and jail management, seeking to maintain order and provide basic services while meeting ever tighter budgetary constraints.[4] One practice that has grown in popularity during the past decade is to charge inmates for various costs associated with their incarceration, including medical care, food, and daily "rental" fees for the cost of overhead at the correctional facility.[5] It is this last charge, known as "pay-to-stay," that this note addresses. While pay-to-stay may be a valuable source of revenue for cash-strapped correctional facilities seeking to cope with overcrowding,[6] it raises a serious constitutional question: Does the imposition of a daily fee upon prisoners, after they have already been sentenced, constitute an increase in punishment after conviction? Article I, §10 of the United States Constitution states that no state may pass an ex post facto bill, and pay-to-stay violates this prohibition.[7]

To date, no court has squarely decided the constitutional question of whether pay-to-stay, when imposed independently of criminal sentencing, is an ex post

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[1] Paige M. Harrison and Allen J. Beck, *Prisoners in 2001*, Bureau of Justice Statistics Bulletin (July 2002), at 1, available at http://www.ojp.usdoj.gov/bjs/pub/pdf/p01.pdf.

[2] *See* http://www.ojp.usdoj.gov/bjs/jails.htm (visited October 20, 2002).

[3] *See* Harrison & Beck, *supra* note 1, at 2.

[4] *See, e.g.* National Institute of Corrections, *Fees Paid by Jail Inmates: Findings from the Nation's Largest Jails* (February 1997), at 4, 7, 9, available at http://www.nicic.org/pubs/1997/013599.pdf.

[5] *See id.* at 2.

[6] 22 states and the federal prison system are currently operating at or above their highest capacity, and all but four of the remaining states are at or above 90% of their highest capacity. Harrison & Beck, *supra* note 1, at 9.

[7] U.S. CONST. art. I, § 10. Congress is also forbidden from passing ex post facto laws. U.S. CONST. art. I, § 9.

facto violation. Pay-to-stay has been challenged in court, unsuccessfully, on Eighth Amendment and Due Process grounds.[8] However, Federal courts have had ample opportunity to address related questions involving post-sentencing monetary fines and modifications of the terms and conditions of incarceration. In general, these ex post facto inquiries have centered upon whether challenged regulations represent a real, rather than speculative, detriment to prisoners, and whether they constitute punishment or merely allowable administrative procedure. Consequently, this Note will focus on how pay-to-stay inevitably causes a detriment to prisoners, how it serves the traditional aims of incarceration, and how it is procedurally and substantively distinguishable from civil fines and administrative fees.

BACKGROUND

The pay-to-stay idea originated in the mid-1990s as an answer to the overcrowding and high costs that had begun to burden correctional facilities.[9] Pay-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.[10] 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. These deductions may be percentages or fixed amounts and are meant to offset the costs of incarceration.[11] The first state to enact legislation allowing the recovery of general incarceration costs was Michigan, in 1984.[12] Since that time, at least fifteen other states have enacted similar laws.[13] Additionally, some county executives and jail administrators

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[8] § III, below, explores other constitutional challenges that have been launched against pay-to-stay programs.

[9] *See* Daniel Shacknai, *Prisoners Should Pay Their Rent*, CHICAGO TRIBUNE, July 9, 1994, at N19 (proposing pay-to-stay as a novel solution to the problem of incarceration costs). The tone and content of Shacknai's editorial indicate that at the time it was published, the pay-to-stay idea was in its infancy; Shacknai, who was at that time a clerk to Justice Bright of the 8th Circuit Court of Appeals, treats pay-to-stay as a new and somewhat far-fetched concept.

[10] *See* National Institute of Corrections, *supra* note 4, at 3. For a representative example of such legislation, *see* CAL. PENAL CODE § 4011.1(a) (1979).

[11] Because separate constitutional questions have been raised about whether prisoners have any property interest in these earnings at all, and whether or not the voluntary nature of work release programs gives authorities the right to impose conditions, this note does not address such programs. *See, e.g. Christiansen v. Clarke,* 147 F.3d 655 (8th Cir. 1998), *Iowa v. Love*, 589 N.W.2d 49 (Iowa 1998).

[12] MICH. COMP. LAWS ANN. § 800.404 (1984).

[13] The National Institute on Corrections reported in 1997 that sixteen states had laws allowing local jails to collect a per diem fee. *See* National Institute of Corrections, *supra* note 4, at 2. My research reveals three states with such legislation that are not mentioned in the NIC report (Arizona, Minnesota, and Nebraska). At least one state, Colorado, requires judges to charge incarceration costs to prisoners at sentencing, but allows state or county authorities to initiate a proceeding subsequently where the costs were not charged at

have implemented pay-to-stay programs independently.[14]

