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## ESTATE TO STATE: PAY-TO-STAY STATUTES AND THE PROBLEMATIC SEIZURE OF INHERITED PROPERTY

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*Pay-to-stay statutes allow states to recover their incarceration-related expenditures from those who are currently or have formerly been incarcerated. Mass incarceration is expensive, and states have aimed to shift this financial burden from their taxpayers and government coffers to the individuals who experience incarceration. Although pay-to-stay laws take many forms, in general, they authorize the government to seek recompense for an individual's incarceration costs from the currently or formerly incarcerated person's assets and income. Many states permit the seizure of inherited property to satisfy this legal financial obligation.*

*Pay-to-stay laws have survived constitutional challenges thus far, but some state legislatures have recently faced public pressure to abolish or limit the scope of their pay-to-stay regimes. This Article criticizes pay-to-stay statutes generally while addressing the special concerns arising when states use these laws to take inherited property as reimbursement. In particular, when states seize inherited property to satisfy the costs of incarceration, the states interfere with the decedent's*

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*freedom to choose their beneficiaries as well as the beneficiary's freedom to inherit. As a practical matter, these statutes apply inequitably by disparately impacting people without substantial wealth and people from communities that have historically been systemically excluded from intergenerational wealth.*

*More broadly, this Article considers the implications of this practice on America's carceral state. First, authorizing the government to seek reimbursement for incarceration costs from a broad range of sources reduces the government's sense of urgency to decarcerate. Put simply, if incarceration is "user-funded" rather than taxpayer-funded, lawmakers are disincentivized from meaningfully addressing mass incarceration. Second, when private prisons administer the incarceration, a for-profit entity yields a profit beyond the costs of incarceration. This is unconscionable generally but is especially so when the assets seized are inherited property. Third, pay-to-stay perpetuates a cycle of poverty that is known to be counterproductively criminogenic. The families and communities of the affected persons experience the harms of this poverty cycle. This Article concludes by proposing the abolition of pay-to-stay statutes generally. At the very least, these statutes should not permit the state to intercept inheritances.*

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## INTRODUCTION

When Teresa Beatty’s mother died in 2020, the State of Connecticut filed a notice in probate court demanding approximately 35 percent—over \$83,000—of Beatty’s inheritance.<sup>1</sup> From 2000 until 2002, Teresa Beatty was incarcerated for a minor drug offense in the State of Connecticut.<sup>2</sup> Twenty years later, the State wanted reimbursement for Beatty’s room and board under its prison debt law. Beatty is the lead plaintiff in a class action challenging that law. In the Complaint filed in the District Court of Connecticut, Beatty emphasizes, “While \$83,762.26 will not make or break the state of Connecticut’s multi-billion-dollar budget, the loss will be devastating to Ms. Beatty.”<sup>3</sup> Ms. Beatty is not alone in being held financially liable for the costs of incarceration: forty-five states have “pay-to-stay” statutes,<sup>4</sup>

1. Complaint at 4–6, *Beatty v. Lamont*, No. 3:22-CV-00380, (D. Conn. Mar. 14, 2022); see also *Beatty v. Lamont*, ACLU OF CONN., <https://www.acluct.org/en/cases/beatty-v-lamont> [<https://perma.cc/7TEG-KTC5>].

2. Dan Barrett, *Gov. Lamont and Attorney General Tong Need to End Prison Debt*, CONN. MIRROR (Mar. 23, 2022, 12:01 AM), <https://ctmirror.org/2022/03/23/governor-lamont-and-attorney-general-tong-need-to-end-prison-debt> [<https://perma.cc/MSE2-JW4A>].

3. Complaint, *supra* note 1, at 6.

4. See *infra* Section I.B. Critics of prison reimbursement legislation often use this term. See, e.g., Alison Bo Andolena, *Can They Lock You Up and Charge You for It?: How Pay-to-Stay Corrections Programs May Provide a Financial Solution for New York and New Jersey*, 35 SETON HALL LEGIS. J. 94 (2010); Laura I. Appleman, *Nickel and Dime into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. REV. 1483, 1501 (2016) (“Through ‘pay-to-stay’ programs, offenders incarcerated in state and county jails are financially responsible for their room and board along with every other possible cost related to their stay.”); Robert Weisberg, *Pay-to-Stay in California Jails and the Value of Systemic Self-Embarrassment*, 106 MICH. L. REV. FIRST IMPRESSIONS 55 (2007); Kristen M. Haight, *Paying for the Privilege of Punishment: Reinterpreting Excessive Fines Clause Doctrine to Allow*

which allow states to seek reimbursement for the costs of incarceration.<sup>5</sup>

The United States incarcerates at a higher rate *per capita* than any other nation in the world.<sup>6</sup> This mass incarceration imposes a huge financial burden on state and local governments.<sup>7</sup> When the state incarcerates a person, the state has a duty to protect and to provide for the incarcerated person's needs.<sup>8</sup> Many states have attempted to defray some of the costs

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*State Prisoners to Seek Relief from Pay-to-Stay Fees*, 62 WM. & MARY L. REV. 287 (2020).

5. See *Is Charging Inmates to Stay in Prison Smart Policy?*, BRENNAN CTR. FOR JUST. (Sept. 9, 2019), <https://www.brennancenter.org/our-work/research-reports/charging-inmates-stay-prison-smart-policy> [<https://perma.cc/3T7U-QYBH>] (providing an interactive infographic, which shows each state's pay-to-stay law).

6. See, e.g., Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL'Y INITIATIVE (Mar. 14, 2022), <https://www.prisonpolicy.org/reports/pie2022.html> [<https://perma.cc/BKU4-7LXQ>] (providing empirical, statistical data to show an overview of the United States' carceral system and supporting the claim that America "locks up more people per capita than any other nation, at the staggering rate of 573 per 100,000 residents"); Sean Kolkey, *People Over Profit: The Case for Abolishing the Prison Financial System*, 110 CALIF. L. REV. 257, 260 (2022) ("[T]he United States has by far the highest incarceration rate *per capita* of any country in the world.") (emphasis added); Mirko Bagaric et al., *Prison Abolition: From Naïve Idealism to Technological Pragmatism*, 111 J. CRIM. L. & CRIMINOLOGY 351, 357 (2021) ("[T]he United States remains the highest incarcerator in the world by a large margin. It imprisons more people than any other nation and at a rate that is, remarkably, ten times higher than that of some other developed nations.").

7. See Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL'Y INITIATIVE (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html> [<https://perma.cc/CE6Y-PBJJ>] (consolidating and synthesizing data from disparate sources and showing the annual total cost of mass incarceration is \$182 billion, excluding private prison profits); see also Stuart John Wilson & Jocelyne Lemoine, *Methods of Calculating the Marginal Cost of Incarceration: A Scoping Review*, 33 CRIM. JUST. POL'Y REV. 639, 640 (2022) (citations omitted):

The high monetary costs of imprisonment and the highest rate of incarceration in the world are some of the factors that are driving the demand for criminal justice reform in the United States . . . . The present high incarceration rate and prison population numbers in the United States are mainly the result of policies that have promoted heavier penalties . . . . Meanwhile, governments are struggling with tight budgets, and are looking at ways to minimize the growth in incarceration and spending.

8. See, e.g., *Youngberg v. Romero*, 457 U.S. 307, 324 (1982) ("[T]he State concedes a duty to provide adequate food, shelter, clothing, and medical care. These are the essentials of the care that the State must provide. The State also has the unquestioned duty to provide reasonable safety for all residents and personnel within the institution."); *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981) (holding

of incarceration by shifting the costs from the taxpayer to the “user.”<sup>9</sup> Through a pay-to-stay statute, a state may seek reimbursement for the costs of incarceration from currently or formerly incarcerated persons.

The scope of these reimbursement statutes varies among states and, in some cases, among counties within the same state.<sup>10</sup> However, the statutes roughly fall into two categories: (1) those that authorize reimbursement only in limited circumstances, such as limiting the source of reimbursement to working prisoners’ wages, or authorizing reimbursement for only certain costs, such as medical care or transportation,<sup>11</sup> and (2) those that broadly authorize reimbursement for the general costs of incarceration, including room and board.<sup>12</sup>

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that the Eighth Amendment prohibition against cruel and unusual punishment may be violated when “[c]onditions . . . may deprive inmates of the minimal civilized measure of life’s necessities”); *Estelle v. Gamble*, 429 U.S. 97 (1976) (requiring that states provide adequate medical care to prisoners).

9. The phrase “user-funded” in relation to the criminal justice system refers to legal financial obligations imposed upon suspects, defendants, and the incarcerated to offset taxpayer burden. This term refers to a broad range of legal financial obligations that the criminal justice system imposes upon those who are involved in the system at all stages, including court fees, probation fees, monitoring costs, and other financial costs. Pay-to-stay is just one example of a far-reaching effort to fund the system through system-involved people rather than taxpayers. *See, e.g.*, Wendy Sawyer, *Vera Finds Costs Outweigh Benefits in a “User-Funded” Criminal Justice System*, PRISON POL’Y INSTITUTE (Jan. 10, 2017), <https://www.prisonpolicy.org/blog/2017/01/10/past-due> [<https://perma.cc/AN9F-KYYV>]; BRIAN HIGSMITH, NAT’L CONSUMER L. CTR., COMMERCIALIZED (IN)JUSTICE: CONSUMER ABUSES IN THE BAIL AND CORRECTIONS INDUSTRY 40 (2019), <https://www.nclc.org/wp-content/uploads/2022/09/report-commercialized-injustice.pdf> [<https://perma.cc/8RRN-A4D3>] (“This report discusses some of the ways that the commercialization of the criminal legal system – abetted by the long-term trends of privatization and cost-shifting to ‘users’ of the system – has resulted in widespread consumer abuses.”); RAM SUBRAMANIAN ET AL., BRENNAN CTR. FOR JUST., REVENUE OVER PUBLIC SAFETY: HOW PERVERSE FINANCIAL INCENTIVES WARP THE CRIMINAL JUSTICE SYSTEM 11 (2022), <https://www.brennancenter.org/our-work/research-reports/revenue-over-public-safety> [<https://perma.cc/NJ54-49V2>] (“Criminal justice fees are usually automatically levied and often framed as ‘user fees,’ shifting the burden of funding public services from taxpayers to defendants, who are all too often low-income individuals from underserved communities.”).

10. *See* TONY MESSENGER, PROFIT AND PUNISHMENT: HOW AMERICA CRIMINALIZES THE POOR IN THE NAME OF JUSTICE 73 (2021) (“Nearly every one of Missouri’s 114 counties charges [a pay-to-stay fee] for a stay behind bars, somewhere between \$35 and \$50 a day.”). *See generally* Lauren-Brooke Eisen, *Charging Inmates Perpetuates Mass Incarceration*, BRENNAN CTR. FOR JUST. (May 21, 2015), <https://www.brennancenter.org/our-work/research-reports/charging-inmates-perpetuates-mass-incarceration> [<https://perma.cc/CRH7-T3HW>].

11. *See infra* Section I.B.1.

12. *See infra* Section I.B.2.

Of those jurisdictions that seize the assets of the incarcerated or formerly incarcerated person as reimbursement for the cost of imprisonment, three expressly authorize the seizure of assets obtained through an inheritance<sup>13</sup> and twenty-five are silent or otherwise ambiguous as to whether inherited assets may be seized.<sup>14</sup> While pay-to-stay statutes are generally problematic from a legal and policy standpoint,<sup>15</sup> unique issues arise when the state takes inherited property as reimbursement for prison costs. This Article discusses these issues and exposes why pay-to-stay statutes should not authorize the government to take assets obtained as an inheritance.

Part I of this Article discusses pay-to-stay statutes, providing an overview of their rise in prevalence and explaining how states assess the costs and the sources from which the states may seize assets. This Part classifies the statutes into the following two categories: those that limit the scope of the statute and those that broadly authorize the seizure of assets.

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13. See CONN. GEN. ST. ANN. § 18-85b(b) (West 2022) (“In the case of an inheritance of an estate by any person who is obligated to pay the costs of such person’s incarceration . . . the claim of the state shall be a lien against such inheritance in the amount of the costs of incarceration or fifty per cent of the assets of the estate payable to such person, whichever is less.”); FLA. ST. ANN. § 944.485 (West 2022) (prefacing the enactment of prison reimbursement liability with: “In recognition of the fact that many prisoners in the correctional system have sources of income and assets outside of the correctional system, which may include . . . inheritances . . . and in recognition of the fact that the daily subsistence cost of incarcerating prisoners in the correctional system is a great burden on the taxpayers of the state . . .”); WASH. REV. CODE ANN. § 72.09.480(4) (West 2022) (establishing a priority of child support obligations over prison reimbursement: “When an inmate who is subject to a child support order receives funds from an inheritance, the deduction required under [Washington’s prison reimbursement statute] shall only apply after the child support obligation has been paid in full.”).

14. There is evidence that these states pursue inherited assets. See, e.g., *Burns v. Arkansas*, 793 S.W.2d 779 (Ark. 1990) (Arkansas used its pay-to-stay law to seize an inheritance from Burns’s father that was deposited into Burns’s account); *State of Missouri ex rel. Nixon v. Turpin*, 994 S.W.2d 53 (Mo. Ct. App. 1999) (Missouri used its pay-to-stay law to seize deposits into Turpin’s inmate account from a trust that was created under the terms of his father’s will).

15. See, e.g., *Is Charging Inmates to Stay in Prison Smart Policy?*, *supra* note 5; Nate Rawlings, *Welcome to Prison. Will You Be Paying Cash or Credit?*, TIME, (Aug. 21, 2013), <https://nation.time.com/2013/08/21/welcome-to-prison-will-you-be-paying-cash-or-credit> [<https://perma.cc/HWJ4-3CRN>]; April D. Fernandes et al., *Forcing People to Pay for Being Locked Up Remains Common*, WASH. POST (May 2, 2022), <https://www.washingtonpost.com/outlook/2022/05/02/forcing-people-pay-being-locked-up-remains-common> [<https://perma.cc/TN9M-Y435>]; Mumina Egal et al., *Opinion: Stop Making CT Prisoners Pay for Incarceration*, CONN. POST (Mar. 18, 2022), <https://www.ctpost.com/opinion/article/Opinion-Stop-making-CT-prisoners-pay-for-17011003.php> [<https://perma.cc/T8ZZ-P64V>].

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Regardless of which form the statute takes, its reach is not limited to those individuals who experience incarceration; instead, its destructive financial implications are also borne by the incarcerated person's family.

Part II shows that when these laws apply to seize inheritances, they undermine the United States' well-established principle of testamentary freedom and disproportionately impact those who stand to inherit from modest estates. This Part additionally raises concerns of racial equity, arguing that these laws reinforce the racial wealth gap and perpetuate the historic exclusion of Black families from intergenerational wealth transfer.

Part III of this Article argues that these statutes carry negative policy implications for efforts to address the United States' mass incarceration problem. These statutes' attempts to create a user-funded system reduce the perceived need for decarceration. When private prisons house incarcerated persons, pay-to-stay laws unjustly use the seized inheritances to benefit the private prisons that profit from mass incarceration. These statutes may also contribute to mass incarceration by keeping formerly incarcerated people in poverty, which increases the likelihood of future criminality.<sup>16</sup> Moreover, using pay-to-stay statutes to seize inherited assets extends the reach of the carceral state to inflict harm on the families and communities of the incarcerated person. This Article concludes with a call to abolish pay-to-stay statutes generally, but especially to eliminate the seizure of inherited property.

## I. PAY-TO-STAY STATUTES

Without endeavoring to chronicle a full historical account of pay-to-stay laws, this Part provides a brief historical overview of pay-to-stay statutes and discusses the various forms they take. This Part then contextualizes the impact of these statutes on the incarcerated persons' families.

