15 Loy. J. Pub. Int. L 319

Loyola Journal of Public Interest Law
Spring 2014

Article

PAYING FOR YOUR TIME: HOW CHARGING INMATES FEES BEHIND BARS MAY VIOLATE THE EXCESSIVE FINES CLAUSE

Lauren-Brooke Eisen[1]

"We're not the Hilton. . .These guys shouldn't have a free ride. . .Society shouldn't be paying for their wrongs."[2]

Introduction

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.[3] A century and a half later in 1985, reacting to the rising costs of operating the Macomb County jail, the Sheriff and the County Board of Commissioners began collecting up to $60 a day from inmates behind bars.[4] Today, the Macomb County Jail bills prisoners for: room and board, work release,[5] physicals, dental visits, medication, prescriptions, nurse sick calls, and hospital medical treatment.[6]

Currently, Macomb County's story is replayed in hundreds of jurisdictions across the country that charge fees to inmates for programs, functions, and services.[7] Over the past forty years, the ***320** United States radically increased its use of prisons to combat crime. Consequently, the country's state prison population grew by more than 700 percent since the 1970s.[8] As a result, the United States boasts less than five percent of the world's population but holds close to twenty-five percent of the world's prisoners.[9] With the explosive correctional growth, state correctional costs have skyrocketed in the last four decades.[10]

While it is understandable that governments would look to recoup these costs, advocates and scholars have long argued that it represents bad policy. However, less work has been done to challenge the legality of this practice, perhaps because courts have historically been so unfriendly to these types of challenges.[11] This essay suggests that exploring the constitutional implications of charging inmates for goods, services, and even their stay behind bars could help to build the case for policy change around the nation. Specifically, legal academics could provide persuasive support for this area of advocacy by reexamining the legality of the current systems of fees and fines under the Eighth Amendment's Excessive Fines Clause.[12] Even if courts continue to strike down these legal arguments, policymakers may finally take heed of such compelling evidence that this practice may potentially violate the U.S. Constitution.

***321** This essay proceeds in three parts. Part II provides a brief overview of the historical and present day uses of inmate fees along with a discussion of policies advocates cite when arguing to eradicate these practices. Part III then reviews the limited case law in this area and suggests new litigation strategies using the Excessive Fines Clause of the Eighth Amendment.

History of Inmate Fees

A. History of Inmate Fees and Pay-To-Stay Practices

For years, counties and states have authorized prison officials to charge inmates for costs associated with incarceration dubbed "pay-to-stay" programs. These charges range from "per-diems" for their stays to charges for meals[13], toilet paper[14], clothing, medical co-pays, and dental fees.[15] Many jurisdictions have begun charging inmates fees in order to collect any money they can to offset staggering correctional costs. In an effort to curry favor with voters, many policymakers and sheriffs tout the advantages of charging inmates fees to decrease the taxpayers' need to foot the bill for incarceration.[16]

Many courts now impose monetary sanctions on a "substantial majority of the millions of U.S. residents convicted of felony and misdemeanor crimes each year."[17] In the last decade additional fees have begun to proliferate in the U.S. criminal justice system such as fees for electronic monitoring, sex offender ***322** registration, and increases in fees already on the books.[18] States are also increasing the number and dollar value of fees associated with the criminal justice system,[19] and these increased fees are proliferating beyond the courts. Departments of corrections and jails "are increasingly authorized to charge inmates for the cost of their imprisonment."[20] Counties and states continue to struggle with ways to increase revenue to pay for exorbitant incarceration bills. In 2010, the mean annual state corrections expenditure per inmate was $28,323, although a quarter of states spent $40,175 or more.[21]

By 1988, forty-eight states authorized some form of correctional fees.[22] Room and board fees grew rapidly in the second half of the 1980s, becoming even more common in the 1990s and into the 21st century.[23] By 2004, approximately one-third of county jails and more than fifty percent of state correctional systems had instituted "pay-to-stay" fees, charging inmates for their own incarceration.[24]

Today, this practice remains prevalent throughout the country. In a 2005 National Institute of Justice survey, thirty-eight percent of responding jails imposed some type of "pay-to-stay" fee, for housing, meals, or both.[25] In fact, as of 2010, there were at least twenty-four states with statutes that authorize ***323** some type of fee in jail.[26] It is possible that the practice occurs in even more states where counties have authorized this practice without state legislation. Unfortunately, no national database exists that would indicate how many jurisdictions across the country utilize this practice.