Administration

Pay-to-stay programs vary in their administration, both as defined by state statute and through local practice. Generally, they can be divided into two categories: those which provide state attorneys general with the authority to initiate court actions to recover the costs of incarceration from a particular individual upon a showing that she is or was in state or county prison,[15] and those that merely provide for the assessment of a fee without any judicial proceeding.[16] Programs imposed by local corrections officials or county governments fall into the latter category. Within these categories, there is some further variation. Some statutes charge fees only to those inmates who are able to pay. Other institutions tally accumulated, unpaid fees and forward the outstanding balance to private collection agencies, which then seek payment from inmates upon their release.[17] At least one jurisdiction conditions the availability of sentence reduction under other applicable laws upon prisoners' cooperation in state efforts to obtain incarceration costs from them.[18] Some statutes do not, technically speaking, require prisoners to pay the cost of their incarceration, but require them to work, and provide corrections authorities with the authority to deduct a fee equivalent to the cost of each prisoner's upkeep from that prisoner's earnings.[19] Some states allow fees to be charged to prisoners held in county or local facilities without judicial proceedings, but do not charge state prisoners at all.[20]

The costs that inmates are actually required to pay also vary greatly. In 1996, the average cost of maintaining state and federal prisoners in the United States was $55.18 per day, ranging from a high of $103.56 (Minnesota) to a low of $21.92 (Alabama).[21] Prisoners are seldom required to pay the full cost of their

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sentencing because of the prisoner's indigence and where the prisoner's financial situation has changed. COLO. REV. STAT. ANN. §18-1.3-701 (2002). Several other states and the federal government provide for the assessment of incarceration costs at the time of sentencing.

[14] *See, e.g.* Emily Ramshaw, *Inmate Fees Spur Protests, Proposals,* BOSTON GLOBE, July 10, 2002, at B2 (County Sheriff unilaterally implemented $35-per-day fee for all inmates); Terry Kliewer, *Waller County Explores the Idea of Making Inmates Pay for Stay,* HOUSTON CHRONICLE, April 2, 1995, at A38.

[15] *See, e.g.* 730 ILL. COMP. STAT. 125/20 (1989).

[16] *See, e.g.* OHIO REV. CODE ANN. § 2929.37 (2002).

[17] *See* Tillman v. Lebanon County Correctional Facility, 221 F.3d 410, 413 (3d Cir. 2000), Tom Gibb, *Jails Looking to Increase Prisoners' Debt to Society,* PITTSBURGH POST-GAZETTE, October 23, 1994, at A1.

[18] *See supra* note 12.

[19] FLA. STAT. ANN. §946.002 (2001).

[20] *See id.,* FLA. STAT. ANN. §951.033 (2001).

[21] Bureau of Justice Statistics, *State Prison Expenditures, 1996* (August 1999), at 2, available at http://www.ojp.usdoj.gov/bjs/pub/pdf/spe96.pdf.

incarceration. Fees range from a few dollars a day to over $60.[22] Some correctional facilities, although authorized by law to collect costs from inmates, choose not to do so because the administrative or court costs (in jurisdictions where a separate action is required), combined with the general indigence of inmates, make pay-to-stay impractical.[23]

Where introduced, pay-to-stay programs have often been opposed, at least initially, by civil liberties and inmate advocacy groups and coalitions of inmate families. However, prison and jail inmates are not, as a rule, exceptionally well-represented in the political process, and it may be assumed that the law-and-order attitude that pervades the modern debate on criminal law, coupled with a public perception that prison conditions are relatively comfortable, militates against any significant outcry in inmates' behalf.[24] In Massachusetts, for example, a Democrat in the state legislature responded to a Republican proposal to impose a five dollar daily fee upon state prison inmates with a counterproposal to raise the fee to ten dollars.[25] A Michigan sheriff summed up the prevailing sentiment as follows: "Prisoners, you're the ones who caused this expensive thing we call corrections, and you're the ones who have to help pay for it."[26]

OTHER CONSTITUTIONAL CHALLENGES TO PAY-TO-STAY

The imposition of per diem fees and other general charges for incarceration costs has occasioned some litigation, although far less than fees charged to prisoners for medical and other services. This is probably due in large part to the greater proliferation of fees for services. Other than the ex post facto argument, which is discussed further below, constitutional challenges to pay-to-stay programs have taken three basic forms: arguments relying upon the Cruel and Unusual Punishment or Excessive Fines Clauses of the Eight Amendment; Due Process arguments; and Equal Protection arguments.

The leading case in the area of pay-to-stay is *Tillman v. Lebanon County Correctional Facility*.[27] *Tillman* is illustrative because the petitioner essentially raised all of the arguments (other than ex post facto) that have been used to assail fees charged to inmates. Similarly, the reasoning employed by the Third Circuit in rejecting the prisoner's arguments is fairly representative of the findings of

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[22] *See* National Institute of Corrections, *supra* note 4, at 9.

[23] *See id.* at 6.

[24] *See id.* at 18; Mark Patinkin, *When Lawbreakers Get Righteous*, PROVIDENCE JOURNAL, August 18, 2002, at A2; *See also* Frank Curreri, *Inmate Rape, Sex Abuse in Utah Prisons Fail to Stir Public Outrage*, SALT LAKE TRIBUNE, December 16, 2001, at A1; Dana Tofig, *Jail: Rough Road or Easy Street?*, HARTFORD COURANT, August 4, 1997, at A1; Editorial, *Prisons No Picnic*, ATLANTA JOURNAL AND CONSTITUTION, September 11, 1995, at 6A.