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16. See, e.g., Alexandra Natapoff, *Gideon's Servants and the Criminalization of Poverty*, 12 OHIO ST. J. CRIM. L. 445, 446 (2015); Brittany L. Deitch, *Rehabilitation or Revolving Door: How Parole Is a Trap for Those in Poverty*, 111 GEO. L.J. ONLINE 46 (2022) (arguing that parole conditions entrap people in poverty); Monica Llorente, *Criminalizing Poverty Through Fines, Fees, and Costs*, A.B.A. (Oct. 3, 2016), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2016/criminalizing-poverty-fines-fees-costs> [https://perma.cc/74EE-2VFE].

A. *The Rise of Pay-to-Stay Statutes*

Forcing prisoners to bear some of the costs of incarceration is not entirely new in the United States. In the colonial era, the penal system required incarcerated persons to perform labor without compensation, and sometimes to pay monetary sanctions, both as part of the punishment and as debt repayment to private creditors.<sup>17</sup> In other words, these monetary sanctions were akin to a punitive fine, restitution, or debt repayment. At that time, however, incarceration was rarely imposed as a post-conviction punishment.<sup>18</sup> Instead, incarceration was generally limited to detention in “gaols,”<sup>19</sup> which served an administrative function by holding people for short periods of time while they awaited trial.<sup>20</sup> Moreover, gaols were run by gaolkeepers, who were often private citizens who lived with their families at the facility and who required detainees to pay towards the costs of their maintenance.<sup>21</sup>

It was not until the late 1700s that some states deemed imprisonment a suitable punishment for those convicted of crimes, but during this period, states turned to prisons modeled after German and Dutch “workhouses,” which specifically aimed

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17. Brittany Friedman, *Unveiling the Necrocapitalist Dimensions of the Shadow Carceral State: On Pay-to-Stay to Recoup the Cost of Incarceration*, 37 J. CONTEMP. CRIM. J. 66, 69 (2021) (“Dating back to the colonial era, jails and prisons held imprisoned persons responsible for their incarceration in the form of work and at times, monetary payment, often as punishment for and repayment of a debt.”). For greater discussion of prison labor in the United States and its relationship to Colonialism, capitalism, and slavery, see Jaron Browne, *Rooted in Slavery: Prison Labor Exploitation*, RACE, POVERTY & ENV'T 42 (2007); Lan Cao, *Made in the USA: Race, Trade, and Prison Labor*, 43 N.Y.U. REV. L. & SOC. CHANGE 1 (2019); Neveen Hammad, *Shackled to Economic Appeal: How Prison Labor Facilitates Modern Slavery While Perpetuating Poverty in Black Communities*, 26 VA. J. SOC. POL'Y & L. 65 (2019).

18. Ashley T. Rubin, *History of the Prison*, in THE HANDBOOK OF SOCIAL CONTROL 277, 280 (2019) (“For much of Western History, punishment was dominated by a combination of capital and corporal punishment – and not by prison as we imagine it today.”).

19. This is an early spelling of the modern word “jails.”

20. See Adam J. Hirsch, *From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts*, 80 MICH. L. REV. 1179, 1189 n.54 (1982). For a more thorough discussion on the history of crime and punishment in colonial America, see Douglas Greenberg, *Crime, Law Enforcement, and Social Control in Colonial America*, 26 AM. J. LEGAL HIST. 293 (1982).

21. See Rubin, *supra* note 18, at 280 (“[T]he jailer himself was usually a private citizen, such as an innkeeper, who made part of his living by selling necessities to prisoners; he was not employed by the state.”).



to generate profit through the labor of incarcerated people.<sup>22</sup> Later, from the mid-nineteenth century until the early twentieth century, convict leasing was widespread throughout the South.<sup>23</sup> Similar to pay-to-stay laws, these prison labor structures aspired to allow states to offset the costs of their carceral systems. However, they differ from pay-to-stay laws because the prison labor model does not require the incarcerated person to pay fees directly to the state for the costs of their maintenance. Moreover, and especially troublingly, no-wage or low-wage prison labor now coexists with pay-to-stay laws.<sup>24</sup>

What is relatively new is the proliferation of pay-to-stay statutes holding prisoners responsible for specific costs, some of which become a debt that acts as an albatross borne by persons

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22. See generally Rubin, *supra* note 18, at 277–92; Laura I. Appleman, *Bloody Lucre: Carceral Labor and Prison Profit*, 2022 WIS. L. REV. 619, 627 (2022) (“The Walnut Street Prison model, which incorporated profitable prisoner labor . . . proved so popular that it became a prototype for prisons all over the United States . . . . Profiting from inmate labor was a key aspect of this new system of punishment. Although many of these early, labor-focused proto-prisons failed due to overcrowding and inmate uprisings, this failure likely was attributable to lack of resources and not to any dislike of monetizing punishment.”); Ashley T. Rubin, *Early US Prison History Beyond Rothman: Revisiting the Discovery of the Asylum*, 15 ANN. REV. L. & SOC. SCI. 137, 147 (2019) (“[E]arly proto-prisons and the subsequent modern prisons were organized around prisoner labor. . . . Even more importantly, however, the promise that prisoners could repay the costs of their incarceration was one of the more convincing arguments in favor of undertaking these mammoth public works projects . . . moreover, the possibility that prisons may even be profitable . . . was a particular lure to states with their minimal tax revenues.”) (citing REBECCA M. MCLENNAN, *THE CRISIS OF IMPRISONMENT: PROTEST, POLITICS, AND THE MAKING OF THE AMERICAN PENAL STATE, 1776–1941* (2008)).

Northern states adopted the shift to incarceration as punishment much earlier than Southern states. ADAM J. HIRSCH, *THE RISE OF THE PENITENTIARY* 8–12 (1992) (describing the shift from jails as administrative holding cells for defendants awaiting their speedy trials to using incarceration as punishment for convicted criminals and explaining that Southern states made the shift later than Massachusetts, New York, and Pennsylvania). In the South, states still resisted state incarceration as punishment and used gaols as administrative pretrial detention centers. A 1795 North Carolina statute required people admitted to gaols to “bear all reasonable charges for carrying and guarding them to the said gaol” when the person has an estate from which funds could be sought. 20th Gen. Assemb., First Sess., ch. 4, § 9 (N.C. 1795). Special thanks to Kristen Bell for bringing this statute to my attention and generously providing it.

23. For a discussion on convict leasing and the Thirteenth Amendment, see James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465 (2019).

24. See ACLU & UNIV. OF CHI. L. SCH. GLOB. HUM. RTS. CLINIC, *CAPTIVE LABOR: EXPLOITATION OF INCARCERATED WORKERS* 57–58 tbl.5 (2022), [https://www.aclu.org/sites/default/files/field\\_document/2022-06-15-captivelaborresearchreport.pdf](https://www.aclu.org/sites/default/files/field_document/2022-06-15-captivelaborresearchreport.pdf) [<https://perma.cc/VN3V-7PEH>].

after their release and throughout their lives outside of prison. The first formal pay-to-stay statute as they exist today was enacted in Michigan in 1935.<sup>25</sup> Legislators presented the bill during a period of “two competing crises, the fiscal crisis of the Great Depression and an overburdened welfare state that was failing to achieve its goals . . . .”<sup>26</sup> As prison populations increased in the 1970s and 1980s, states struggled to fund the growing costs of housing and caring for their incarcerated populations.<sup>27</sup> It was during this period of economic recession and rising incarceration rates that other states followed Michigan’s decades-old lead and enacted their own pay-to-stay laws. The reason for the rise in pay-to-stay statutes is simple: mass incarceration is expensive. From 1977 to 2020, state and local expenditures on corrections alone—not including costs of policing and prosecuting crime—rose from \$19 billion to \$86 billion dollars per year.<sup>28</sup> Including the federal system, police, prosecution, and other expenses, mass incarceration today costs nearly \$200 billion each year.<sup>29</sup> Along with the many other ills mass incarceration bred, state and county coffers had difficulty funding the increased expenses of running their jails and prisons. States needed “an answer to the overcrowding and high

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25. MICH. COMP. LAWS § 800.401 (1935).

26. Gabriela Kirk et al., *Who Pays for the Welfare State? Austerity Politics and the Origin of Pay-to-Stay Fees as Revenue Generation*, 63 SOCIO. PERSPS. 921, 926 (2020), <https://doi.org/10.1177/0731121420967037> [<https://perma.cc/GC6J-PJ4F>].

27. S.P. Conboy, *Prison Reimbursement Statutes: The Trend Toward Requiring Inmates to Pay Their Own Way*, 44 DRAKE L. REV. 325, 326–27 (1996) (footnotes omitted):

The state, local, and federal correctional population has grown on a yearly basis at an astounding rate – nearly doubling every ten years since 1970; thus, the costs associated with such prison population growth have increased accordingly. . . . In an effort to effectively address the problem of financing the increasingly expensive care and maintenance of correctional facilities and the convicts they house, many states have enacted laws requiring inmates to reimburse the government for a portion of the costs of their own incarceration.

28. See *Criminal Justice Expenditures: Police, Corrections, and Courts*, URBAN INST., <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/criminal-justice-police-corrections-courts-expenditures> [<https://perma.cc/M5NC-Y2MR>].

29. See Wagner & Rabuy, *supra* note 7 (consolidating and synthesizing data from disparate sources and showing the annual total cost of mass incarceration is \$182 billion, excluding private prison profits); see also Fernandes et al., *supra* note 15 (“The United States incarcerated more people per capita than anywhere else in the world and it spends at least \$182 billion per year to do so.”).

costs that had begun to burden correctional facilities.”<sup>30</sup> State legislatures’ solution to this budgetary problem was to force the incarcerated person—or “user” of the carceral system—to pay for the costs of their imprisonment.

User fees are common and help the government fund services in a broad range of contexts. For example, visitors to national parks may need to pay an entrance fee to enjoy the park,<sup>31</sup> and people wishing to mail a package through the U.S. Postal Service must pay for postage.<sup>32</sup> From an economic perspective, user fees aim to “introduce market-like efficiency” and to “reduce wasteful overconsumption of public services.”<sup>33</sup> These goals might be achieved in some contexts, but scholars criticize applying user fees in the criminal context. Some scholars argue that user fees in the criminal system simply fail to achieve the goal of user fees.<sup>34</sup> Others focus on the distinctions between people who are incarcerated and people who use other government services, expressing concerns related to the lack of voluntariness in one’s participation in the criminal system, the government’s legal obligation to provide these services, and the impacts these fees have on the vulnerable populations who are most likely to pay these fees.<sup>35</sup> Moreover, the characterization of

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30. Joshua Michtom, *Making Prisoners Pay for Their Stay: How A Popular Correctional Program Violates the Ex Post Facto Clause*, 13 B.U. PUB. INT. L.J. 187, 188 (2004).

31. *Designing and Implementing Federal User Fees*, GOV’T ACCOUNTABILITY OFF. BLOG (Oct. 27, 2015), <https://www.gao.gov/blog/2015/10/27/designing-and-implementing-federal-user-fees> [<https://perma.cc/9AXZ-ZD29>] (“The government charges user fees for goods and services which generally have benefits that are above and beyond what is normally provided to the public. For example, you may have paid a fee to enter a national park.”).

32. See U.S. GOV’T PUBL’G OFF., ANALYTICAL PERSPECTIVES 272 (2009), <https://www.govinfo.gov/content/pkg/BUDGET-2009-PER/pdf/BUDGET-2009-PER-8-2.pdf> [<https://perma.cc/8CDK-QK66>] (“Examples of business-type or market-oriented user charges include charges for the sale of postal services (the sale of stamps) . . .”).

33. Ariel Jurow Kleiman, *Nonmarket Criminal Justice Fees*, 72 HASTINGS L.J. 517, 520 (2021).

34. See generally *id.* (arguing that user fees in the criminal system do not achieve the intended goals of market-like efficiency and preventing consumption because the criminal system is a “nonmarket structure”); see also Matthew Menendez et al., *The Steep Costs of Criminal Justice Fees and Fines*, BRENNAN CTR. FOR JUST. (Nov. 21, 2019), <https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines> [<https://perma.cc/YN65-YGHD>] (reporting that collection of criminal justice fees and fines is economically inefficient at raising revenue due to the costs of collection).

35. See, e.g., FINES & FEES JUST. CTR., ASSESSMENTS AND SURCHARGES: A 50-STATE SURVEY OF SUPPLEMENTAL FEES 1 (2022) (“It is a misnomer to refer to these

pay-to-stay as a “user fee” has contributed to lower courts’ decisions deeming the laws constitutional as a nonpunitive fee collected as reimbursement.<sup>36</sup> Thus, applying the word “user” to describe the criminal system-involved individual and the phrase “user fee” to describe legal financial obligations, including pay-to-stay statutes, is fraught with controversy.

Gaining more traction in the 1980s and 1990s, states began implementing these statutes, routinely charging room and board fees and passing along other costs to incarcerated persons.<sup>37</sup> The prevalence of this practice coincided with “a broader shift in criminal justice toward placing many costs of the system on defendants through fees and other required payments.”<sup>38</sup> Although the passage and implementation of these statutes have been challenged in many states on numerous grounds, courts consistently reject constitutional objections to the

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assessments and surcharges as ‘user fees,’ though many policymakers, and even some reform advocates, use that term. A user fee is a cost imposed because someone engages in a voluntary service . . . or avails himself of a special governmental allowance . . . . People who are involved in criminal, municipal, or traffic course are not participating voluntarily. They are not ‘users’ of a system; they are subjected to it.”); Brittany Friedman et al., *“Like If You Get a Hotel Bill”: Consumer Logic, Pay-to-Stay, and the Production of Incarceration as a Public Commodity*, 36 SOCIO. F. 735 (2021) (arguing that pay-to-stay laws commodify incarceration and create a capitalistic “producer-consumer relationship between incarcerated people and the state” while the state is under a legal duty to provide the services for which it charges the incarcerated person); Cortney Lollar, *The Costs of the Punishment Clause*, 106 MINN. L. REV. 1827, 1895 (2022) (discussing criminal financial obligations through the lens of the Thirteenth Amendment and calling for the elimination of “any ‘user fees’ within the criminal legal system” because “they rarely serve a purpose related to theories of punishment . . . [and] keep thousands of people under the thumb of the criminal legal system”); Tamar R. Birkhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595, 1661 (2015) (explaining race- and class-based equity issues with criminal system fees and how people of color “have already been disproportionately stopped by police, arrested, charged, and convicted of criminal offenses . . . which have resulted in incarceration”).

36. See, e.g., *Alexander v. Comm’r of Admin. Servs.*, No. 468821, 2003 WL 536623 (Conn. Super. Ct. Feb. 11, 2003); *Dean v. Lehman*, 18 P.3d 523, 534 (Wash. Sup. Ct. 2001) (en banc).

37. Leah A. Plunkett, *Captive Markets*, 65 HASTINGS L.J. 57, 66–67 (2013); see also Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, 15 LOY. J. PUB. INT. L. 319, 319 (2014) (“In 1846, the United States saw the birth of the first correctional fee law when Michigan enacted legislation authorizing counties to charge sentenced jail inmates for the costs of medical care. A century and a half later in 1985, reacting to the rising costs of operating the Macomb County jail, the Sheriff and County Board of Commissioners began collecting up to \$60 a day from inmates behind bars.”) (footnote omitted).