B. Rationales for Implementing Inmate Fees

In order to better understand some of the potential constitutional arguments against "pay-to-stay" fees, it is important to understand the four major rationales behind charging inmates fees once they are behind bars. The first rationale, already discussed in this article, is that the revenue stream helps to offset expensive incarceration budgets. The second rationale is punitive in nature and focuses on teaching inmates a lesson for their criminal acts. Some policy makers and correctional officials make the argument that charging inmates for their stay is grounded in rehabilitation or deterrence.[27] Others argue that fees teach inmates valuable lessons.[28] One Iowa Sheriff said about the practice of charging inmates, "if they are violating the law, then they should be the ones to pay for it."[29] ***324** Officials in Riverside County, California who voted to approve a plan to charge inmates for their stay and reimburse the county for food, clothing and health care stated, "You do the crime, you will serve the time, and now you will also pay the dime."[30]

A third rationale is political in that policy makers, judges, and sheriffs can often gain the support of constituents by supporting inmate "pay-to-stay" fees. However, because it is often difficult and costly to collect the revenue, many commentators have dismissed the idea of charging inmates for their stay behind bars as political grandstanding.[31] A jail administrator in Macomb County wrote that, "local jails are viewed as another county service that drains taxpayer dollars . . . . One might ask why law-abiding citizens should be burdened with the cost of incarceration when they never use that service, or why taxpayers should be further victimized by supporting inmates who have the wherewithal to pay."[32] In 2001, the Supreme Court of Washington explained in a case challenging automatic state reimbursement deductions from inmate accounts that inmates have "made it necessary for the State to keep and maintain [them] at a large cost."[33]

A fourth rationale focuses on reducing frivolous requests for services by inmates. Prison officials often complain that they have

less time and resources to spend on those with serious medical illnesses and that these policies result in "[l]ess money . . . spent for over-the-counter wraps, aids, ointments and medication given to inmates."[34] In many cases, facilities hope the fees "will reduce unnecessary sick call visits as well as cover a small portion of the costs of care."[35]

C. Types of Pay-to-Stay

There are three different models of "pay-to-stay" programs in ***325** jails and prisons. The first type, often described as "per-diems", refers to counties and states that charge individuals a fee per day. It is estimated that "a third of the nation's 3,000-some county jails levy room-and-board fees."[36] The following are a handful of examples of practices that are common throughout our nation. Riverside County, California's pay-to-stay program charges prisoners $142.42 per day, which is more than many local hotels.[37] As of 2009, Oregon's city council authorized its jail to charge inmates $60 a day.[38] All inmates sentenced to the Pennington County Jail in Rapid City, South Dakota are charged $6.00 per day for room and board.[39] Lancaster County Pennsylvania charges inmates $10 a day to stay at the county jail.[40] Around two-thirds of Ohio Counties have implemented these fees. Franklin County, Ohio charges inmates $40 a day to stay in their jail.[41] "Since its opening in 1998, the Southeast Ohio Regional Jail in Nelsonville has utilized a 'pay-to-stay' policy in charging inmates $15 for booking fees and an additional $1 per day spent there."[42]

The second type of inmate fee involves charging inmates for individual items such as: toilet paper, medical co-pays, dental services, meals, clothing, and other necessities. In 2009, the ***326** county jail in Maricopa County, Arizona began charging inmates $1.25 a day for meals.[43] Gaston County, North Carolina, charges inmates $20 for medical and dental visits.[44] Dallas County charges jail inmates $15 for most medical procedures.[45] And, Collin County, Texas, charges $10 when inmates require a sick visit and $3 for each prescription.[46] Many state laws allow the fees to be waived if inmates are indigent or have no funds in their inmate bank accounts.[47]