[25] *See* Emily Ramshaw, *Prison Fees Go Bipartisan*, BOSTON GLOBE, July 11, 2002, at A4.

[26] Todd Bensman, *States Making Inmates Pay for Services in Jail,* DALLAS MORNING NEWS, May 15, 1998, at 35A (quoting McComb County (Mich.) Sheriff William Hackel).

[27] 221 F.3d 410 (3d Cir. 2000).

American courts in similar cases.

The petitioner, Leonard Tillman, served a total of approximately sixteen months in jail (during two separate stays) and owed $4,000 upon his release. Tillman sued the warden and the jail under 42 U.S.C. § 1983, alleging that the $10 per day fee that he had been charged during his jail time constituted cruel and unusual punishment and an excessive fine,[28] and that the jail's action in confiscating money from his commissary account to satisfy the debt was a deprivation of property without due process of law. Tillman also alleged an equal protection violation because at least one other prisoner in the same facility at the same time was not charged the daily fee due to an administrative error, and because "trusty" inmates were not charged the daily fee as a matter of policy.[29]

The Third Circuit, relying on one of its own decisions, which allowed jails to charge medical costs to prisoners,[30] held that the assessment of daily fees did not constitute cruel and unusual punishment so long as the inability to pay the fees did not affect the subject prisoner's access to needed services.[31] The central inquiry, the court found, was whether Tillman in any way suffered greater punishment or was deliberately denied basic human needs by the respondent. Tillman made no such contention.

As to Tillman's Excessive Fines argument, the court held that the fees charged to him were not fines because they were rehabilitative, rather than punitive, in nature.[32] Even if they were fines, the court held, they were not excessive because they were not out of proportion to Tillman's crime (possession of cocaine with intent to deliver, which can carry a criminal assessment of up to $100,000).[33]

The court rejected Tillman's Due Process argument on the reasoning that adequate due process was available through the prisoner grievance procedure. It held that a correctional facility implementing an administrative measure designed for cost-recovery was a situation in which a post-deprivation remedy was adequate.[34]

Tillman's Equal Protection argument was evaluated and rejected under rational basis review.[35] The court found nothing improper about the respondent's motives in taking the funds from Tillman's his account. Further, the court noted that because "trusty" inmates earn their room and board by doing extra maintenance and

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[28] *See* U.S. CONST. amends VIII, XIV, § 1.

[29] *Tillman*, 221 F.3d at 415.

[30] Reynolds v. Wagner, 128 F.3d 166 (3d Cir.1997).

[31] *Tillman*, 221 F.3d at 418.

[32] *Id.* at 420 (citing Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989), for the proposition that fines are punishments).

[33] *Id.* at 420-421 ($4000 was simply not excessive). The court reserved the question of whether a higher fine or accumulated debt might constitute an excessive fine. *Id.* at 21.

[34] *Id.* at 421-422.

[35] Citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), the *Tillman* court found that "[b]ecause the distinctions at issue here do not implicate a suspect or quasi-suspect class, the state action here is presumed to be valid and will be upheld if it is rationally related to a legitimate state interest." *Tillman*, 221 F.3d at 423.

cleaning tasks, and the failure to charge the daily fees to one other inmate was an unintentional error that was corrected upon discovery, there was no evidence of any intent on the part of the respondent to discriminate against Tillman.[36]

Several of the reasons underlying the failure of petitioner's claim in *Tillman* indicate the crucial issues in mounting an ex post facto attack on pay to stay programs. Significantly, the court found that there was no constitutional distinction between charges to prisoners for medical costs and charges for room and board, although a prisoner may refuse medical treatment but cannot refuse incarceration.[37] In doing so, the court accepted the county's contention that the fees were rehabilitative rather than punitive, and Tillman did not attempt to prove otherwise. This is a crucial distinction, as it shows how the initial definition of the challenged regulation - as punitive or not - can determine whether a constitutional question is even raised. The threshold determination that pay-to-stay is, in fact, punitive, is an essential element if the practice is to be defeated under an ex post facto argument.

More generally, *Tillman* illustrates how judicial deference to executive administrative practices can be a significant hurdle to the vindication of inmates' constitutional rights. In dicta, the Third Circuit indicates that even if it were to find the petitioner's constitutional rights had been violated, it might still find the violation outweighed by the state's interest in "sparing the taxpayers the cost of imprisonment."[38]

Tillman's failure also shows the need for a different approach. Eighth and Fourteenth Amendment challenges are all potentially fruitful *in certain circumstances*. If, for example, the fees imposed were far out of proportion to the underlying offense, the Excessive Fines Clause might do the job.[39] Similarly, if the state imposed pay-to-stay fees only on a discrete group of prisoners (e.g. African-Americans, murderers, etc.), an Equal Protection analysis might defeat the application. But every time a court finds that the facts of a given case are insufficient to support a constitutional challenge, pay-to-stay gains constitutional legitimacy. An ex post facto challenge avoids this problem, because it is necessarily facial, not as-applied.