38. Plunkett, *supra* note 37, at 67.

structure and practice of the pay-to-stay regime.<sup>39</sup> Today, nearly all states have some form of pay-to-stay statute.<sup>40</sup>

### B. Categories of Pay-to-Stay Statutes

Pay-to-stay statutes vary across jurisdictions. This Section categorizes the statutes to illustrate the scope of the problem of states using pay-to-stay statutes to seize inherited property. Conceptually, these statutes fall into two categories: (1) those that are limited in their scopes and (2) those that broadly authorize the seizure of assets to offset the overall costs of the carceral system. This section briefly articulates the defining features of each of these statutes and provides a few examples from each category to provide a cursory overview.

#### 1. Limited in Scope

The states that limit the scopes of their pay-to-stay statutes restrict the reimbursement in three primary ways: by limiting

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39. The constitutional arguments against pay-to-stay are worthy of thorough engagement through an additional article, but a detailed discussion of the constitutionality of pay-to-stay laws has little bearing on the arguments presented in this Article. For examples of decisions rejecting constitutional arguments against pay-to-stay, see, e.g., *Alexander*, 2003 WL 536623, at \*3 (holding that Connecticut's pay-to-stay law does not violate the Fifth Amendment Takings Clause); *Dean*, 18 P.3d at 535 (en banc) (holding that Washington's pay-to-stay law does not violate the Takings Clause); *Slade v. Hampton Rds. Reg'l Jail*, 407 F.3d 243, 254 (4th Cir. 2005) (rejecting a Takings Clause challenge to Virginia's pay-to-stay law); *Elliott v. Simmons*, 100 Fed. Appx. 777, 780 (10th Cir. 2004) (finding no Due Process violation because "[t]he state's goals behind this fee structure were to teach fiscal responsibility and reimburse the state for costs of incarceration, both of which are rationally related to the scheme set forth in [the state statute]"); *Ilkanic v. City of Fort Lauderdale*, 705 So.2d 1371, 1372–73 (Fla. 1998) (finding no Due Process violation in an application of Florida's pay-to-stay law); *Tillman v. Lebanon Cnty. Corr. Facility*, 221 F.3d 410, 420–21 (3d Cir. 2000) (upholding Pennsylvania's pay-to-stay law against an Eighth Amendment Excessive Fines Clause challenge).

40. Forty-five states have pay-to-stay statutes in some form. Maine, Hawaii, New Hampshire, Illinois, New York, and Washington, DC, are the only U.S. jurisdictions without a pay-to-stay law. Additionally, in California, prisoners may opt out of the overcrowded and dangerous county jails by paying for a jail upgrade to a somewhat safer and more comfortable detention center. The pay-to-stay "upgrade" system is outside the scope of this Article. For more on this, see generally Kim Shayo Buchanan, *It Could Happen to "You": Pay-to-Stay Jail Upgrades*, 106 MICH. L. REV. FIRST IMPRESSIONS 60 (2007); Alysia Santo et al., *Afraid of Jail? Buy an Upgrade*, MARSHALL PROJECT (Mar. 9, 2017, 6:00 AM), <https://www.themarshallproject.org/2017/03/09/afraid-of-jail-buy-an-upgrade> [https://perma.cc/SPB4-TLCM].

the types of assets the state may seize, the types of expenses eligible for reimbursement, or the circumstances under which the statute applies.

*a. Limited Assets from Which to Seize*

The jurisdictions discussed below limit their pay-to-stay statutes by specifying which assets are eligible for seizure. In these jurisdictions, states may not seek recompense from every potential source of funds but are instead only permitted to seize particular assets.

Most of the states with this limitation only authorize seizure from wages earned during the period of incarceration.<sup>41</sup> Often, because the state is charged with managing this source of funds, states define clear procedures related to the amounts that may be deducted and the prioritization of this debt. In Vermont, for example, the Commissioner of Corrections receives wages earned from inmates participating in work release programs.<sup>42</sup> From these wages, the Commissioner may “[d]educt an amount determined to be equivalent to the cost of providing for the living expenses of the inmate.”<sup>43</sup> Similarly, if an incarcerated person in Alaska earns 50 percent or more of the state’s minimum wage,<sup>44</sup> the Commissioner of Corrections “may deduct the cost of confinement of the prisoner up to the statewide average cost of confinement . . . .”<sup>45</sup> These deductions occur before the Commissioner disburses for support of the incarcerated person’s dependents or for the payment of restitution or fines the incarcerated person owes.<sup>46</sup> Minnesota applies similar rules with similar priorities for those incarcerated persons who

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41. States authorizing seizure only from wages earned during the period of incarceration include Alaska, California, Georgia, Minnesota, Montana, New Mexico, and Vermont.

42. VT. STAT. ANN. tit. 28, § 755 (West 2022). A work release program authorizes eligible incarcerated people to work outside the correctional facility. Some jurisdictions’ work release programs also allow incarcerated people to engage in educational pursuits in academic or vocational schools outside the correctional facility.

43. *Id.* § 755(1).

44. Minimum wage in Alaska in 2022 was \$10.34 and was slated to increase to \$10.85 in 2023. See *Alaska Minimum Wage to Increase to \$10.85 in 2023*, ALASKA DEPT OF LAB. & WORKFORCE DEV. (Oct. 20, 2022), <https://labor.alaska.gov/news/2022/news22-17.htm> [<https://perma.cc/RTE3-FHDH>].

45. ALASKA STAT. § 33.30.201(b) (West 2022).

46. *Id.* §§ 33.30.201(b)–(c).

participate in a work release program, allowing for reimbursement for incarceration costs to supersede the support of dependents.<sup>47</sup>

Some of the states that draw from wages earned during the period of incarceration calculate the deduction more generously in favor of the affected incarcerated individual. For example, before legislators in New York repealed the fee in December 2022,<sup>48</sup> New York only deducted one dollar per week of confinement, but the Commissioner was required to waive the collection when the fee “would work an unreasonable hardship on the prisoner or his or her immediate family.”<sup>49</sup> Other states consider the incarcerated person’s support obligations to immediate family when determining the amount to seize under their pay-to-stay statutes.<sup>50</sup>

*b. Limited Costs Eligible for Reimbursement*

Five jurisdictions limit their pay-to-stay statutes to only permit the state or county to seek reimbursement for particular expenses, usually related to medical care.<sup>51</sup> In Mississippi, the incarcerated person may be held responsible for expenses related to “nonemergency medical care, treatment and medicine.”<sup>52</sup> In South Carolina, incarcerated persons are liable for a \$5 fee per occurrence of medical treatment.<sup>53</sup> In Utah, courts may order an incarcerated person to pay for expenses the state incurred in providing transportation and medical services to that person during their term of incarceration.<sup>54</sup>

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47. MINN. STAT. ANN. § 241.26, subdiv. 5 (West 2022).

48. See *Assembly Bill A8215*, N.Y. SENATE, <https://www.nysenate.gov/legislation/bills/2021/A8215> [<https://perma.cc/qq2g-jhnc>].

49. N.Y. CORRECT. LAW § 189(2) (McKinney 2021) (repealed 2022).

50. See, e.g., ALASKA STAT. § 33.30.201(c) (2022) (indicating the priority of deductions from incarcerated persons’ wages and listing deductions “for support of the prisoner’s dependents, if any” first); N.M. STAT. ANN. § 33-8-8 (West 2022) (prioritizing dependent families).

51. These five states are Massachusetts, Mississippi, New Jersey, South Carolina, and Utah. Other states allow prisons to charge medical fees, but these five represent the states that only authorize reimbursement for certain expenses. For a fuller discussion of medical copays and fees in the prison context, see generally Rachael Wiggins, Note, *A Pound of Flesh: How Medical Copayments in Prison Cost Inmates Their Health and Set Them Up for Reoffense*, 92 U. COLO. L. REV. 255 (2021).

52. MISS. CODE ANN. § 47-5-179(1) (West 2022).

53. S.C. CODE ANN. § 24-13-80(B)(2) (2022).

54. UTAH CODE ANN. § 76-3-201(4)(d) (West 2022).

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Massachusetts authorizes reimbursement of medical and mental health services as well as haircuts.<sup>55</sup> New Jersey restricts its pay-to-stay statute by holding incarcerated persons liable only for the costs of their medical care.<sup>56</sup>

Limiting the costs eligible for reimbursement reduces the overall amount the incarcerated person must pay for their incarceration, but it does not cleanse the harms of pay-to-stay. Despite seeming to impose a less burdensome imposition on the payer, the arguments for abolition discussed below still apply to these types of pay-to-stay laws.

*c. Limited Circumstances of Liability*

Many states limit their pay-to-stay statutes by only authorizing reimbursement under certain circumstances. Most commonly, as in fourteen states, reimbursement is only permitted when sought from working prisoners. In contrast with the limitation discussed above, this limitation centers on the employment status of the person from whom the state may seek reimbursement, not the source from which the funds may be drawn. Additionally, this limitation sometimes allows states to seek reimbursement both from incarcerated people who work outside the prison through work release programs and from those who work inside the prison for low wages. Other circumstances include pay-to-stay laws that only permit reimbursement for incarceration in local or county jails and those laws that only apply when the incarcerated person is imprisoned for specified categories of offenses.

When prisoners in New Mexico earn compensation for labor performed while incarcerated, the state may deduct “reasonable costs” of confinement and victim restitution from that compensation, up to 50 percent.<sup>57</sup> In Georgia, those participating in voluntary work programs may have “reasonable charges for room and board” deducted from their earnings.<sup>58</sup> Maryland’s pay-to-stay law applies to “weekend inmates,” who stay in a correctional facility for nonconsecutive periods of forty-eight hours or less per week, and allows the local correctional facility to “impose on and collect . . . a reasonable fee in an

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55. MASS. GEN. LAWS ANN. ch. 124, §§ 1(r)–(s) (West 2022).

56. N.J. STAT. ANN. § 30:7E-2 (West 2022).

57. N.M. STAT. ANN. § 33-8-8(C)(2) (West 2022).

58. GA. CODE ANN. § 42-5-120(b)(9) (West 2022).



amount not to exceed the average cost of providing food, lodging, and clothing for an incarcerated individual for the time the incarcerated individual is confined in the local correctional facility.”<sup>59</sup>

Some states only allow local and county jails to seek reimbursement from the incarcerated person. In Wisconsin, for example, counties are authorized to seek reimbursement “[f]rom each person who is or was a prisoner, not more than the actual per-day cost of maintaining that prisoner . . . .”<sup>60</sup> Nevada similarly authorizes local detention facilities to charge up to “the actual cost per day for the maintenance and support of the prisoner and may include, without limitation, the costs of providing heating, air-conditioning, food, clothing, bedding and medical care to a prisoner.”<sup>61</sup> Nevada is one of several states that expressly permits pay-to-stay assessments to include expenses during pre-trial detention.<sup>62</sup> Virginia allows local correctional facilities “to charge inmates a reasonable fee, not to exceed \$3 per day, to defray the costs associated with the prisoners’ keep.”<sup>63</sup> Kentucky allows the sentencing court to require the sentenced person to reimburse the county jail for costs of confinement, including “[a] per diem for room and board of not more than fifty dollars (\$50) per day or the actual per diem cost, whichever is less, for the entire period of time the prisoner is confined to the jail.”<sup>64</sup>

In 2022, Connecticut significantly reduced the reach of its pay-to-stay law by limiting its application to exempt the first \$50,000 of assets “except in the case of an inmate incarcerated for a capital felony . . . in effect prior to April 25, 2012, or murder with special circumstances committed on or after April 25, 2012

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59. MD. CODE ANN., CORR. SERVS. § 11-801 (West 2022).

60. WIS. STAT. § 302.372(2)(a)(1) (West 2022).

61. NEV. REV. STAT. § 211.2415(2) (West 2022).

62. *Id.* § 211.2415(1)(a). Other states with this language include Arizona and Oregon. *See* ARIZ. REV. STAT. ANN. § 31-238(C) (2022) (“The calculation of the number of days of incarceration in a given fiscal year for the purpose of [calculating incarceration costs] shall include time served before conviction.”); OR. REV. STAT. ANN. § 169.151(1)(a) (West 2022) (“The county or city may seek reimbursement: [a]t a rate of \$60 per day or its actual daily cost of safekeeping and maintaining the person, whichever is less, multiplied by the total number of days the person was confined to the local correctional facility, including, but not limited to, any period of pretrial detention . . . .”).

63. VA. CODE ANN. § 53.1-131.3 (West 2022).

64. KY. REV. STAT. ANN. § 441.265(2)(a)(2) (West 2022).

...”<sup>65</sup> Although this limitation is a step in the right direction, it nevertheless remains problematic. Connecticut charges a per diem, per capita rate to incarcerated or formerly incarcerated people under its pay-to-stay law. Limiting its application to only the most serious offenses means that those who are subjected to the statute will be the people who serve the longest prison sentences and, thus, accumulate the highest bills.

Even in jurisdictions that limit the scope or application of their pay-to-stay laws, most arguments presented in this Article apply. In any jurisdiction that permits the state to seize inherited property as recompense for the costs of incarceration, all of the arguments presented in this Article apply to those statutes.

## 2. Broad Pay-to-Stay Laws

Approximately one-third of U.S. states have broad pay-to-stay statutes. These statutes authorize the state departments of corrections<sup>66</sup> or, in some cases, attorneys general<sup>67</sup> or other public entities<sup>68</sup> to seek reimbursement for the costs of incarceration. For these jurisdictions, costs of incarceration are broadly defined and generally include room and board, food, medical care, transportation, and other expenses. Some states provide for a method of calculation, including per diem or per capita assessments, while others rely on a determination of the actual cost of incarceration for a particular incarcerated person.

Rhode Island allows the state to seek reimbursement “for the cost or the reasonable portion of the cost incurred by the state relating to [incarceration of a person who has been sentenced]” and specifies that those “cost[s] shall include

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65. CONN. GEN. ST. ANN. § 18-85a(b) (West 2022).

66. *See, e.g.*, OHIO REV. CODE ANN. §§ 5120.56–.57 (West 2022); 42 R.I. GEN. LAWS § 42-56-38 (West 2022).

67. *See, e.g.*, TENN. CODE ANN. § 41-21-908(a)(1) (West 2022); MO. ANN. STAT. § 217.831(3) (West 2022). For a discussion on Missouri’s pay-to-stay laws and their impacts on those who are indebted to the state for “board bills,” see MESSENGER, *supra* note 10, 73–87 (discussing pay-to-stay’s impacts on people who cannot afford to pay their bills with a particular emphasis on Missouri).

68. *See, e.g.*, OKLA. STAT. ANN. tit. 22, § 979a(A) (West 2022) (explaining that the court orders the costs, and the clerk of the court collects the costs before distributing the collected amount to the “municipality, holding facility, county, or other public entity responsible for the operation of such facility where the person was held at any time”); LA. STAT. ANN. § 15:705 (2022) (sheriffs or governing authority of the parish).

physical services and commodities such as food, medical, clothing, and specialized housing, as well as social services . . . .”<sup>69</sup> Similarly, South Dakota broadly holds incarcerated persons “liable for the cost of the inmate’s confinement which includes room and board charges; medical, dental, optometric, and psychiatric services charges; vocational education training; and alcoholism treatment charges.”<sup>70</sup>

Colorado allows the state to seek reimbursement for the cost of incarceration, which is calculated by the “per capita cost of maintaining prisoners in the local jail or a correctional facility . . . .”<sup>71</sup> Colorado defines “cost of care” broadly to include “room, board, clothing, medical care, and other normal living expenses,”<sup>72</sup> and it allows for the state to seek reimbursement for these costs any time within two years after the person’s release from incarceration or supervision.<sup>73</sup> In its legislative declaration, the Colorado General Assembly includes that it

finds that a convicted person’s financial circumstances may be fraudulently misrepresented to the sentencing court or that such circumstances may change after sentencing so that a person who is unable to pay the cost of care at sentencing may be or become able to contribute to the cost of care at a later date.<sup>74</sup>

Delaware allows its state Department of Correction to seek reimbursement for the “cost of care, treatment or both . . . .”<sup>75</sup> Delaware uses a per diem method of calculating costs, wherein the cost is assessed on the total expenditures made by the facility divided by the number of days of incarceration.<sup>76</sup> Tennessee provides that the amount the state may seek is “the expenses incurred or to be incurred, or both, by the state for the cost of care of the inmate during the entire period or periods the person is an inmate in a state correctional facility.”<sup>77</sup> Tennessee caps the amount at the “per diem cost of care for maintaining inmates

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69. 42 R.I. GEN. LAWS § 42-56-38(a) (West 2022).