The third type of pay-to-stay model refers to four-star accommodations for those who can afford to pay to serve time in a more desirable facility.[48] These types of pay-to-stay facilities garnered a good deal of media buzz after the New York Times published an article in 2007 noting:

> [F]or offenders whose crimes are usually relatively minor (carjackers should not bother) and whose bank accounts remain lofty, a dozen or so city jails across the state offer pay-to-stay upgrades. Theirs are a clean, quiet, if not exactly recherché alternative to the standard county jails, where the walls are bars, the fellow inmates are hardened and privileges are few.[49]

These types of accommodations are most common in California where many of the state's prisons are overcrowded. So much so, that in May of 2011, the United States Supreme Court held in Brown v. Plata that the state's prisons were "close to ***327** double the state prisons' designed capacity," and that the health and safety of inmates was "unconstitutionally compromised."[50] The Supreme Court noted that overcrowding in California's prisons creates a system wide violation of the Eighth Amendment's prohibition on cruel and unusual punishment and ordered the state to reduce its prison population to 110,000, or to 137.5 percent of capacity.[51]

Because of the unique situation of gross overcrowding in California, facility upgrades for those convicted of crimes are more common than in other states. For example, the Fremont Police Department in California is now offering an option to pay a one-time fee of $45 plus $155 a night to those inmates serving short sentences on lesser charges, so that they can stay in a smaller facility and avoid the county jail.[52] The Fullerton County Jail in California offers a similar program for $100 a day and notes on its website that pay-to-stay inmates are "housed separate from all other inmates and will have minimal contact with non-sentenced inmates."[53] In Southern California there are approximately fifteen of these types of pay-to-stay programs, where the daily charges range from $85.00 to $255.00 per day.[54] Most agencies utilize three avenues to recover fees from inmates: (1) billing the inmates as fees accrue; (2) deducting money from ***328** inmate accounts (usually the commissary funds); and (3) billing inmates post-incarceration.[55]

This essay deals with charging per-diems for an inmates' stays as well as charging for necessities and other expenses while incarcerated. This essay does not touch on "pay-to-stay upgrades" where inmates can choose to stay at a nicer facility.

D. Policy Objections

There are myriad reasons why charging inmates is a shortsighted public policy. Perhaps one of the most compelling reasons not to charge these fees is that citizens chose to remove these individuals from society. Therefore, collectively, our society needs to bear the brunt of the fiscal costs that feeding, housing, and providing medical attention to this group of people brings with it.[56] Yes, incarceration is expensive - exorbitantly expensive, in fact - but that is the price American citizens need to pay for its jails and prisons that are now exploding with inmates. Shifting even just a portion of the burden of the cost to inmates, eighty percent of whom are indigent,[57] is not only bad fiscal policy, but ***329** also provides less incentive to policymakers to keep down costs associated with incarceration.

Advocates contend that charging individuals fines in jail imposes an unnecessary burden on inmates, disproportionally affecting indigent populations[58] along with racial and ethnic minorities,[59] all of whom are disproportionately represented among the prisoner population. Advocates further point out that these policies generate barriers to reentry[60] and encourage a cycle of poverty that is difficult to escape.[61] Adding fuel to the fire, family members often pick up the tab for these fees, depositing funds in inmate commissary accounts so they do not leave jail or prison with criminal justice debt. An article in the National Prison Project Journal noted, "[o]ften prisoners will do without hygiene items or medical treatment rather than have their families deposit funds that will be immediately confiscated to satisfy prison charges."[62]

***330** Additionally, the effect of one individual inmate's decision not to seek medical treatment because he or she cannot afford the copayment contains far-reaching consequences beyond that one inmate. For example, inmates and correctional staff who have contact with an inmate who forgoes a sick visit are all in danger of contracting a communicable disease. If a prison fee delays an inmate seeking treatment, consequences may reverberate throughout a correctional facility.[63]

These fines are also counter-productive in ensuring public safety. Incarcerated people who re-enter society are less likely to successfully reintegrate with hundreds of dollars in fines hanging over their heads.[64] Furthermore, it often costs more to administrate the fees than counties are generating in revenue.[65] Some agencies report actual revenues from their fee based operations are as low as six percent of the fees assessed.[66] Other programs, like one in Olmsted County, Minnesota, have outright failed; the Minnesota program was revamped because administrative costs outpaced revenue. A number of agencies have noted their lack of staff capacity to effectively monitor and collect fees.[67]