An ex post facto attack on pay-to-stay also has the benefit of one of the Constitution's few unequivocal prohibitions on state action. The Supreme Court's interpretation of the Ex Post Facto Clause has been relatively consistent and lacking in judicial exceptions. For these reasons, the Clause represents the best chance to arrest the spread of pay-to-stay programs.

MOUNTING OUT AN EX POST FACTO CHALLENGE TO PAY-TO-STAY

In 1798, the Supreme Court set forth the types of law that the Ex Post Facto

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[36] *Id.* at 423-424.

[37] *Id.* at 419.

[38] *Id.* at 416 (quoting United States v. Spiropoulos, 976 F.2d 155, 168 (3d Cir. 1992)).

[39] *See supra,* note 33.

Clause is meant to prohibit.[40] Among these were those laws that inflict a greater punishment for a crime than was called for by law when the crime was committed.[41] The Court has interpreted this aspect of the prohibition on ex post facto laws to apply where a law passed after the commission of a crime *requires* a more severe punishment than the law in effect at the time of commission,[42] or where the state "enhances the measure of punishment by altering the substantive formula used to calculate the applicable sentencing range."[43] To show that imposing monetary fees on prisoners after the prisoners are sentenced implicates this aspect of the Ex Post Facto clause, we must answer two questions in the affirmative: First, does pay-to-stay create a definite detriment for prisoners, rather than merely the possibility of a detriment? Second, is pay-to-stay directly related to punishment?

A. Pay-To-Stay Causes a Substantive Disadvantage to Prisoners

Not every post hoc modification of criminal law is, *per se*, a violation of the Ex Post Facto Clause simply because it is applied to a prisoner who has already been convicted.[44] Three recent Supreme Court cases, Collins v. Youngblood,[45] California Dep't of Corrections v. Morales,[46] and Lynce v. Mathis,[47] give an idea of the modern contours of the Ex Post Facto Clause. These cases suggest that for a challenged regulation to be found unconstitutional, it must be certain or very likely to cause an increase in punishment. Laws that are merely advisory, encouraging increased periods of incarceration but leaving the final decision to the discretion of a parole board, will survive this test.[48]

In *Collins v. Youngblood*, the Supreme Court found that a Texas law that allowed reform of an improper verdict was not an ex post facto violation because there was no change in the substance of the definition of the crime for which the defendant was resentenced, nor was there an increase in the possible punishment for that crime.[49] Although the defendant in that case actually received an increase in his

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[40] Calder v. Bull, 3 U.S. 386, 390 (1798) (opinion of Chase, J.). Although the definition is in dicta, the Supreme Court has relied upon it routinely. *See, e.g.* Rogers v. Tennessee, 532 U.S. 451, 456 (2001), Carmell v. Texas, 529 U.S. 513, 521-525 (2000), Collins v. Youngblood, 497 U.S. 37, 41-42 (1990).

[41] *Calder*, 3 U.S. at 390.

[42] Lindsey v. Washington, 301 U.S. 397 (1937).

[43] California Dep't of Corrections v. Morales, 514 U.S. 499, 505 (1995) (citing Miller v. Florida, 482 U.S. 423 (1987) and Weaver v. Graham, 450 U.S. 24 (1981)).

[44] *See, generally, Collins*, 497 U.S. 37.

[45] 497 U.S. 37 (1990).

[46] 514 U.S. 499 (1995).

[47] 519 U.S. 433 (1997).

[48] *See, e.g.*, Garner v. Jones, 529 U.S. 244, 253-255. *See, also,* Murray v. Phelps, 1993 U.S. Dist. LEXIS 21001 (1993) (M.D.La.) (law imposing a parole supervision fee was not an ex post facto violation, in part because it was a guideline, not a mandatory rule).

[49] *Collins*, 497 U.S. 37.

particular term of incarceration, the Court found no ex oost facto violation because the prisoner did not suffer an increased detriment *as a result of the application of the law*, but as a result of the initial, erroneous verdict.[50]

In *California Department of Corrections v. Morales*, the Supreme Court stated that laws that have the *potential* to increase the length of incarceration, but do not require the increase, do not to violate the Ex Post Facto Clause.[51] In that case, the challenged law changed the frequency of parole hearings from once every year to once every three years.[52] The Court found no ex post facto violation because the law worked no direct substantive change in the required length of punishment.[53] Instead, the Court held, it "created only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes, and such conjectural effects are insufficient under any threshold we might establish under the *Ex Post Facto* Clause."[54]

In *Lynce v. Mathis*, by contrast, the Court found that where the retroactive application of a new law *mandated*, without exception, that the time remaining in a prisoner's sentence be increased, the Ex Post Facto clause was violated.[55]

Assuming that the imposition of daily, cost-of-living fees upon prisoners is punishment for constitutional purposes (see §IV.2, below), pay-to-stay programs necessarily fail the ex post facto test suggested by *Youngblood, Morales,* and *Lynce*. Where imposed by law, pay-to-stay fees are seldom subject to any discretion as to application, except that prisoners who cannot pay them are sometimes exempted. (This might, at best, allow the laws to survive a facial challenge while still succumbing to an as-applied constitutional attack.) Unlike parole, which varies from prisoner to prisoner based upon a wide array of factors, and which can be affected by a prisoner's conduct during incarceration, pay-to-stay is usually applied to all inmates regardless of their behavior.[56]

B. Pay-To-Stay Is Punitive for Constitutional Purposes

The Ex Post Facto Clause prohibits laws that increase the *punishment* for crimes

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[50] *Id.*

[51] *Morales*, 514 U.S. at 510.