70. S.D. CODIFIED LAWS § 24-2-28 (2022).

71. COLO. REV. STAT. ANN. § 17-10-103(3) (West 2022).

72. *Id.* § 17-10-102(1).

73. *Id.* § 17-10-104(1)(c).

74. *Id.* § 17-10-101.

75. DEL. CODE ANN. tit. 29, § 8913(c) (West 2022).

76. *Id.* § 8913(d).

77. TENN. CODE ANN. § 41-21-907(h) (West 2022).

in the state correctional facility in which the inmate is housed.”<sup>78</sup>

Prior to significantly limiting its pay-to-stay statute in 2022 by only applying it to those who are incarcerated for serious offenses, Connecticut charged \$249 per day of incarceration.<sup>79</sup>

In total, forty-five states have some form of pay-to-stay statute. Of these, three expressly authorize the seizure of inherited assets,<sup>80</sup> and twenty-five are silent as to whether inherited assets may be seized.<sup>81</sup> When states seize inherited assets to satisfy the financial obligations the state has imposed upon the currently or formerly incarcerated person, problems emerge.

### C. Financial Impact of Pay-to-Stay on Families

Whether the state uses its pay-to-stay statute to seize the affected person’s assets during the person’s term of incarceration or after their release, the likely outcome of the practice is to keep the person in a cycle of poverty. Roughly 80 percent of the prison population is indigent.<sup>82</sup> Moreover, studies show that growing up in poverty makes one more likely to be incarcerated as an adult.<sup>83</sup>

While in prison, the average peak hourly wage someone behind bars can earn is about fifty-two cents per hour.<sup>84</sup> In seven

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78. *Id.* § 41-21-907(d).

79. *At \$249 Per Day, Prison Stays Leave Ex-inmates Deep in Debt*, NBC CONN. (Aug. 27, 2022, 10:55 AM), <https://www.nbcconnecticut.com/news/local/at-249-per-day-prison-stays-leave-ex-inmates-deep-in-debt/2860653> [https://perma.cc/2DSQ-ZCFR].

80. CONN. GEN. ST. ANN. § 18-85b(b) (West 2022); FLA. ST. ANN. § 944.485 (West 2022); WASH. REV. CODE ANN. § 72.09.480(4) (West 2022).

81. *See, e.g.*, KY. REV. STAT. § 441.265 (2022); N.J. STAT. ANN. 30:7E2; OHIO REV. CODE § 5120.56; OR. REV. STAT. § 169.151.

82. Eisen, *supra* note 10, at 4 (“Experts estimate that at least 80 percent of individuals in jail are indigent.”).

83. ADAM LOONEY & NICHOLAS TURNER, BROOKINGS INST., WORK AND OPPORTUNITY BEFORE AND AFTER INCARCERATION 1, 2 (2018), [https://www.brookings.edu/wp-content/uploads/2018/03/es\\_20180314\\_looneyincarceration\\_final.pdf](https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf) [https://perma.cc/84AA-HBN2] (“[I]ndividuals incarcerated in their early 30s are much more likely to have grown up in poverty . . . . Boys who grew up in families in the bottom 10 percent of the income distribution . . . are 20 times more likely to be in prison on any given day in their early 30s than children born in top-decile families . . .”).

84. ACLU & UNIV. OF CHI. L. SCH. GLOB. HUM. RTS. CLINIC, *supra* note 24; *see also* Beth Schwartzapfel, *Prison Money Diaries: What People Really Make (and Spend) Behind Bars*, MARSHALL PROJECT (Aug. 4, 2022, 9:00 AM), <https://>

states, incarcerated people earn no wages at all for their labor,<sup>85</sup> which is permissible under the express language of the Thirteenth Amendment.<sup>86</sup> Nearly everything in prison costs money, but the working wages are so low that many hours or days of labor are needed to be able to make phone calls or obtain hygiene products, writing paper, or snacks from commissary.<sup>87</sup> In Colorado, for example, the fee for a medical visit is \$3, which on its face may seem reasonable.<sup>88</sup> However, a prison job in Colorado pays 13 cents per hour, which means that the incarcerated person must work more than 23 hours to gross \$3.<sup>89</sup> Setting aside the other costs that the \$3 must cover and looking only at the number of hours required to earn the costs of a medical visit, that \$3 copay is the equivalent of a \$214.62 fee for a free person who works at the state's minimum wage of \$9.30.<sup>90</sup> This context sheds light on why many incarcerated people rely on their families or friends to contribute to their inmate accounts. Others often "do without hygiene items or medical treatment rather than have their families deposit funds that will be immediately confiscated to satisfy prison charges."<sup>91</sup>

Even in jurisdictions that only permit the state to take funds from the inmate's account, those accounts are often funded by the incarcerated person's family, who are already likely to be low-income<sup>92</sup> and who may be deprived of a potential wage-

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[www.themarshallproject.org/2022/08/04/prison-money-diaries-what-people-really-make-and-spend-behind-bars](http://www.themarshallproject.org/2022/08/04/prison-money-diaries-what-people-really-make-and-spend-behind-bars) [<https://perma.cc/NZ42-F8AM>] (describing prison economics from the perspective of the incarcerated people and sharing anecdotes from incarcerated people).

85. ACLU & UNIV. OF CHI. L. SCH. GLOB. HUM. RTS. CLINIC, *supra* note 2484, at 55.

86. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction") (emphasis added); *see also* 13TH (Kandoo Films 2016) (documentary describing the relationship between the American criminal justice system and the Thirteenth Amendment).

87. *See* Schwartzapfel, *supra* note 84.

88. Wendy Sawyer, *The Steep Cost of Medical Co-Pays in Prison Puts Health at Risk*, PRISON POLY INITIATIVE (Apr. 19, 2017), <https://www.prisonpolicy.org/blog/2017/04/19/copays> [<https://perma.cc/JTW3-XG6J>].

89. *Id.*

90. *Id.*

91. Eisen, *supra* note 10, at 4 (quoting Mark Lopez & Kara Chayriques, *Billing Prisoners for Medical Care Blocks Access*, 9 NAT'L PRISON PROJ. J. 1, 2 (1994)).

92. SANETA DEVUONO-POWELL ET AL., ELLA BAKER CENTER, FORWARD TOGETHER & RESEARCH ACTION DESIGN, WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES, 11 (2015) ("Incarceration is both a predictor and a consequence of poverty. More than half of those entering the criminal justice system

earner during the inmate's term of incarceration.<sup>93</sup> When a family member deposits funds into the inmate's account, pay-to-stay statutes authorize the entity managing that account to siphon set percentages to satisfy pay-to-stay obligations.<sup>94</sup> Some have described this practice as a "de facto taxation on poor families," arguing that these policies are coercive insofar as the prison environment is such that the costs of telephone use, medical charges, commissary, and legal financial obligations cannot possibly be covered by the low wages prisoners are able to earn during incarceration.<sup>95</sup> Thus, families are placed in a situation where they must either deposit funds into the incarcerated person's account or deny their loved ones these services and goods. Because the inmate account managers will take pay-to-stay and other fees off the top, the families who deposit funds for the purpose of covering telephone charges and commissary items must deposit more than the amount to cover those expenses.<sup>96</sup> In other words, they must deposit enough that

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live at or below the poverty line (\$11,770 per year in annual income) when sentenced . . .").

93. *Id.* at 17:

[M]any families also face a significant loss of income during incarceration that results in financial instability. . . . [N]early half of formerly incarcerated individuals contributed 50% or more to their families' total household income prior to incarceration, and . . . their families struggled to cover basic costs of living as a result of both the loss of income as well as the costs associated with conviction and incarceration.

*See also* Michtom, *supra* note 30, at 201 ("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.").

94. Mary Fainsod Katzenstein & Maureen R. Waller, *Taxing the Poor: Incarceration Poverty Governance, and the Seizure of Family Resources*, 13 *PERSPS. ON POL.* 638, 639 (2015) ("[F]amilies are pressured by government policy to provide financial support both during their loved ones' incarceration and in the period following release. In facilities which require the incarcerated to pay fees for medical care or to cover the costs of pay-to-stay jails, family members often pick up those expenses.").

95. *See generally id.*

96. Creasia Finney Hairston, *Prisoners and Families: Parenting Issues During Incarceration* 5 (Dec. 2001) (Nat'l Pol'y Conf., Working Paper, 2001), [https://aspe.hhs.gov/sites/default/files/migrated\\_legacy\\_files/42341/Hairston.pdf](https://aspe.hhs.gov/sites/default/files/migrated_legacy_files/42341/Hairston.pdf) [<https://perma.cc/EY4D-AQZU>]:

Many basic items that prisoners need or want are not furnished by correctional institutions and pay for prison work is generally too meager to purchase them. Families either voluntarily, or by request, send money

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the net balance after the fees are deducted is sufficient to cover the intended purpose of the deposit.

Pay-to-stay laws pose a severe financial burden on the families of those who are incarcerated, even when the laws are not used to seize inherited property. But using these statutes to seize inherited property amplifies the injustice and exposes additional legal and policy issues. Parts II and III discuss how seizing inherited assets violates well-established principles of testamentary freedom, perpetuates racial wealth inequity, reduces perceived urgency to address the United States' mass incarceration problem, hinders reentry for recently released incarcerated people, and expands the reach of the carceral state's harms to the families and communities of those who are impacted.

## II. SEIZING INHERITANCES

The seizure of inherited property through pay-to-stay statutes raises unique concerns that are distinct from the more general criticisms of pay-to-stay laws. This Part addresses three such concerns: (1) interference with the decedents' testamentary freedom, (2) interference with the incarcerated beneficiaries' freedom to inherit, and (3) intrusion upon the intergenerational transfer of wealth within particular classes of persons who have been marginalized for centuries. State seizure of inherited property risks expansion of the carceral state and deepens the deleterious impact of incarceration on the family and loved ones of the incarcerated person.

### A. *Undermining Testamentary Freedom*

Testamentary freedom describes the widely settled American view<sup>97</sup> that individuals have a property right that

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to the prisoner for toiletries, reading materials, stamps, food, and clothing. They also pay involuntarily for prison medical visits and health care, institutional fines, and child support when corrections departments collect money from prisoners for those services/items by placing a levy on all monies that are deposited in prisoners' financial accounts.

97. Eva E. Subotnik, *Copyright and the Living Dead?: Succession Law and Postmortem Term*, 29 HARV. J.L. & TECH. 77, 85 (2015) ("At the heart of contemporary succession law is testamentary freedom, which is a fundamental principle of American law."). *But see* Kevin Noble Maillard, *The Color of*

allows them to control the disposition of their property after death through testamentary acts, such as wills and trusts.<sup>98</sup> Although there is considerable debate about the nature of testamentary freedom,<sup>99</sup> “Americans enjoy nearly unbridled testamentary freedom, a right that has been fully engrained in the American psyche.”<sup>100</sup> This freedom is “unique among modern systems,” in that it allows a person to exclude presumptive heirs from inheriting from their estate.<sup>101</sup> Testamentary freedom, as it relates to the freedom of

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*Testamentary Freedom*, 62 SMU L. REV. 1783 (2009) (discussing that the aspirations of testamentary freedom have historically and presently failed to serve interracial and nontraditional families).

98. See RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS §10.1 cmt. a (AM. L. INST. 2003):

The organizing principle of the American law of donative transfers is freedom of disposition. Property owners have the nearly unrestricted right to dispose of their property as they please. This section implements this fundamental principle by stating two well-accepted propositions: (1) that the controlling consideration in determining the meaning of a donative document is the donor’s intention; and (2) that the donor’s intention is given effect to the maximum extent allowed by law.

99. Some consider testamentary freedom to be a natural right, while others conceptualize it as a statutory right. See Mark Glover, *The Freedom of Inheritance*, 2017 UTAH L. REV. 283, 288–89 (discussing rationales to support testamentary freedom). In light of the ambiguous discussion in *Hodel v. Irving*, 481 U.S. 704 (1987), some argue that there may be a constitutional right of testation. See Suzanne S. Schmid, *Escheat of Indian Land as a Fifth Amendment Taking in Hodel v. Irving: A New Approach to Inheritance?*, 43 U. MIAMI L. REV. 739, 759 (1989) (“Thus, the holding of *Irving* puts teeth into the argument that the right of inheritance has a constitutional rather than a purely statutory basis because the Court implicitly reasoned that the escheat provision swept too broadly into an area protected by the fifth amendment takings clause.”).

100. Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 882 (2012). But see Irene D. Johnson, *There’s a Will, but No Way – Whatever Happened to the Doctrine of Testamentary Freedom and What Can (Should) We Do to Restore It?*, 4 EST. PLAN. & CMTY. PROP. L.J. 105, 106 (2011) (arguing that testamentary freedom is “a thing of smoke and mirrors” because courts tend to adhere to prevailing social norms); Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235 (1996) (arguing that courts selectively apply strict compliance and other doctrines to invalidate wills as a means to enforce moral norms when a testator’s intent does not reflect those norms).

101. Robert H. Sitkoff, *Freedom of Disposition in American Succession Law, in LA LIBERTAD DE TESTAR Y SUS LÍMITES [FREEDOM OF TESTATION AND ITS LIMITS]* 501, 501 (Antoni Vaquer Aloy et al. eds., 2018), <https://ssrn.com/abstract=3197342> [<https://perma.cc/3GVN-EQ2K>].



disposition, has been deemed a “hallmark,”<sup>102</sup> “keystone,”<sup>103</sup> “ideal,”<sup>104</sup> “cornerstone,”<sup>105</sup> “polestar,”<sup>106</sup> and “touchstone”<sup>107</sup> of American law of succession. The freedom of disposition “has come to be recognized as a separate stick in the bundle of rights called property.”<sup>108</sup>

Although most law in this area emphasizes honoring the wishes of the decedent and ensuring that their property passes with deference to and respect for the deceased, the freedom of disposition is not absolute. One exception to the freedom of disposition is in the situation where the testator’s spouse is named in testamentary documents, but the testator and spouse are divorced at the time of the testator’s death. In this situation, the state will presume those ex-spouses to be ineligible to inherit from the decedent’s estate. The context of a divorce authorizing the state law to exclude a named beneficiary is entirely distinct from the context of states using pay-to-stay laws to prevent inheritance. In the divorce scenario, the state supports its exclusion of the named beneficiary on the notion of honoring the presumed intent of the decedent. In the pay-to-stay context, the state holds its own interests ahead of the wishes of the decedent.

Another exception to the freedom of disposition exists to protect the interests of the decedent’s surviving spouse and

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102. THOMAS P. GALLANIS, *FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS* 349 (5th ed. 2011) (“Freedom of disposition is a hallmark of the American law of succession.”).

103. Mark Glover, *A Therapeutic Jurisprudential Framework of Estate Planning*, 35 SEATTLE U. L. REV. 427, 444 (2012) (“Testamentary freedom is so fundamental that it has consistently been heralded as the keystone of the law of succession.”).

104. E. Gary Spitko, *Gone but Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 278 (1999) (“The ideal of testamentary freedom grounds the law of testation.”).