Toward A New Litigation Strategy

Plaintiffs have litigated fees behind bars for decades on a variety of grounds. Litigants have raised a litany of constitutional challenges to health care fees,[68] booking fees,[69] room-and-board ***331** fees,[70] and charges incurred while inmates were held pre-trial.[71] Both state and federal courts have upheld the legality of jails' rights to deduct funds directly from prisoner commissary accounts.[72] Federal courts have similarly upheld the right of jails to deduct the cost of room-and-board directly from a pre-trial detainee's prisoner account to pay for housing costs.[73] In most cases, the courts have held that these fees do not violate the U.S. Constitution. However, one court held that a jail's policy in taking cash from all prisoners, including pre-trial detainees, for booking fees at the time of initial booking at the jail violates the Fourteenth Amendment's guarantee of due process because no pre-deprivation hearing was offered.[74]

Those arguing charges incurred in jail are unconstitutional have raised Due Process and Equal Protection arguments. Many have argued that the practice violates the Cruel and Unusual Punishment Clause of the Eighth Amendment. In almost all ***332** cases, the courts have sided with the agencies that implement these practices.

Many litigation strategies - from challenges against cruel and unusual punishment to arguments about equal protection - have

proven unsuccessful. However, from this unfavorable case law advocates opposing these fees have overlooked doctrinal openings to conduct challenges under the U.S. Constitution. This essay will specifically explore the potential to challenge inmate fees under the Excessive Fines Clause of the Eighth Amendment. Advocates, in particular, would benefit from utilizing litigation as part of their reform strategy. Although successful in getting their objections written about by the media, news articles have a limited ability to change these practices. The media covers these stories relentlessly, but advocates see almost no impact as more and more jurisdictions implement fee practices each year. Litigation utilizing the Excessive Fines Clause offers a unique opportunity to argue that charging inmates fees while incarcerated violates the U.S. Constitution.

A. Excessive Fines Clause of the Eighth Amendment

The Eighth Amendment provides "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[75] The Clause, while once virtually ignored, has been "rescued from obscurity" in recent years.[76] As recently as 1998, the Supreme Court wrote," [t]his Court has had little occasion to interpret, and has never actually applied, the Excessive Fines Clause.[77] The adoption of the Eighth Amendment generated little debate in the First Congress and the state ratifying conventions.[78] In fact, the Clause was taken verbatim from the Virginia Declaration of Rights of 1776, which mirrored a provision of the English Bill of Rights of 1689.[79] Any debate regarding the Eighth Amendment has tended to focus on the Eighth Amendment's Cruel and Unusual Punishments Clause, ***333** not the Excessive Fines Clause. However, some limitations on fine amounts are found in the Magna Carta.[80] In fact, the Constitution is silent on how to determine whether a fine is "excessive" under the Excessive Fines Clause. An 1819 case from the Kentucky Court of Appeals states "no definite criterion is furnished by the constitution or bill of rights by which to ascertain what fine would or would not be excessive."[81]

B. Forfeiture Cases Examined Under the Excessive Fines Clause

The Excessive Fines Clause of the Eighth Amendment is violated only if the disputed fees are both "fines", which constitute punishment for an offense, and are "excessive."[82] According to Webster's dictionary, "excessive" means "surpassing the usual, the proper, or a normal measure of proportion." Little jurisprudence exists on the Excessive Fines Clause. However, to the extent that the Supreme Court has interpreted the Excessive Fines Clause, it has done so primarily in civil and criminal forfeiture cases over the last two decades.