[52] *Id.* at 503.

[53] *Id.* at 509.

[54] *Id.*

[55] 519 U.S. 433, 449 (1997). In this case, a prisoner who had actually already been released on parole was rearrested and required to serve more of his sentence.

[56] In *Tillman*, the court mentions that "trusty" inmates, those charged with certain extra tasks such as sweeping corridors, are exempted from paying the cost of their incarceration. *Tillman*, 221 F.3d at 423-424. Although this practice is not the norm in the administration of pay-to-stay programs, it arguably might help pay-to-stay survive an ex post facto challenge. However, since there are probably not enough "trusty" positions available for every inmate (or even most inmates), the prohibited increase in punishment would remain very likely, if not certain, under the *Youngblood-Morales-Lynce* analysis.

already committed.[57] The Supreme Court's ex post facto jurisprudence has focused in large part on whether the challenged laws or regulations were punitive in nature, or whether, instead, they were meant to serve some other purpose, be it administrative or rehabilitative.

In *Kennedy v. Mendoza-Martinez*,[58] the Court enunciated a non-exclusive, seven-factor analysis for determining whether a governmental regulation is punitive in nature so as to require the procedural protections of the Fifth and Sixth Amendments:

> "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . ."[59]

The Court has relied on this test routinely to determine the nature of governmental regulations beyond the context of the Fifth and Sixth Amendments, although only a few of the factors have been deemed dispositive.[60] It necessarily must form the basis of an ex post facto challenge to pay-to-stay programs.

In *Tillman*, although the issue was not squarely addressed, the court did address briefly whether the challenged Cost Recovery Program was punitive for purposes of the Excessive Fines Clause:

> If the assessments and confiscations under the Cost Recovery Program can only be explained as serving in part to punish, they are punishment for purposes of the Excessive Fines Clause, even if they may also be understood to serve remedial purposes. . . . [H]owever, . . . the undisputed record indicates that the program was imposed for rehabilitative and not punitive purposes.[61]

Examining the purposes that motivate a challenged program is one of two analytical methods that various decisions have posited to determine whether that program is punishment for constitutional purposes. The other is an examination of the actual characteristics and effects of the challenged program.

Despite the *Tillman* court's assertion that the purpose of a challenged regulation is central in determining whether it is punitive or not, the Supreme Court has not made such a definitive rule, calling the problem "extremely difficult and elusive of solution."[62] The best guide the Court has established remains the seven-factor *Mendoza-Martinez* test.

The first factor, the imposition of an affirmative disability or restraint, is of

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[57] *See* Calder v. Bull, 3 U.S. 386, 390 (1798).

[58] 372 U.S. 144 (1962).

[59] *Id.* at 168-169.

[60] *See, e.g.*, Hudson v. United States, 522 U.S. 93 (1997), U.S. v. Salerno, 481 U.S. 739, 747 (1987), Schall v. Martin, 467 U.S. 253 (1984).

[61] *Tillman*, 221 F.3d at 420 (internal cites and quotations omitted).

[62] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963).

debatable applicability to pay-to-stay. The accumulation of debt is certainly a disability, since it requires inmates to pay before they can enjoy the privileges afforded to other inmates, and may subject them to civil forfeiture proceedings during incarceration or upon release. However, in evaluating governmental regulations under the *Mendoza-Martinez* test for Double Jeopardy purposes, the Court has established that civil fines do not constitute punishment so long as the intent of the legislature in imposing them was not punitive.[63] Nevertheless, pay-to-stay fees, even when legislatively qualified as civil in nature, can be distinguished from the civil fines upon which the Court has based its Double Jeopardy jurisprudence. Notably, the civil fines that the Court upheld in *Hudson v. United States* and other cases, although they may rest on the same facts or transactions, require a separate finding of liability based upon a discrete application of law.[64] Pay-to-stay fees, by contrast, are inextricably intertwined with the fact of incarceration, which is founded entirely upon a violation of the criminal law.

Additionally, the Double Jeopardy Clause, by its terms, prohibits only that a person "be subject for the same offence to be twice put in jeopardy of *life or limb*."[65] The omission of the word "property" in this context cannot be ascribed to mere chance, since the phrase "life, liberty, or property" appears in the same amendment, in the Due Process Clause.[66] Although the Ex Post Facto clause does not define explicitly what laws it is meant to prohibit, the contemporaneous interpretation of the clause in *Calder v. Bull* (1798) is informative: "[T]he plain and obvious meaning and intention of the prohibition is this; that the Legislatures of the several states, shall not pass laws, after a fact done by a subject, or citizen, *which shall have relation to such fact*, and shall punish him for having done it."[67] The imposition of daily fees on a prisoner undoubtedly has relation to the "fact done" by her, the violation of the criminal law. This is true even in those jurisdictions that require the commencement of separate civil actions before the state may recover incarceration costs, since the only fact the state must prove to prevail in such actions is that the prisoner is or has been incarcerated, an involuntary consequence

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[63] *See* Hudson v. United States, 522 U.S. 93, 99-103 (1997).