105. Glover, *The Freedom of Inheritance*, *supra* note 99, at 284 (footnotes omitted) (“Freedom of disposition is the cornerstone of the modern law of succession. Individuals enjoy nearly unfettered discretion to decide how property should be distributed upon death, and the law is largely designed to facilitate the exercise of this freedom.”).

106. Weisbord, *supra* note 100, at 877–78 (“The polestar of American inheritance law, testamentary freedom is a right protected by the U.S. Constitution, and once it is exercised, courts go to great lengths to implement the decedent’s intent by closely honoring and interpreting testamentary instructions.”).

107. Paula A. Monopoli, *Toward Equality: Nonmarital Children and the Uniform Probate Code*, 45 U. MICH. J.L. REFORM 995, 1010 n.94 (2012) (“Freedom of testation and testator’s intent are frequently identified as paramount jurisprudential touchstones in the area of trusts and estates.”).

108. Sitkoff, *supra* note 101, at 501.

creditors.<sup>109</sup> However, even with these restrictions, American succession law permits mechanisms through which people can avoid the possibility of creditors attaching the inherited property. Specifically, all states recognize that creditors cannot reach a beneficiary's interest in a discretionary trust.<sup>110</sup> Even more saliently, a spendthrift trust bars a beneficiary from transferring their interest and prevents creditors from attaching it.<sup>111</sup> The donor's freedom of disposition supports the legitimacy of these trusts,<sup>112</sup> as early caselaw assessing the legitimacy of spendthrift trusts declined to consider the beneficiary's wishes, instead focusing on the right of the donor to "control his bounty."<sup>113</sup> Through these forms of sophisticated estate planning, it is possible for someone seeking to leave an inheritance to an incarcerated person to protect the inheritance from the state's application of its pay-to-stay laws. However, discretionary and spendthrift trusts are largely only accessible to those who can afford complex estate planning services.<sup>114</sup>

Recently, scholars have discussed demographic issues surrounding the law of succession—specifically that many people do not exercise this important freedom for myriad

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109. *See id.* at 502 ("To be sure, freedom of disposition is not absolute, not even within the permissive American tradition. The law protects a donor's spouse and creditors, allows for the imposition of transfer taxes, and imposes a handful of anti-dead hand public policy constraints, the most venerable of which is the Rule Against Perpetuities.") (citation omitted).

110. Sitkoff, *supra* note 101, at 513–14 ("In all common law jurisdictions, a beneficiary of a *discretionary trust* cannot alienate his or her beneficial interest and a creditor of the beneficiary cannot compel the trustee to make a distribution.>").

111. *Id.* at 514 ("A beneficiary of a spendthrift trust cannot transfer his or her beneficial interest and his or her creditors cannot attach it, and this is true even if the beneficiary has a present right to a mandatory distribution.>").

112. *Id.* ("The rationale for permitting a spendthrift trust, created by the settlor's imposition of a disabling restraint on alienation of the beneficial interest, is firmly rooted in freedom of disposition.>").

113. *Id.* (citing *In re Morgan's Estate*, 72 A. 498, 499 (Pa. 1909), as well as *Nichols v. Eaton*, 91 U.S. 716, 727 (1875)).

114. *See infra* Section II.C.1.

reasons.<sup>115</sup> When an individual does not express their<sup>116</sup> wishes for the disposition of their property, their property passes through the default rules of the state's intestate succession schemes. These "one-size-fits-all rules"<sup>117</sup> apply when a decedent, for whatever reason, fails to successfully exercise their testamentary freedom, thereby placing their property at the mercy of the state's default distribution scheme.<sup>118</sup>

Whether a decedent dies testate<sup>119</sup> or intestate,<sup>120</sup> unless the decedent was able to pass their property through a trust with provisions for protecting the beneficiary's interest from creditors, any assets or property that the incarcerated or formerly incarcerated person inherits or stands to inherit may be confiscated by a state with a pay-to-stay statute that permits such a practice. As described above in Teresa Beatty's story, states like Connecticut have pay-to-stay statutes that authorize the state to file a notice or lien in probate court or to seize the assets after the formerly incarcerated person obtains title to the property.<sup>121</sup> Other states may pursue the assets after they are in the possession of the incarcerated or formerly incarcerated person. Even in those states which restrict seizure to inmate account funds, if a person inherits during their period of incarceration and those inherited assets are deposited into an

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115. See, e.g., Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L.J. 36 (2009) (using empirical methods to theorize that socio-demographics can predict testacy/intestacy status and discussing the significance of the intestacy/testacy distinction); M. Akram Faizer, *Bridging the Divide: A Proposal to Bring Testamentary Freedom to Low-Income and Racial Minority Communities*, 99 TEX. L. REV. ONLINE 20 (2020) (proposing a two-step approach to addressing intergenerational wealth transfer disparities: first, by democratizing state laws by allowing electronic wills, and second, by applying a totality-of-the-circumstances test for the testator's likely intent instead of the standard intestate succession rules).

116. This Article intentionally uses the singular "their."

117. DiRusso, *supra* note 115, at 61 ("The intestate is no individual at all but is rather one in a mass of indistinguishable dead subject to the same one-size-fits-all rules.").

118. 26B C.J.S. *Descent and Distribution* § 1 (2011) ("Where a decedent fails to dispose of some or all of their property through a testamentary transfer, the statutes of descent and distribution govern who receives the unaccounted-for property. In essence, such statutes provide a default distribution scheme to resolve the uncertainty created by intestacy.") (footnote omitted).

119. *Testate*, BLACK'S LAW DICTIONARY (2d ed. 1910) (one who has made a will; one who dies leaving a will).

120. *Intestate*, BLACK'S LAW DICTIONARY (2d ed. 1910) (without making a will).

121. See *supra* Introduction.

inmate account, then those states may take some or all of the incarcerated person's inheritance.<sup>122</sup>

Regardless of the method the state uses to take the inherited property, this practice blatantly violates the wishes of the decedent who has named an incarcerated person in their will. When the testator<sup>123</sup> expresses their desires for the distribution of their property after death and complies with the formalities of will creation (often with the assistance and expense of an attorney), they have an expectation that those desires will be honored. By intervening in the probate process<sup>124</sup> or taking the funds after distribution, the state uses its pay-to-stay laws to infringe upon the testamentary freedom of the decedent. If the decedent were aware that the assets they designated to be distributed to the incarcerated person would be taken by the state, they surely would not name the incarcerated person in their will. Thus, the state's taking of inherited property contradicts the decedent's testamentary intent.

Even in situations where the decedent dies intestate, the state's taking of inherited property infringes on basic principles of American succession. The goal of succession statutes is, in part, to avoid property escheating<sup>125</sup> to the government.<sup>126</sup> Pay-to-stay statutes that authorize the seizure of inherited property promote government seizure of the decedent's property. If the

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122. See e.g., WASH. REV. CODE ANN. § 72.09.480(4) (West 2022) (authorizing deductions for the cost of incarceration and other deductions from inheritances in inmate funds).

123. *Testator*, BLACK'S LAW DICTIONARY (2d ed. 1910) (one who makes a will).

124. The process by which the probate court determines the validity of a will and claims against the estate and administers the distribution of assets.

125. *Escheat*, BLACK'S LAW DICTIONARY (2d ed. 1910) (when the property goes to the state because there is no individual who is eligible to inherit).

126. See Cristy G. Lomenzo, *A Goal-Based Approach to Drafting Intestacy Provisions for Heirs Other Than Surviving Spouses*, 46 HASTINGS L.J. 941, 945 (1995) (identifying "avoiding frequent escheat" as a goal of intestacy provisions). For a discussion of the early history of American succession law, see Carole Shammas, *English Inheritance Law and Its Transfer to the Colonies*, 31 AM. J. LEGAL HIST. 145, 149 (1987):

In 1670, a statute standardized the distribution and descent of personality in the absence of a will, and the formula established at that time remained the basic pattern of intestate division not only in England but in the United States until the latter part of the twentieth century. The state no longer recognized the historic claims of monarch, lord, and Church to all or part of the estate. The widow received one third forever, with the children inheriting the remainder equally.

state's intestate succession rules provide for a distribution to an incarcerated or formerly incarcerated person, but the state's pay-to-stay statutes permit the state to take that property, the state's own laws permit an end-run around the well-established principle of avoiding frequent escheatment through statutory succession. This analogy to escheatment is particularly apt when assets seized under pay-to-stay laws, despite being nominally deemed "reimbursements," are deployed to state agencies other than their departments of corrections.<sup>127</sup>

Thus, regardless of whether the testator expressed their wishes through a formal estate plan or died intestate, pay-to-stay statutes authorizing seizure of inherited assets sharply conflict with the well-established principle of testamentary freedom that serves as the cornerstone of American succession law. The conflict should be resolved by assessing the comparative weight of each policy's intended goals. Incarceration reimbursement statutes merely aim to reimburse the states for the bloated costs of their own poor policymaking decisions in the criminal justice system.<sup>128</sup> By contrast, testamentary freedom echoes America's core value of freedom from excessive government intrusion<sup>129</sup> by affording people the opportunity to determine the distribution of their property after death. In view of this conflict between two laws with significantly unequal policy rationales, succession laws rooted in testamentary freedom should prevail over reimbursement laws rooted in states' budgetary concerns stemming from mass incarceration.

*B. Denying the Testator's and Beneficiary's Freedom of Inheritance*

A corollary of testamentary freedom's right to testation is the right to inheritance.<sup>130</sup> This latter right is conceptualized as

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127. See *Dean v. Lehman*, 18 P.3d 523 (Wash. 2001) (en banc) (a class of incarcerated persons alleged that the state used their seized assets for purposes other than reimbursement for the costs of incarceration, and the Court held that the inquiry into how the funds were used was irrelevant for its Takings Clause analysis).

128. See *supra* Section II.A.

129. For a historical discussion of succession laws in the United States, see generally Shammass, *supra* note 126.

130. Subotnik, *supra* note 97, at 96 (citing Adam J. Hirsh & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 6 n.16 (1992)) ("Any discussion of testamentary freedom requires an initial distinction between an

“the freedom of an owner at death to avoid confiscation of her property by the state.”<sup>131</sup> Even though in this context the freedom belongs to the testator, some have argued that the beneficiary of a testamentary gift also has a freedom to inherit.<sup>132</sup>

With respect to the testator’s right of inheritance, the state’s taking of property after death through its pay-to-stay scheme clearly betrays this right. The testator sought to exercise this right to avoid confiscation by the state at death, but the state, during probate or after distribution, specifically targets and seizes those assets.

With respect to the beneficiary’s freedom to inherit, the beneficiary is entitled to receive the specified portion of the estate that the decedent bequeathed or devised to them or that the intestate succession laws allocated to them. When the state interferes with this property, their freedom to inherit is limited. The state, which is not named as a beneficiary, takes the property designated for the incarcerated or formerly incarcerated person who is named. One common scenario in which the state authorizes someone who is not named in testamentary documents to inherit from the estate—and thus, alters the shares of those who are named—is in the context of the spousal share. When a decedent’s testamentary documents fail to name a spouse to whom the decedent is married at the time of death, the state will allow the surviving spouse to inherit the portion of the estate specified in the state’s statutes.<sup>133</sup>

As in the divorce analogy described above, this is distinct from the pay-to-stay context of state interference with inheritance. In the spousal-share context, the state seeks to ensure that the surviving spouse is provided for and, in the

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owner’s rights to transmit property to the recipients of her choosing and her rights to transmit property at all (that is, to avoid its confiscation by the state) – or between what Adam Hirsh and William Wang term the *right of testation* and the *right of inheritance*.”).

131. Hirsh & Wang, *supra* note 130, at 6 n.16 (“The right of testation (that is, the right of an owner at death to choose the beneficiaries of her property) must be distinguished analytically from freedom of inheritance (that is, the freedom of an owner at death to avoid confiscation of her property by the state).”).

132. See generally Glover, *The Freedom of Inheritance*, *supra* note 99.

133. However, some states allow for married persons to draft around this statute through a prenuptial agreement. See Johnson, *supra* note 100, at 107–08 (“Almost all jurisdictions have statutory provisions that preclude a testator from disinheriting his surviving spouse, unless the spouse has agreed to such disinheritance in a prenuptial or postnuptial agreement.”).

scenario in which the decedent and surviving spouse marry after the testamentary documents are created, the state presumes the intent of the decedent. By contrast, pay-to-stay interferences have much less noble aims. These intrusions into the freedom to inherit merely serve to alleviate the financial burden the state assumed in confining the beneficiary rather than to honor familial succession. The state itself is responsible for bearing these costs to comply with its Eighth Amendment obligations to provide for the basic needs of those who are held in the state's custody.<sup>134</sup>

Those pay-to-stay statutes that authorize the seizure of inherited assets problematically interfere with the freedom of inheritance as it pertains to the testator's freedom to avoid state seizure of assets after death and as it relates to the beneficiary's freedom to inherit from the estate. As discussed in the next section, adding a troubling wrinkle to this issue, families with wealth and access to robust estate-planning tools can draft their estate plans to avoid the state's seizure from the estate.

### *C. Equity Issues*

Pay-to-stay statutes' impositions on freedoms of testation and inheritance do not affect all prisoners equally. Those who stand to inherit from more sizable estates may be counterintuitively less affected, because people with greater wealth have access to complex estate-planning services and can create trusts or other instruments to avoid the state seizure while those inheriting the least would be most affected. Importantly, the groups of people who are most likely to be affected by this intrusion into intergenerational wealth transfer are those who have been marginalized throughout America's history.

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134. See U.S. CONST. amend. VIII (prohibiting the government from inflicting "cruel and unusual punishments"). The U.S. Supreme Court has interpreted this Clause as requiring the state to provide for the basic needs of those in its custody. See *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989) (explaining that a duty arises from "the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty" and that failing to uphold this duty to "provide for his basic human needs – e.g., food, clothing, shelter, medical care, and reasonable safety – it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause"). A complete Eighth Amendment argument is outside the scope of this Article and will be examined and argued more thoroughly in a future work.

### 1. Greater Impact on People Without Substantial Wealth

The seizure of inherited assets to satisfy pay-to-stay debt does not impact everyone equally. There are legal mechanisms available to avoid state seizure of inherited property, but the access-to-justice issues that exist in estate law extend to the issue of the state seizing inherited assets. Specifically, the decedent could establish a trust to avoid the state's taking, or the currently or formerly incarcerated intended beneficiary could disclaim the inheritance. Both of these strategies to avoid the seizure would generally require access to legal advice and the financial means to pay for legal services.

People without substantial wealth often die intestate or with simple estate plans, such as wills, that must be probated. These arrangements result in outright distributions to the beneficiary. In some states, the state may seize these assets upon distribution.<sup>135</sup> In other words, once the title and possession of the property transfers from the estate into the name of the beneficiary, that property becomes the beneficiary's asset. Other states permit the state to file a notice in probate court whenever a beneficiary who has an obligation to the state under its pay-to-stay statute is named in a will that has been submitted to probate.<sup>136</sup> In these states, the state may intercept the inherited property before it is transferred to the beneficiary. In either case, probate records are accessible to the government and distributions are generally made outright. Thus, the state may identify assets and intervene in the probate process when an estate plan triggers a requirement to file in probate court.

On the other hand, people with greater wealth are often able to draft their estate plans in a way that avoids these risks. People who have substantial wealth have greater access to estate-planning and financial-management resources. When these individuals wish to name an incarcerated or formerly incarcerated loved one as a beneficiary under their estate plan, they can plan around the possibility of the seizure of that

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135. See, e.g., WASH. REV. CODE ANN. § 72.09.480(4) (West 2023); FLA. ST. ANN. § 944.485 (West 2022) (requiring that incarcerated people disclose inheritances as a condition of release or eligibility and that they pay "all or a fair portion of [their] subsistence costs" from those assets).

136. See CONN. GEN. ST. ANN. § 18-85b(b) (West 2022).



inheritance.<sup>137</sup> For example, they may be able to establish a discretionary support trust that benefits the incarcerated or formerly incarcerated person without transferring the requisite control of the property that would make the property eligible for seizure.<sup>138</sup> Moreover, the relatively private nature of such a trust reduces the likelihood that the government will detect the assets, when compared to assets inherited through wills that must pass through the formal probate process.<sup>139</sup>

Due to limited access to highly sophisticated estate- and wealth-planning tools, people without significant wealth at the time of their death are particularly vulnerable to states exercising their authority under pay-to-stay statutes. This is problematic in two primary ways. First, it is counterproductive from a cost-benefit perspective. Modest estates with limited assets have little for states to take. The costs and efforts involved in intervening in the probate process or tracking the assets after distribution may outweigh the potential yield from the eventual

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137. See generally Allison Anna Tait, *The Law of High-Wealth Exceptionalism*, 71 ALA. L. REV. 981 (2020) (explaining the ways in which high-wealth families use trust planning to shield their assets from government interference and regulatory oversight).

138. GEORGE GLEASON BOGERT ET AL., *THE LAW OF TRUSTS AND TRUSTEES* § 228 (3d ed. 2007) (“When a settlor creates a discretionary trust that imposes standards for the beneficiary’s support or for support, maintenance, and education, these trusts are now often called discretionary support trusts.”); A. KIMBERLY DAYTON ET AL., *ADVISING THE ELDERLY CLIENT* § 16:112 (2013) (“A discretionary support trust is a trust that gives the trustee discretion whether or not to distribute from the trust for the support of the beneficiary.”); 76 AM. JUR. 2D *Trusts* § 113 (2016) (footnote omitted):

Trusts are neither support trusts nor discretionary trusts but, rather, a hybrid of those two types, namely, a discretionary support trust where the language of the trust instruments indicates that the settlors’ purpose is not only to support the beneficiaries but also grant the trustee greater liberty in decision making than the trustee of an ordinary support trust. Thus, a settlor creates a discretionary support trust when the purpose of the trust is to furnish the beneficiary with support, and the trustee has the discretion to pay the income or principal to the beneficiary as the trustee deems necessary for the support of the beneficiary.

139. A trust is an example of a will substitute, which is exempted from probate administration and is instead administered privately by the trustee. Empirical research on estate planning in the United States is often limited by the reality that trusts are private and researchers have difficulty concretely quantifying their prevalence. See Emily S. Taylor Poppe, *Surprised by the Inevitable: A National Survey of Estate Planning Utilization*, 53 U.C. DAVIS L. REV. 2511, 2535 (2020) (“[K]nowledge of the use of other estate planning instruments [such as trusts] is truly limited.”).

seizure. At least when the size of the estate is significant, there is greater potential to capture a windfall that offsets the costs of incarceration. Second, it is counterproductive from a criminal justice perspective. As discussed in greater detail below, this practice keeps the poor in a cycle of poverty that is known to be criminogenic.<sup>140</sup> By denying the beneficiary of a modest estate their inheritance, the state keeps the incarcerated or formerly incarcerated in a financial position that inhibits reentry, prevents advancement, and promotes future criminality.

Apart from trusts, another option may be for the beneficiary of any estate to disclaim the inheritance. Simply put, even if the decedent died intestate or with a will that is probated, the beneficiary could file simple paperwork to disclaim their interest in the inheritance. This would allow the property to bypass them and go to other beneficiaries instead. However, this option is only realistically enjoyed by those who know about it. If there is no attorney available or if the beneficiary is unable to access the forms, then a disclaimer is unavailable as a practical matter. Moreover, even if the beneficiary can successfully disclaim their interest in the estate, they should not need to elect to undermine their loved one's wishes to avoid the state's seizure of the inherited property.

## 2. Racial Disparities

The United States has notoriously stark wealth<sup>141</sup> gaps compared to other nations, and this gap has grown ever-wider in recent years.<sup>142</sup> Notably, the racial wealth gap could be properly

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140. See *infra* Section III.C.

141. This Article relies on wealth, rather than income, as wealth—defined as net worth—is passed to future generations, while income generally is not. See, e.g., DALTON CONLEY, BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA 155 (10th anniversary ed. 2009) (“That is, although race, income, job status, and net worth all tend to vary hand-in-hand, careful statistical parsing shows that it is really net worth that drives opportunity for the next generation.”); Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 89 OR. L. REV. 453, 476–77 (2010) (“Where one generation has wealth . . . the next generation enjoys a leg up.”); Lynnise E. Phillips Pantin, *The Wealth Gap and the Racial Disparities in the Startup Ecosystem*, 62 ST. LOUIS U. L.J. 419, 436 (2018) (“Wealth and real property, unlike income, accumulates in value and may be passed from generation to generation.”).

142. Juliana Menasce Horowitz et al., *Most Americans Say There Is Too Much Economic Inequality in the U.S., But Fewer than Half Call It a Top Priority*, PEW RSCH. CTR. (2020), <https://www.pewresearch.org/social-trends/2020/01/09/most-americans-say-there-is-too-much-economic-inequality-in-the-u-s-but-fewer-than->

characterized as a chasm between Black and White Americans.<sup>143</sup> Meanwhile, in addition to being statistically less likely to have as much wealth as the White population, Black Americans are significantly more likely to experience incarceration.<sup>144</sup> When pay-to-stay statutes result in the state seizing an inheritance from a Black person who is currently or was recently incarcerated, this further reinforces the wealth gap and perpetuates the historic exclusion of Black families from intergenerational wealth transfer.

Scholars have criticized America's racially biased application of testamentary freedom. For example, Kevin Noble Maillard, a law professor, argues that "the aspirational concept of testamentary freedom" conflicts with the historic practice of denying interracial wealth transfer.<sup>145</sup> Anti-miscegenation laws and slavery particularly contributed to this practice because states with such laws failed to recognize members of interracial family structures as eligible to inherit from a White decedent.<sup>146</sup> Through examination of probate records, Maillard shows that judicial concepts of "legitimacy" have played a central role in

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half-call-it-a-top-priority [<https://perma.cc/9K3D-QZZ6>] ("The wealth gap among upper-income families and middle- and lower-income families is sharper than the income gap and is growing more rapidly."); Anshu Siripurapu, *The U.S. Inequality Debate*, COUNCIL ON FOREIGN RELS. (Apr. 20, 2022, 5:14 PM), <https://www.cfr.org/backgroundunder/us-inequality-debate> [<https://perma.cc/A2BS-FCKV>] ("Income and wealth inequality in the United States is substantially higher than almost any other developed nation, and it is on the rise, sparking an intensifying national debate."); Danaya C. Wright, *What Happened to Grandma's House: The Real Property Implications of Dying Intestate*, 53 U.C. DAVIS L. REV. 2603, 2607 (2020) ("Even as the income gap between different demographics has narrowed, the wealth gap has grown in ways that are quite alarming. In the United States, over 75% of wealth is controlled by the top 10% of the population.").

143. See Strand, *supra* note 141, at 461–62 ("Not only is wealth inequality in general relatively high and on the rise in the United States, racial trends in wealth inequality are stark. . . . [T]he ratio of Black median net worth to White median net worth was 0.08 (\$3700 to \$43,800). Even more dramatic, the ratio of Black median net financial worth to White median net financial worth was 0.00 (\$0 to \$6999)."); Felix B. Chang, *Asymmetries in the Generation and Transmission of Wealth*, 79 OHIO ST. L.J. 73, 84 (2018) ("Not surprisingly, wealth gap is greater than income gap; also, not surprisingly, the wealth gap tracks racial disparities.").

144. See Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENT'G PROJECT (Oct. 2021), <https://www.sentencingproject.org/app/uploads/2022/08/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf> [<https://perma.cc/RH8V-B2S2>] ("Black Americans are incarcerated at 4.8 times the rate of white Americans.").

145. Maillard, *supra* note 97, at 1788.

146. See generally *id.*

determining who is eligible to inherit.<sup>147</sup> Relying on racist social norms to undermine the decedent's express testamentary intent, courts entertained will contests and routinely prevented the transfer of property to Black relatives.<sup>148</sup> As Maillard describes it, interracial "'family' did not exist as a reality in a legal regime that defined intimacy in terms of black and white, with nothing in between."<sup>149</sup> Though the abolition of slavery and anti-miscegenation laws allowed for legal interracial wealth transfer in probate courts, the United States erected other systemic barriers to generational wealth for Black people.

America's more recent history of segregation significantly contributed to intergenerational poverty among Black Americans.<sup>150</sup> In *The Color of Law*, Richard Rothstein makes the case that racial residential segregation is *de jure*, calling the

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147. *Id.* at 1789–90 (footnote omitted) (“Relationships that fit the state’s conception of appropriate prospective spouses receive state protection of their relationship and of their property. For those relationships existing outside of this realm of approval, securing these same rights proves to be a remarkably difficult process.”).

148. *See generally id.*

149. *Id.* at 1816.

150. *See generally* SHERYLL CASHIN, *WHITE SPACE, BLACK HOOD: OPPORTUNITY HOARDING AND SEGREGATION IN THE AGE OF INEQUALITY* (2021). *See also, e.g.*, Wright, *supra* note 142, at 2608 (“And although there are many reasons for the wealth gap, from income inequality, racism, housing segregation, and tax policy, to risk-averse tendencies and lack of education about how to protect and grow wealth, intergenerational wealth transfers permissible by succession laws certainly contribute to the divide.”); Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429, 439–45 (1998) (discussing the intergenerational effects of structural racism in the U.S., including housing segregation and redlining, resulting in billions of dollars of home equity lost for Black Americans); Etienne C. Toussaint, *Dismantling the Master’s House: Toward a Justice-Based Theory of Community Economic Development*, 53 U. MICH. J.L. REFORM 337, 400 (2019) (“[S]olutions to economic inequality must wrestle with our nation’s political history of institutionalized racism that dictated who owns the primary factors of production that create intergenerational wealth.”); Strand, *supra* note 141, at 462 (explaining that housing in Black neighborhoods appreciates less than housing in White neighborhoods and stating that this “stems from historical federal practices (especially housing, tax, and transportation) that enforced residential segregation and continuing patterns of extremely high levels of racial housing separation[,]” and that “the cumulative wealth implications” of the effects of past and present housing discrimination are “substantial”). For a discussion on poverty disparities between White and Black Americans, see Tricia Young, *A Change Must Come: The Intersection of Intergenerational Poverty and Public Benefits*, DEPAUL J. FOR SOC. JUST. art. 5, 1–2 (2021) <https://via.library.depaul.edu/jsj/vol14/iss1/5> [<https://perma.cc/8LYR-QQPM>] (“Without assets to pass from one generation to another, poverty is destined to be cyclical.”).

notion of *de facto* segregation a “myth.”<sup>151</sup> Rothstein traces the history of American laws and policies aimed at furthering race-based residential segregation, noting that one practical effect of this residential segregation is that White families’ suburban homes appreciated in value over time, which “resulted in vast wealth differences between whites and blacks. . . . Because parents can bequeath assets to their children, the racial wealth gap is even more persistent down through generations than income differences.”<sup>152</sup> Segregation, redlining, and discriminatory lending practices prevented Black families from accumulating wealth and passing that wealth to the next generation, further perpetuating the wealth gap.<sup>153</sup> Though the literature on racial wealth inequity focuses predominately on homeownership, employment discrimination,<sup>154</sup> credit score disparities,<sup>155</sup> and access to banking services<sup>156</sup> are just a few examples of further systemic issues that contribute to the racial wealth gap.

Because Black people make up a disproportionately high percentage of incarcerated people, pay-to-stay laws disproportionately impact families who have historically been excluded from intergenerational wealth transfer. Through these laws, the state has forged another avenue to further the wealth gap by precluding Black people from enjoying the

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151. RICHARD ROTHSTEIN, *THE COLOR OF LAW* at xii (2017) (“Popularized by Supreme Court majorities from the 1970s to the present, the *de facto* segregation myth has now been adopted by conventional opinion, liberal and conservative alike.”).

152. *Id.* at 179.

153. *See, e.g., id.*; Strand, *supra* note 141; R. Richard Banks, “Nondiscriminatory” *Perpetuation of Racial Subordination*, 76 B.U. L. REV. 669 (1996).

154. *See* Jhacova Williams & Valerie Wilson, *Black Workers Endure Persistent Racial Disparities in Employment Outcomes*, ECON. POL’Y INST. (Aug. 27, 2019), <https://www.epi.org/publication/labor-day-2019-racial-disparities-in-employment> [<https://perma.cc/4C3N-W59B>] (discussing both unemployment and underemployment for Black workers).

155. *See* Thea Garon, *Young Adults’ Credit Trajectories Vary Widely by Race and Ethnicity*, URBAN INST. (Aug. 22, 2022), <https://www.urban.org/urban-wire/young-adults-credit-trajectories-vary-widely-race-and-ethnicity> [<https://perma.cc/4SDD-JTCZ>].

156. *See* 2021 FDIC National Survey of Unbanked and Underbanked Households, FDIC, <https://www.fdic.gov/analysis/household-survey> [<https://perma.cc/N5J6-8RY2>] (July 24, 2023) (“Differences in unbanked rates between Black and White households . . . were present at every income level. For example, among households with income between \$30,000 and \$50,000, 8.0 percent of Black households . . . were unbanked, compared with 1.7 percent of White households.”).

intergenerational transfer of wealth and exercising their testamentary freedom.

### III. IMPLICATIONS FOR THE CARCERAL STATE

As noted above, states specifically enacted pay-to-stay statutes to offset the costs of mass incarceration. This Part discusses the failures of pay-to-stay statutes in the broader context of the carceral state. First, pay-to-stay statutes, by design, reduce the states' sense of urgency to move toward much-needed decarceration. Second, pay-to-stay statutes allow private prisons to profit from incarceration, which raises additional policy concerns. Finally, pay-to-stay statutes engender a criminogenic cycle of poverty, which fuels further incarceration. This Part concludes each Section with a brief discussion on how these failures are particularly concerning when the reimbursement comes through inherited property. In general, pay-to-stay further metastasizes the reach of the carceral state, both within the walls of prisons and throughout society. When applied to inherited property, the effects of the carceral state's ever-growing web weave their way further and deeper into the community at large.

#### A. *Reduction in Urgency to Decarcerate*

Incarceration rates in the United States have “more than quintupled since 1970.”<sup>157</sup> For decades, much discussion in the criminal justice space has focused on the United States' unenviable position as the global leader in per capita incarceration rates.<sup>158</sup> Calls for decarceration<sup>159</sup> and

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157. Eisen, *supra* note 10, at 8.

158. See, e.g., Sawyer & Wagner, *supra* note 6; Kolkey, *supra* note 6, at 260; Bagaric et al., *supra* note 6, at 357.

159. See, e.g., Ben Grunwald, *Toward an Optimal Decarceration Strategy*, 33 STAN. L. & POL'Y REV. 1 (2022) (proposing methods for implementing decarceration); Dennis Schrantz et al., *Decarceration Strategies: How 5 States Achieved Substantial Prison Population Reductions*, SENT'G PROJECT, (Sept. 5, 2018), <https://www.sentencingproject.org/app/uploads/2022/08/Decarceration-Strategies.pdf> [<https://perma.cc/646A-YUWP>] (presenting a data-driven report examining the five states with the most significant reductions in prison populations in order to “aid policymakers and criminal justice officials in achieving substantial prison population reductions”); William Harms, *Leading the Way in Advancing Decarceration*, U. CHI. SCH. SOC. SERV. ADMIN. MAG., (Spring 2018), [https://crownschool.uchicago.edu/ssa\\_magazine/leading-way-advancing-decarceration](https://crownschool.uchicago.edu/ssa_magazine/leading-way-advancing-decarceration)

abolition<sup>160</sup> have enjoyed some modest success. In recent years, especially during the COVID-19 pandemic,<sup>161</sup> incarceration rates have slowly and slightly decreased.<sup>162</sup> However, at the current creeping pace of decline in incarceration, state prison incarceration rates will not return to pre-mass-incarceration levels until 2088.<sup>163</sup>

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[<https://perma.cc/6WWV-NZ4L>] (“Epperson and other leaders of the decarceration movement hope to cut the prison and jail population . . .”).