[64] *See, e.g., id.* at 97-98.

[65] U.S. CONST. amend. V [emphasis added].

[66] *Id.*

[67] *Calder,* 3 U.S. at 390 (1798) [emphasis added]. Although the cited sentence is immediately followed by this statement, "I do not think [the Ex Post Facto Clause] was inserted to secure the citizen in his private rights, of either property, or contracts," this is in the context of a case in which no criminal law was ever violated. The juxtaposition of these two sentences distinguishes a law that modifies or interferes with pre-existing property or contract rights (as was the case in the facts of *Calder*), which is permitted by the Ex Post Facto Clause, from a law that modifies the punishment for a previously committed act (as is the case with pay-to-stay), which is not permitted. This distinction is bolstered later in the decision: "In the present case, there is no fact done by . . . Plaintiffs in Error, that is in any manner affected by the [challenged law]: It does not concern, or relate to, any act done by them." *Id.* at 392.

of the criminal act.[68]

The second factor of the *Mendoza-Martinez* test, whether the challenged regulation has historically been regarded as punishment, goes to the heart of the question. Monetary assessments have historically been used in both civil and criminal settings, and the distinction is often exceedingly fine. As the Supreme Court aptly observed, in *Ingraham v. Wright*, "Some punishments, though not labeled criminal by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application" of constitutional protections.[69]

There is some historic precedent for distinguishing between civil forfeitures standing alone and those accompanying and dependent upon criminal conviction. Under English law,

> [the] convicted felon forfeited his chattels to the Crown and his lands escheated to his lord; the convicted traitor forfeited all of his property, real and personal, to the Crown. The basis for these forfeitures was that a breach of the criminal law was an offense to the King's peace, which was felt to justify denial of the right to own property.[70]

Clearly punitive in nature, this type of taking, known as "forfeiture of estate," was separate and distinct from the more common "statutory forfeiture" of the offending objects used in violation of the customs and revenue laws, which was usually enforced through a proceeding *in rem* rather than *in personam*.[71] Notably, while the Supreme Court has held that civil forfeitures *in rem* of the sort that could be sustained independent of a criminal prosecution are *not* punishment for Double Jeopardy purposes,[72] it has never made a similar finding for forfeitures dependent on a criminal conviction.

The third factor of the *Martinez-Mendoza* analysis, whether the challenged regulation comes into play due to a finding of *scienter*, or intent, is susceptible of differing interpretations when applied to pay-to-stay. On the one hand, fees to recover incarceration costs are almost always imposed uniformly on all inmates.[73] In that regard, no *scienter* finding is required. Such an analysis, however, is predicated upon the assumption that the fact of incarceration can be divorced from the fact of criminal conviction. In reality, this distinction is groundless, since incarceration is entirely involuntary. The argument that is often repeated in defense of pay-to-stay programs, that inmates should pay the cost of incarceration because it was their own poor judgment that landed them in jail,[74] actually serves to show how pay-to-stay *is* based on a finding of *scienter* (insofar as the underlying criminal convictions are based on some form of intent).

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[68] *See, e.g., supra* note 15.

[69] Ingraham v. Wright, 430 U.S. at 669 (1977).

[70] Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682 (1974).

[71] *See id.*

[72] *United States v. Ursery,* 518 U.S. 267 (1996).

[73] *But see supra,* note 50.

[74] *See* Bensman, *States making inmates pay, supra* note 24,

The fourth element of the *Martinez-Mendoza* analysis, whether the challenged regulation promotes the traditional aims of punishment, is essential to mounting a successful ex post facto challenge to pay-to-stay programs. Although the Supreme Court has cautioned that in the Double Jeopardy context, "the mere presence of this purpose is insufficient to render a sanction criminal, as deterrence may serve civil as well as criminal goals,"[75] it made this assertion in a case where a deterrent purpose was shown without any retributive purpose.[76] Pay-to-stay, as its proponents assert, is both deterrent and retributive. An important argument in favor of pay-to-stay is that because incarceration provides free shelter, food, and medical care, recidivism is not deterred sufficiently.[77] One Iowa sheriff said about pay-to-stay, "What it means to me is . . . it will be a deterrent, and that's my number one thing."[78] Arguments that focus on inmates' own responsibility for being incarcerated in the first place necessarily implicate retribution: "If they are violating the law, than they should be the ones to pay for it."[79] Additionally, the general public approval for pay-to-stay seems to be based in large part on retributive considerations.[80] In fact, the only justification for pay-to-stay that doesn't meet the criteria of this aspect of the *Martinez-Mendoza* analysis is its ability to raise funds.

The fifth of the *Martinez-Mendoza* factors, whether the behavior to which the challenged regulation applies is already a crime, implicates the same question that is raised by the *scienter* factor: can incarceration be examined as a behavior independent of the underlying criminal offenses that cause it? For the same reasons enunciated above, the answer should be no.