160. See, e.g., Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781 (2020); Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. 1 (2022); ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613 (2019) (defining different versions of abolitionism); Ruth Wilson Gilmore & James Kilgore, Commentary, *The Case for Abolition*, MARSHALL PROJECT (June 19, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/06/19/the-case-for-abolition> [<https://perma.cc/RZ4N-77TX>].

161. See, e.g., Linda So et al., *America’s Inmate Population Fell by 170,000 Amid COVID. Some See a Chance to Undo Mass Incarceration*, REUTERS (Oct. 28, 2020, 12:00 PM), <https://www.reuters.com/investigates/special-report/usa-jails-release> [<https://perma.cc/EMR9-AKF7>] (describing the mass release necessitated by the COVID-19 pandemic and the responses of various stakeholders); *Decarceration and Crime During COVID-19*, ACLU (July 27, 2020), <https://www.aclu.org/news/smart-justice/decarceration-and-crime-during-covid-19> [<https://perma.cc/Y62U-T68Z>]. For a discussion on the urgent need to decarcerate during the COVID-19 pandemic, see *Covid-19, Decarceration, and Abolition*, POWER (Apr. 16, 2020), <https://power.buellcenter.columbia.edu/media/118> [<https://perma.cc/FGM4-UFM5>] (three-part video series).

162. See Nazgol Ghandnoosh, *U.S. Prison Decline: Insufficient to Undo Mass Incarceration*, SENT’G PROJECT (May 19, 2020), <https://www.sentencingproject.org/publications/u-s-prison-decline-insufficient-undo-mass-incarceration> [<https://perma.cc/3832-3ZC6>] (analyzing the most recent data from the Bureau of Justice Statistics on those serving sentences greater than one year and discussing the data available at the time of publication related to the COVID-19 pandemic and releases).

163. Alexi Jones, *New BJS Data: Prison Incarceration Rates Inch Down, but Racial Equity and Real Decarceration Still Decades Away*, PRISON POL’Y INITIATIVE (Oct. 30, 2020), [https://www.prisonpolicy.org/blog/2020/10/30/prisoners\\_in\\_2019](https://www.prisonpolicy.org/blog/2020/10/30/prisoners_in_2019) [<https://perma.cc/Y8Q6-QSH3>].

Not only is our state and federal prison population still massive, the data in the report reveals [sic] that our pace of decarceration has been stubbornly slow. Recent criminal justice reforms have not been nearly enough to counteract the massive growth of our prison populations over the past forty years. At the current pace of decarceration: it will be 2044 when the federal prison population returns to pre-mass incarceration levels . . . 2088 when *state* prison populations return to pre-mass incarceration levels.

Although opponents of abolition and decarceration<sup>164</sup> cite many reasons to support their position, especially the concern that abolition would result in dangerous criminals living freely in society,<sup>165</sup> pay-to-stay statutes disincentivize lawmakers from addressing the mass incarceration problem. So long as the financial burden of mass incarceration is shifted from the taxpayer to the system-involved person, lawmakers do not face the budgetary considerations or public outcry<sup>166</sup> that often motivate legislation. When the burden to fund the system falls on the incarcerated person (and their family), there is simply less pressure or incentive for lawmakers to work on decarceration.

On an ancillary but important note, when pay-to-stay statutes include a scheme for calculating per capita expenses,<sup>167</sup> the people incarcerated during the relevant period bear a greater cost when there is a reduction in inmates. Much of the cost of prison operation goes to those prison expenditures that remain similar regardless of the size of the prison population.<sup>168</sup> As the

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164. Decarceration refers to the process of “getting people out of prison,” while abolition refers to the broader movement to abolish prisons altogether. See Bagaric et al., *supra* note 6, at 371.

165. See, e.g., Thomas Ward Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2013 (2022) (discussing abolition opponents’ common objection that abolition unsatisfactorily would result in the release of dangerous criminals); Peter N. Salib, *Why Prison?: An Economic Critique*, 22 BERKELEY J. CRIM. L. 111 (2017) (responding to objections to abolition, including the critique that prison is necessary for incapacitation); McLeod, *Prison Abolition and Grounded Justice*, *supra* note 160, at 1168 n.48 (“I use this terminology – ‘the dangerous few’ – because . . . it captures succinctly the anticipated objection of a critic who resists an abolitionist framework in virtue of a concern for public safety.”).

166. A notable exception in the pay-to-stay context is recent legislation in Connecticut, which limited its application of pay-to-stay to include only those convicted of serious offenses, such as murder. This can be attributed, at least in part, to advocacy groups raising awareness and applying pressure to state lawmakers to abolish the state’s far-reaching pay-to-stay laws. See *At \$249 Per Day, Prison Stays Leave Ex-inmates Deep in Debt*, *supra* note 79.

167. See, e.g., WASH. REV. CODE ANN. § 72.09.480(1)(a) (West 2022) (providing that “cost[s] of incarceration” are determined “based on the average per inmate costs established by the department and office of financial management”); CONN. GEN. ST. ANN. § 18-85a(a) (West 2022) (“The Commissioner of Correction shall adopt regulations . . . concerning the assessment of inmates of correctional institutions or facilities for the costs of their incarceration.”); CONN. AGENCIES REGS. § 18-85a-1(a) (2023) (calculating the amount owed by each inmate by multiplying “the average per capita cost, per diem”).

168. See John Pfaff, Commentary, *The Incalculable Costs of Mass Incarceration*, APPEAL (Sept. 20, 2018), <https://theappeal.org/the-incalculable-costs-of-mass-incarceration> [<https://perma.cc/EZZ8-6UKX>] (explaining why it is problematic to



plaintiffs in *Beatty v. Lamont* note in their complaint, “When those administering the justice system . . . increase or decrease the number of people they charge with and sentence to imprisonment-bearing offenses, the assessed cost borne by every incarcerated person falls or rises proportionally.”<sup>169</sup> Thus, puzzlingly, per capita calculations create a system where it is in the incarcerated person’s financial interest that the state incarcerates more people for longer periods.

Decarceration efforts are important for reasons beyond lowering the costs of the penal system. The carceral state’s harms impact people regardless of their status as either system-involved or as a taxpayer. Incarceration affects the millions of children who have or have had an incarcerated parent.<sup>170</sup> The carceral state impacts data collection, resulting in “misleading findings about trends in vital areas like economic growth, political participation, unemployment, poverty, and public health.”<sup>171</sup> The carceral state impedes economic mobility, disparately impacting communities of color.<sup>172</sup> The connection between our criminal system, race, and inequality has been well documented.<sup>173</sup> Supporters of the growing abolitionist movement view the carceral state as “inherently and

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view the costs of mass incarceration through a “per-inmate” lens); *see also* Josie Duffy Rice & Clint Smith, *Justice in America Episode 13: Juvenile Justice*, APPEAL (Jan. 30, 2019), <https://theappeal.org/justice-in-america-episode-13-juvenile-justice> [<https://perma.cc/WG7W-56BV>] (echoing Pfaff’s article and noting the fallacies in public discourse that lead to people believing that the release of one inmate will result in a savings of that person’s per capita cost of incarceration).

169. Complaint, *supra* note 1, ¶ 73.

170. ERIC MARTIN, NAT’L INST. JUST. J., HIDDEN CONSEQUENCES: THE IMPACT OF INCARCERATION ON DEPENDENT CHILDREN (2017) (presenting statistics to show the scope of the problem of parental incarceration and outlining some of the effects parental incarceration has on children); Julie Poehlmann-Tynan & Kristin Turney, *A Developmental Perspective on Children with Incarcerated Parents*, 15 CHILD DEV. PERSPS. 3, 3 (2020) (“About 2.6 million U.S. children currently have a parent in jail or prison and most people who are incarcerated have minor children.”).

171. Marie Gottschalk, *Bring It On: The Future of Penal Reform, the Carceral State, and American Politics*, 12 OHIO ST. J. CRIM. L. 559, 560 (2015).

172. *See generally* Terry-Ann Craigie et al., *Conviction, Imprisonment, and Lost Earnings: How Involvement with the Criminal Justice System Deepens Inequality*, BRENNAN CTR. FOR JUST. (Sept. 15, 2020), <https://www.brennancenter.org/our-work/research-reports/conviction-imprisonment-and-lost-earnings-how-involvement-criminal> [<https://perma.cc/42X2-ZDEZ>].

173. Alexandra Natapoff, *Atwater and the Misdemeanor Carceral State*, 133 HARV. L. REV. F. 147, 155 (2020) (“Critical race scholarship and much of criminal procedure scholarship have been pointing out the deep connections between race, crime, and inequality for decades.”).

unavoidably racial”<sup>174</sup> and point to its roots in chattel slavery as well as its disparate impact on communities of color to illustrate its inextricable entwinement with racism.<sup>175</sup> In short, the carceral state harms society broadly and creates a ripple effect through all communities, with its deleterious impacts falling especially upon communities of color. When attempts to create a user-funded system diminish the pressure to decarcerate, the burdens on everyone who is impacted by mass incarceration continue.

Pay-to-stay laws authorizing the seizure of inherited assets provide another path for the state to shift costs from its coffers, enabling the state to avoid addressing the urgent need to reduce incarceration. Moreover, the practice creates further harms by adding another stitch in the troubling quilt of the carceral state: expanding the harms to the families of the affected incarcerated person. The state’s seizure of inherited assets impacts the estate and all other beneficiaries of that estate. Instead of keeping the assets with the families and their communities, the state siphons off the incarcerated person’s share to fund the carceral state that has produced other negative impacts on that family and community. The negative impacts of incarceration on the families and communities, which include poverty and psychological trauma, are criminogenic and further fuel mass incarceration. The state should focus on addressing mass incarceration rather than finding ways to avoid its responsibility to fund the system it has created.

### *B. Private Prisons*

Scholars, advocates, and politicians have long criticized the privatization of prisons.<sup>176</sup> Proponents of private prisons claim

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174. *Id.*

175. See, e.g., Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019); Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. REV. 87 (2022).

176. See, e.g., Farah Mohammed, *The Problem with Privatizing Prisons*, JSTOR DAILY (May 15, 2017), <https://daily.jstor.org/the-problem-with-privatizing-prisons> [<https://perma.cc/Y2PP-WX29>] (“Private prisons have no real incentive to rehabilitate prisoners. If they make their profit from criminal society, it goes against business sense to reduce criminality.”); Ira P. Robbins, *The Legal Dimensions of Private Incarceration*, 38 AM. U. L. REV. 531, 795 (1989) (discussing the constitutional, contractual, and statutory issues that would arise for jurisdictions that were considering privatization at that time); Robert Craig & André Douglas Pond Cummings, *Abolishing Private Prisons: A Constitutional and*

that outsourcing punishment to for-profit entities results in cost savings,<sup>177</sup> but these savings are merely illusory, and there is no clear financial advantage or disadvantage.<sup>178</sup> Some have also

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*Moral Imperative*, 49 U. BALT. L. REV. 261, 267 (2020) (footnote omitted) (“Privatization of incarceration introduces serious perverse incentives created by government and financial bias throughout the criminal justice process, and contracting a core governmental function undermines the legitimacy of the justice system at large.”); *Banking on Bondage: Private Prisons and Mass Incarceration*, ACLU (Nov. 2011), <https://www.aclu.org/banking-bondage-private-prisons-and-mass-incarceration> [<https://perma.cc/29TZ-UYYP>] (criticizing the private prison industry for its practice of profiting from mass incarceration, failure to save the state money, and inhumane treatment of their prisoners); Bernie Sanders, *Abolish For-Profit Prisons*, MEDIUM (May 16, 2019), <https://medium.com/@SenSanders/abolish-for-profit-prisons-cb9496f93a0b> [<https://perma.cc/FV4D-92J6>] (noting general concerns with entities that profit from incarceration and specific concerns about the treatment of prisoners in for-profit facilities and the methods used to select prisoners, and concluding that, “we absolutely must end the existence of the private for-profit prison industry”); Press, Release, Office Of Governor Gavin Newsom, Governor Newsom Signs AB32 to Halt Private, For-Profit Prisons and Immigration Detention Facilities in California (Oct. 11, 2019), <https://www.gov.ca.gov/2019/10/11/governor-newsom-signs-ab-32-to-halt-private-for-profit-prisons-and-immigration-detention-facilities-in-california> [<https://perma.cc/G4KZ-EW7F>] (citing Assembly member and co-author of the bill, Rob Bonta, who said, “By ending the use of for-profit, private prisons and detention facilities, we are sending a powerful message that we vehemently oppose the practice of profiteering off the backs of Californians in custody . . . and that we are committed to humane treatment for all”).

177. See, e.g., Tonya Alanez, *Scott Pushes for State Prisons Privatization*, ORLANDO SENTINEL (Aug. 6, 2021, 9:01 AM), <https://www.orlandosentinel.com/news/os-xpm-2011-02-14-os-scott-budget-privatization-20110214-story.html> [<https://perma.cc/5HYR-4TW7>] (“Under a prison plan that he says would save \$82.4 million, [Florida Governor Rick] Scott wants to cut 1,690 state corrections jobs, move as many as 1,500 inmates from state lock-ups to privately run prisons and close two still-unnamed state correctional institutions.”); Dana Liebelson, *Gary Johnson Has Been a Champion of Private Prisons Throughout His Career*, HUFFINGTON POST (Oct. 12, 2016, 3:31 PM), [https://www.huffpost.com/entry/gary-johnson-private-prisons\\_n\\_57fe7723e4b0162c043956a1](https://www.huffpost.com/entry/gary-johnson-private-prisons_n_57fe7723e4b0162c043956a1) [<https://perma.cc/EBR9-2CBW>] (discussing Johnson’s reliance on private prisons as governor of New Mexico and quoting his praise of the cost-savings that private prisons offer); *What We DO, What We DON’T Do*, CORECIVIC, [https://www.corecivic.com/hubfs/\\_resources/What%20We%20Do%20Card.pdf](https://www.corecivic.com/hubfs/_resources/What%20We%20Do%20Card.pdf) [<https://perma.cc/FK95-Z7PQ>] (“We save taxpayer dollars. An industry-supported, peer-reviewed study published by the Independent Institute found that companies like ours generate from 12% to 58% in long-run taxpayer savings without sacrificing the quality of our service.”).

178. See, e.g., Kara Gotsch & Vinay Basti, *Capitalizing on Mass Incarceration: U.S. Growth in Private Prisons*, SENT’G PROJECT (Aug. 2, 2018), <https://www.sentencingproject.org/publications/capitalizing-on-mass-incarceration-u-s-growth-in-private-prisons> [<https://perma.cc/BSL3-9BBH>] (“Prison privatization has prospered because of claims that for-profit facilities are more cost efficient at providing services than publicly-run institutions The evidence does not support this assertion.”); Alex Friedmann, *Apples-to-Fish: Public and Private Prison Cost Comparisons*, 42 FORDHAM URB. L.J. 503 (2014) (discussing opposing studies and showing that any savings are shifted from the state to the private entity).

argued that private prisons cost more than state-run facilities because the for-profit entities (1) require governmental oversight and those costs may not be taken into account and (2) often house only able-bodied people, making their operational costs distinguishable from those of state-run facilities.<sup>179</sup> Generally, the data are unreliable and fail to show clearly whether private prisons actually save the state money.<sup>180</sup>

To the extent that private prisons cost more than state-run facilities, states should not use pay-to-stay statutes to pass that increased cost onto the incarcerated person. If the state enters into contracts with private prison companies, the state has obligated itself to pay the associated cost. Any increased cost of confinement is therefore a problem the state has created for itself through its own decision-making processes. By unilaterally obligating the prisoner to bear increased costs, the state is shirking its responsibility and passing the consequences of its own bad decision-making onto the incarcerated person.

Even if, on the other hand, private prisons save the state money, society collectively holds the responsibility and the privilege to pay for punishment. One important feature of our criminal justice and punishing systems is their expressive function. When an individual is punished, society broadly has expressed its view of the individual's blameworthiness.<sup>181</sup> As law professor Laura Appleman explains, in the broader context of privatizing prisons, "community participation in the determination and imposition of criminal punishment helps express the people's beliefs and values about the wrongdoer, the

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179. Laura I. Appleman, *Cashing in on Convicts: Privatization, Punishment, and the People*, 2018 UTAH L. REV. 579, 611 (2018) (footnote omitted) ("[C]ost comparisons often fail to account for differences in health care costs for sick inmates, who normally remain in state supervision. Contracts with private prison companies usually restrict their inmate intake to those prisoners who are healthy, young, and have fewer psychiatric needs.").

180. *Private Prisons*, ACLU, <https://www.aclu.org/issues/smart-justice/mass-incarceration/private-prisons> [<https://perma.cc/8ALV-JGD3>] ("While supporters of private prisons tout the idea that governments can save money through privatization, the evidence is mixed at best – in fact, private prisons may in some instances cost more than governmental ones.").

181. See Joel Feinberg, *The Expressive Function of Punishment*, 49 *MONIST* 397, 400 (1965), reprinted in JOEL FEINBERG, *DOING AND DESERVING* 95, 98 (1970) ("Punishment is a conventional device for the expression of attitudes and resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority himself or of those 'in whose name' the punishment is inflicted.").

crime, and the injury to society.”<sup>182</sup> When pay-to-stay statutes fund private prisons, society is denied this essential right to participate in the punishment process. Even though this might be a right that the taxpayer would prefer to avoid having, it is an important reflection of the citizen’s role in the criminal justice system. Just as many retributivists claim that punishment itself is a “right” of the guilty person that validates their autonomy,<sup>183</sup> this unpleasant right of the taxpayer to bear the costs of incarceration respects their voice in the punishment process. Moreover, if the prisoner is paying for their own incarceration, this raises the question of whether the incarceration itself constitutes punishment under the traditional definition, which holds that punishment is inflicted upon the guilty by society.

If private prisons cost less to operate than state-run facilities, the purported savings to the state become corporate profits for the incarcerating entity.<sup>184</sup> When a state with a pay-

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182. Appleman, *supra* note 179, at 616.

183. See, e.g., Russell L. Christopher, *Deterring Retributivism: The Injustice of “Just” Punishment*, 96 NW. U. L. REV. 843, 864 (2002) (“Retributivism, however, honors offenders to such a degree that it conceives of punishment as the right of the offender.”); G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 126, § 100 (Allen W. Wood ed., H.B. Nisbet trans., 1991) (1821) (“The injury which is inflicted on the criminal is not only just *in itself* . . . it is also a *right for the criminal himself*.”); HERBERT MORRIS, ON GUILT AND INNOCENCE: ESSAYS IN LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY 41 (1976) (“A person has a right to be punished, meaning by this that a person has a right to all those institutions and practices linked to punishment.”); JEFFRIE MURPHY, *Moral Death: A Kantian Essay on Psychopathy*, in RETRIBUTION, JUSTICE, AND THERAPY 128, 134 (1979) (“The right to be punished and regarded as a responsible agent, though sometimes painful when honored, at least leaves one’s status as a moral person intact.”); K.G. Armstrong, *The Retributivist Hits Back*, in THE PHILOSOPHY OF PUNISHMENT: A COLLECTION OF PAPERS 471, 484 (H.B. Acton ed., 1969) (“If we penalize the criminal according to what he has done, we at least treat him like a man, like a responsible moral agent.”).

184. Friedmann, *supra* note 178, at 504 (“But how much of that \$300.8 million [in savings achieved by Corrections Corporation of America (CCA), a for-profit prison company] went to taxpayers or reverted to state treasuries or county coffers? None. Those ‘savings’ went to CCA [now Core Civic] in the form of corporate profit.”); see also *Who Benefits When a Private Prison Comes to Town?*, NPR ALL THINGS CONSIDERED (Nov. 5, 2011, 6:30 PM), <https://www.npr.org/2011/11/05/142058047/who-benefits-when-a-private-prison-comes-to-town> [<https://perma.cc/M6CL-VC5J>] (“[Tobey] Sommer, director of equity research at SunTrust Robinson Humphrey in Tennessee, says both CCA [now Core Civic] and Geo Group [the largest prison corporations] made more than \$1 billion each [in 2010] and their CEOs took home multimillion-dollar bonuses.”). *But see Geo Group 2022 Annual Report*, GEO GRP. 1 (2022) (showing 2022 profits of \$171.7 million); *CoreCivic 2022 Annual Report Form K-10*, CORECIVIC 92 (2022) (showing 2022 profits of \$122.3 million).

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to-stay law enters into a contract with a private entity, this contract obligates the state to pay for the costs of maintaining inmates, the pay-to-stay law passes the costs onto the inmates, and the private prisons profit from the transaction. In other words, what is nominally a reimbursement to the state is actually a surplus generator for the private entity. Moreover, when pay-to-stay statutes function in this way, the state facilitates an arrangement in which it enters into a contract with one private party and obligates another private party to pay the costs through its statutory scheme. The state then enjoys the benefit offered by the for-profit prison company, the for-profit entity enjoys a profit from both the state and the prisoner, and the prisoner bears the costs of the state's and company's benefits. Pay-to-stay statutes' ostensible goal of shifting the burden of incarceration from the taxpayer to the "user" is inconsistent with the practical outcome of corporate profit in the private prison context.

When the state acquires reimbursement through inherited assets and those funds become corporate profit, this presents a particular affront to the testamentary freedoms of the decedent and the incarcerated person. The decedent chose to bequeath a gift to the incarcerated or formerly incarcerated person, often without knowing about the risk that the state would seize that distribution to fund the costs of incarceration. The state then intercepts the inheritance and acts as a conduit to pay the prison corporation that reaps a profit from the transaction. Allocating this money to corporate profits undermines the testamentary intent of the decedent arguably to an even greater degree than when the state keeps the funds in its own coffers purportedly for the public good. People generally do not leave testamentary gifts to corporations.<sup>185</sup> It would likely be inconceivable to the testator that the corporation that had administered punishment on their loved one would be legally entitled to benefit from the inheritance intended for the loved one.

From the perspective of the incarcerated person, this practice interferes with their freedom to inherit and benefits a corporation that profited from inflicting punishment upon them. Typically, at the time a person inherits property, they are in mourning and experiencing grief from the loss of a loved one.

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185. See Strand, *supra* note 141, at 465 ("Individuals . . . tend to choose to pass their wealth to succeeding generations of their own families because of strong cultural norms that lead to these decisions in people's estate plans.").

Preventing them from receiving their inheritance adds insult to this injury and imposes further suffering upon them. Moreover, formerly incarcerated people are nearly always low-income and dependent upon others to meet their needs.<sup>186</sup> Plainly stated, a legal regime that channels an impoverished person's expected inheritance to the corporation that profits from that impoverished person's incarceration is unconscionable.<sup>187</sup>

### C. Cycle of Poverty

After release from incarceration, the released individuals face substantial reentry obstacles. Namely, joblessness<sup>188</sup> and legal financial obligations—such as parole costs, fines, restitution, fees, interest, and reimbursement charges—prevent class mobility.<sup>189</sup> Moreover, when people “leav[e] jails and prisons with a mountain of debt,”<sup>190</sup> they are kept in a cycle of poverty that is proven to be criminogenic.<sup>191</sup> Two explanations for the criminogenic nature of poverty are particularly helpful here. On the one hand, people earning low wages who are unable to improve their financial position through legitimate means, such as employment or government benefits, may turn to criminal activity to make ends meet.<sup>192</sup> On the other hand, even

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186. About 80 percent of formerly incarcerated persons earn less than \$15,000 per year. See Looney & Turner, *supra* note 83, at 7. This is insufficient for a single person to meet their basic needs in any state. See Francisco Velasquez, *How Much Money a Single Person Needs to Earn to Get By in Every U.S. State*, CNBC (Aug. 25, 2021, 4:48 PM), <https://www.cnbc.com/2021/08/17/income-a-single-person-needs-to-get-by-in-every-us-state.html> [<https://perma.cc/M4AS-Z38R>].

187. A deeper exploration into the issues arising when pay-to-stay statutes are combined with private prisons is forthcoming in another article.

188. Estimates show that roughly 60 percent of formerly incarcerated people are jobless on any given day. See Leah Wang & Wanda Bertram, *New Data on Formerly Incarcerated People's Employment Reveal Labor Market Injustices*, PRISON POL'Y INITIATIVE, (Feb. 8, 2022), <https://www.prisonpolicy.org/blog/2022/02/08/employment> [<https://perma.cc/VE36-GH4T>] (citing E. ANN CARSON ET AL., BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., EMPLOYMENT OF PERSONS RELEASED FROM FEDERAL PRISON IN 2010 (2021), <https://bjs.ojp.gov/content/pub/pdf/eprfp10.pdf> [<https://perma.cc/JEV3-DM7Y>]).

189. Looney & Turner, *supra* note 83, at 7 (showing that about 80 percent of formerly incarcerated persons earn less than \$15,000 per year).

190. Eisen, *supra* note 10, at 2.

191. See, e.g., Natapoff, *supra* note 16, at 446; Deitch, *supra* note 16, at 46 (arguing that parole conditions entrap people in poverty); Llorente, *supra* note 16.

192. See, e.g., Derek Gilna, *Brookings Institute Study Finds Direct Connection Between Poverty and Crime Rates*, PRISON LEGAL NEWS (Dec. 7, 2018), <https://www.prisonlegalnews.org/news/2018/dec/7/brookings-institute-study-finds-direct-connection-between-poverty-and-crime-rates> [<https://perma.cc/M5B9-C7R9>]

when those in poverty do not actually commit any criminal offenses, because the American criminal system treats the poor as “presumptive criminals,”<sup>193</sup> they are more likely to interact with the criminal system, which in turn can result in false convictions or guilty pleas. Moreover, any interaction between a person in poverty and the criminal justice system will put the financially disadvantaged person in an even worse position, making the poor even poorer.<sup>194</sup>

When persons who are released from prison fail to pay their legal financial obligations, they risk being returned to prison. Just as families feel forced to deposit funds into their loved ones’ inmate accounts, they are similarly coerced into paying for their loved ones’ criminal justice debt after their release.<sup>195</sup> In this scenario, families must make a difficult choice between paying their recently released loved one’s debt, which enables them to remain in and contribute to the community, or risking their loved one’s reincarceration, which carries a host of collateral consequences for the family and creates further financial strain through additional criminal justice system debts.

Given this context, whether someone inherits funds during or after their incarceration, the state’s seizure of those assets not only significantly impacts the incarcerated or formerly incarcerated person but also negatively affects the family. The person’s share of the estate is removed from the total estate, keeping the remaining beneficiaries’ proportionate share the same as what they would receive if the incarcerated beneficiary had received their share. However, it denies the intended beneficiary their share, putting them in a worse position than their co-beneficiaries. If the beneficiary is incarcerated at the time of the seizure, then assuming the remaining beneficiaries are family or loved ones, those remaining beneficiaries may feel compelled to continue providing support for the incarcerated

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(summarizing the findings of Looney & Turner, *supra* note 83); Kayode Crown, *Mississippi Parolees Paying for Supervision May Perpetuate More Criminality for Poor*, MISS. FREE PRESS (Nov. 22, 2021), <https://www.mississippifreepress.org/18335/mississippi-parolees-paying-for-supervision-may-perpetuate-more-criminality-for-poor> [https://perma.cc/92NG-RDEN] (telling anecdotes about low-income parolees who turn to theft, drug dealing, and prostitution in order to pay their supervision fees).

193. Natapoff, *supra* note 16, at 446; *see also* Deitch, *supra* note 16 (discussing the harms flowing from the financial costs of complying with parole conditions, including the cycle of poverty and prison).

194. *See* Natapoff, *supra* note 16, at 446.

195. *See* Katzenstein & Waller, *supra* note 94.



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person through deposits to the inmate account. If the person is released from prison at the time of the seizure, those remaining beneficiaries may feel compelled to provide support for the formerly incarcerated person by providing for their housing, food, and other necessities.

Irrespective of the impact on the family, the seizure of inherited assets impacts the currently or formerly incarcerated person to an even greater extent than when the state seizes other property. Because currently and formerly incarcerated persons often rely on their families to help provide for their needs, when a family member dies and the currently or formerly incarcerated person stands to inherit, they experience the loss of ongoing support. They lose the person who helped financially and emotionally support them, but when the state seizes inheritances, they also lose the assets the decedent had set aside for them in the event of the decedent's death. Thus, when the state uses pay-to-stay statutes to seize inheritances, the person is not denied a windfall; they are often at a net loss.

#### CONCLUSION

Although pay-to-stay statutes are problematic as a whole and lawmakers should continue to abolish or significantly limit their application, particular issues arise in the context of using inherited assets to satisfy pay-to-stay debts. At the very least, lawmakers should consider the policy implications of permitting the seizure of inherited assets under pay-to-stay statutes and prohibit this practice. Taking inherited property from a person who is experiencing or has experienced incarceration for the ostensible purpose of reimbursing the state for the cost of the state's constitutional compliance with the Eighth Amendment Cruel and Unusual Punishment Clause results in harmful outcomes, not only for the beneficiary but for society as a whole. Seizing inherited property violates the testamentary freedom of the decedent who wishes to leave assets to benefit their loved one. The practice further betrays the corollary freedom of inheritance, which recognizes a protection from the state confiscating property by authorizing the state to interfere with and take the property for itself. Troublingly, these laws disparately impact people on the basis of wealth and race. People with substantial wealth have greater access to estate-planning mechanisms that can prevent the state's seizure of the intended

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beneficiary's inheritance, but those without access to these sophisticated tools are counterproductively more likely to have their intended gift intercepted by the state.

In addition to disrespecting the wishes of the decedent and harming the other beneficiaries, this practice has broader impacts in the carceral state. First, pay-to-stay laws are intended to reduce the financial burden of funding the costly corrections system. Rather than making efforts to decarcerate, states focus on ways to mitigate the cost of continuing mass incarceration. Second, when states employ private prisons as an additional means to reduce the financial burden of mass incarceration, the seizure of inherited assets for the costs of incarceration particularly affront the decedent and the intended beneficiary because the assessed costs include the profit the corporation yields from inflicting punishment on the beneficiary. Third, seizing inheritances to satisfy pay-to-stay laws perpetuates a cycle of poverty that is criminogenic and damaging to the entire community. The practice is yet another example of systemic exclusion from intergenerational wealth within populations that have been historically marginalized. Apart from being immoral and cruel, this practice counterproductively affects predominantly those with less wealth and creates barriers to reentry for formerly incarcerated persons. The incarcerated person and their family and community feel the harmful impacts of this expansion of the carceral web, as the state's seizure of a share of the decedent's estate creates financial strain on the incarcerated person's support system.