C. Refuting The Justifications: Pay-To-Stay Is Neither a Permissible Civil Fine Nor a Valid Rehabilitative Tool.

The sixth and seventh factors in the *Martinez-Mendoza* analysis, whether the challenged regulation may be rationally justified by an alternative purpose and

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[75] *Hudson,* 522 U.S. at 105 (citing *United States v. Ursery,* 518 U.S. 267) (internal quotations omitted).

[76] *Id.*

[77] *See, e.g.,* Mark Patinkin, *Prison Can Offer All The Comforts of Home,* Providence Journal-Bulletin, July 21, 2002, at A2; Mitchell Zuckoff, *Incarceration Takes Its Toll,* Boston Globe, October 15, 1998, at A1 (pay-to-stay programs "are a small but psychologically important deterrent aimed at encouraging ex-inmates never to return"), Bensman, *States making inmates pay, supra,* note 24.

[78] *Id. See, also,* Shacknai, *Prisoners Should Pay Their Rent, supra* note 9 (comparing pay-to-stay favorably with rehabilitation programs, which "[run] counter to our understandable desire to make criminals pay dearly for their offenses").

[79] Bensman, *States Making Inmates Pay, supra,* note 26 (quoting an Iowa sheriff who favors pay-to-stay).

[80] *See, e.g.,* Philip P. Pan, *Pr. George's Considers Fee for Jail Food,* Washington Post, June 1, 1998, at B1 ("Making certain criminals pay a penalty is what the public wants to see . . .").

whether the regulation is excessive in relation to that alternative purpose, provide the strongest arguments in defense of pay-to-stay programs. Pay-to-stay has been justified as a rehabilitative tool to teach prisoners fiscal responsibility[81] and as a tool for raising revenues.[82] Since no pay-to-stay fees currently being charged in the nation exceed the actual cost of incarceration, it cannot be said that they are excessive in this regard. However, the mere assertion, or even the actual existence, of a purpose other than punishment has been found insufficient to define a challenged regulation as not punitive. In finding a change in sentencing guidelines to violate the Ex Post Facto clause, the Supreme Court in *Lynce* stated the matter as follows:

> In arriving at our holding in *Weaver*, we relied *not on the subjective motivation of the legislature* in enacting the gain-time credits, but rather on whether objectively the new statute "lengthen[ed] the period that someone in petitioner's position must spend in prison." Similarly, in this case, the fact that the generous gain-time provisions in Florida's 1983 statute were motivated more by the interest in avoiding overcrowding than by a desire to reward good behavior is not relevant to the essential inquiry demanded by the *Ex Post Facto* Clause . . .[83]

Some state courts have been willing to deem pay-to-stay laws purely compensatory and civil in nature. In *State v. Anthony*,[84] for example, the Alaska Supreme Court distinguished the confiscation of prisoners' state oil dividend payments[85] to compensate crime victims and allay the costs of incarceration from a federal statute that prohibited convicts from profiting by selling their stories, which was found to violate the Ex Post Facto Clause.[86] Relying heavily on expressed legislative intent, the court found that the invalid federal statute was explicitly punitive, while the challenged Alaska law was, by its own term, regulatory and compensatory.[87] However, the court noted that "[i]f the legislature simply intended to take the dividends from incarcerated felons for the purpose of paying a higher dividend to the rest of the state's residents, then ex post facto problems might arise." It could be argued that pay-to-stay does exactly that with tax revenues: it takes extra monies from incarcerated felons for the purpose of alleviating the tax burden on the rest of a state's residents.

The argument that pay-to-stay charges are civil in nature and not connected to criminal punishment has also been eloquently refuted by the Seventh Circuit:

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[81] *See, e.g., id.*, Patinkin, *Prison Can Offer All the Comforts of Home, supra* note 77.

[82] *See, e.g.*, Bensman, *States Making Inmates Pay, supra* note 26; Shacknai, *Prisoners Should Pay Their Rent, supra* note 9; Ramshaw, *Prison Fees Go Bipartisan, supra* note 25, National Institute of Corrections, *Fees Paid by Jail Inmates, supra* note 4.

[83] *Lynce*, 519 U.S. at 442-443 (citations omitted, emphasis added).

[84] 816 P.2d 1377 (Alaska 1991).

[85] Every citizen of Alaska receives a yearly dividend payment from the state's petroleum profits. *See* Alaska Stat. §43.23.005 (2002).

[86] *See United States v. McDonald*, 607 F.Supp. 1183 (E.D.N.C. 1985).

[87] *Anthony*, 816 P.2d at 1378.

> [Federal guidelines] call for longer sentences as the harm caused by the offense rises; longer sentences (or sentences in more secure custody) are more costly; thus the costs of confinement rise with the seriousness of the crime, and a fine based on these costs therefore reflects the seriousness of the offense.[88]

In essence, since the length of incarceration is a function of the seriousness of the crime, monetary fines imposed for each day of incarceration are inexorably linked to the seriousness of crime and the statutorily required punishment.

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

It should also be noted that if pay-to-stay is to be characterized as a simple administrative fee, a useful tool that raises revenues by charging those who use government services, it is radically different than other such fees. For example, court filing fees, which are imposed upon those seeking to engage governmental machinery, or tolls, which are paid only by those who choose to drive over certain roads, are voluntary. The Supreme Court's analysis of the distinction between a tax of general application and a fee is instructive:

> A fee . . . is incident to a voluntary act, *e.g.*, a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station. The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society.[89]

Certainly, incarceration cannot be called voluntary, in contrast to the prison medical charges that were found constitutional by the Third Circuit in *Reynolds v. Wagner*.[90] There, the court reasoned that if inmates sought medical care outside of jail, they would do so voluntarily and assume any accompanying costs. The same cannot be said of incarceration itself, nor even of room and board, which might vary greatly in cost and quality outside of jail, or might be provided at no cost by the inmate's family. It is also highly debatable whether the benefit bestowed by incarceration is upon the prisoner or the public at large.[91]

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[88] *United States v. Turner*, 998 F.2d 534, 536 (7th Cir. 1993).

[89] National Cable Television Ass'n v. United States, 415 U.S. 336, 340-341 (1974).

[90] *See Reynolds*, 128 F.3d 166.

[91] State courts have interpreted the constitutions of at least ten states to prohibit the imposition of non-voluntary charges by the executive branch of government, holding such action to be a usurpation of the legislative authority to levy taxes. *See, e.g., State v.*

POLICY ARGUMENTS AGAINST PAY-TO-STAY

While it is not within the scope or intention of this note to elaborate in detail the political or practical implications of pay-to-stay, it is worth noting that legal challenges are not the only avenue of redress for governmental denial of constitutional rights, and that forceful policy arguments have been made against this practice.

Foremost among the arguments against pay-to-stay is that it places an additional financial burden upon families already deprived of a wage-earner, especially where these family members, as taxpayers, are already subsidizing the cost of incarceration. It is true that some pay-to-stay programs take inmates' other financial obligations into account before imposing incarceration costs. Nevertheless, the result of saddling prisoners with debt, taken together with the overall low level of education among the prison population and the general trend away from providing job training in prison, means that released inmates will find it exceedingly difficult to support their families. The director of an association for inmate families in Texas described the problem this way: "When you're taking it from the inmate, how are they [sic] going to have the job or employment to do it? Somebody suffers, and it's going to be the families, the children on welfare, the wife trying to hold down two jobs."[92]

A second, related argument posits that inmates who are required to pay off potentially significant debts upon release will be more inclined to resort to criminal activity to earn money.[93] Although data measuring recidivism in this respect are not available, the proposition is not an exaggeration, since pay-to-stay has the potential to saddle prisoners with significant debt.[94] Taken together with the paucity of earning opportunities for individuals with felony convictions,[95] this debt may put serious pressure on former inmates to resort to criminal activity.

CONCLUSION

Due to the conjunction of rising prison and jail populations, shrinking state budgets, and a pervasive "get tough" attitude toward convicted criminals, the practice of imposing mandatory fees on inmates is on the rise throughout the United States. Because of the political unpopularity of prisoners' rights and courts'

Medeiros, 973 P.2d 736, 741 (Haw. 1999); *State v. City of Port Orange*, 650 So. 2d 1, 7 (Fla. 1994); *Emerson College v. Boston*, 462 N.E.2d. 1098, 1104 (Mass. 1984). Where state courts have made this distinction between taxes and fees, pay-to-stay programs imposed by correctional authorities (rather than by statute) may be vulnerable to an additional challenge based on state law.

[92] *Id.* (quoting Linda Reeves, Executive Director, Texas Inmate Families Association).

[93] *See generally* Editorial, *Prison Rights and Wrongs*, BOSTON GLOBE, June 14, 2002, at A26.

[94] Assuming the national average length of incarceration of 28.8 months (*see supra* text accompanying note 21), and a typical pay-to-stay fee of $10 per day, a prisoner could emerge from jail or prison owing in excess of $9000.

[95] *See, e.g.*, Pan, *Pr. George's Considers Fee for Jail Food*, *supra* note 80.

general deference to state agencies' discretion, little has been said or done to arrest the spread of pay-to-stay. The program is politically safe and fiscally sound, and even seems fair at first blush: why not make prisoners responsible for the financial burden that they create? However, under the analysis suggested by current constitutional jurisprudence, the imposition of pay-to-stay after and apart from sentencing is a later increase in punishment for crimes already committed - the very definition of an ex post facto bill.

Nothing in the U.S. Constitution prevents state legislatures from enacting legislation that imposes monetary fines on prisoners prospectively - that authority lies at the very heart of traditional state police powers. State legislatures may even be able to delegate sufficient authority to correctional agencies for these agencies to impose fees directly as part of incarceration. Any challenges to such actions would have to be grounded in state law or political will. But where prisoners who have already been sentenced are then subject to daily fees for incarceration, whether by act of the executive or the legislature, the state government violates an express prohibition of the U.S. Constitution.

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