In 1993, in Alexander v. United States, the Court recognized that a criminal forfeiture of an individual's entire business might constitute an excessive fine, remanding the case back to the Court of Appeals.[83] Five years later, the Supreme Court had the opportunity to examine another forfeiture claim under the Excessive Fines Clause in United States v. Bajakajian. In Bajakajian, Hosep Bajakajian attempted to leave the United States with $357,144 in U.S. currency without claiming the funds through U.S. customs inspectors.[84] The currency was seized and Bajakajian was taken into custody.[85] The Supreme Court based its holding on an historical reading of the Excessive Fines Clause; it concluded the "touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the ***334** gravity of the offense that it is designed to punish."[86] Justice Thomas's opinion stated that the penalty of a forfeiture of $357,144 was "grossly disproportional to the gravity of [the] offense."[87] Although Bajakajian's holding applies to an asset forfeiture proceeding, its principle can be borrowed and applied to cases in which an inmate is required to pay fees while behind bars.

C. Seminal Constitutional Casein Jail Fee Jurisprudence

The seminal case in jail fee jurisprudence is Tillman v. Lebanon County Correctional Facility.[88] Tillman is considered significant because the petitioner raised every constitutional argument inmates have argued in past litigation - except for the Ex Post Facto Clause.[89] In the case, Leonard Tillman, a former prisoner in an Ohio County jail, brought suit after he was assessed a fee of $10 per day for housing costs stemming from his incarceration in a county facility for state parole violations.[90] Ultimately, he accumulated a debt exceeding $4,000.[91] The unpaid fees were then turned over to a collection agency after he was released from prison.[92] Tillman was later recommitted to the jail, and pursuant to the facility's Cost Recovery Program, officials

confiscated half of the funds in Tillman's wallet as well as half of all funds he received during his stay at the facility in order to satisfy the balance.[93]

Tillman sued the warden and the jail under 42 U.S.C. § 1983, alleging the $10 a day fee he was charged while in jail constituted cruel and unusual punishment and was an excessive ***335** fine,[94] and the jail's confiscation of funds from his wallet and commissary account to satisfy his debt resulted in a deprivation of property without due process of law.[95] Tillman failed to argue violation of a particular law, but the Magistrate Judge engaged in an analysis of the Eighth and Fourteenth Amendment and issued a memorandum opinion recommending that the motion be denied.[96] The Magistrate Judge questioned whether these facts presented a case of cruel and unusual punishment because here, prisoners do not have a choice but to be imprisoned, and the fees incurred are based on their incarceration and not on something they could have control over.[97] The defendants filed supplemental affidavits, including copies of relevant sections from the updated prisoner handbooks.[98] Defendants also stated that "the Cost Recovery Program was not intended to punish, but rather to rehabilitate by teaching inmates financial responsibility by sharing in the costs of their food, housing, clothes, and protection."[99] The District Court granted summary judgment and dismissed the complaint.[100]

Regarding the cruel and unusual punishment argument, the District Court found that Tillman was never denied basic human necessities.[101] Rejecting the "excessive fines" argument, the Court declined to treat the fees as a "fine," and concluded that "even if they were fines, they were not excessive because the costs of incarceration by definition cannot be disproportionate to the offense."[102] The district court also rejected Tillman's due process claim because the "notice given and postdeprivation remedy available through the grievance procedure were constitutionally ***336** adequate."[103] Regarding Tillman's equal protection claim, the District Court held that it was not violated because some inmates were taught financial responsibility because they were afforded opportunities to work and were additionally required to make payments of at least $70.00 per week.[104] The District Court dismissed the case and Tillman appealed.

The Third Circuit affirmed the lower court's opinion and held that the amount of fees was not "excessive" under the Eighth Amendment.[105] The Third Circuit noted that the $4,000 in fees charged Tillman were not punitive; they were determined to be "rehabilitative" in nature.[106] Agreeing with the District Court's reasoning, the Third Circuit noted that the factual record in the case indicated that the program "was imposed for rehabilitative and not punitive purposes."[107] The Third Circuit held that even if the Cost Recovery Program of the facility is considered a "fine," and not a "fee," it was not "excessive" because the fines were not out of proportion to the maximum fine of $100,000 for Tillman's convicted offense - possession with intent to deliver approximately 29 grams of cocaine.[108]

Regarding Tillman's other Constitutional claims, the Third Circuit held that the assessment of daily fees did not constitute cruel and unusual punishment so long as the inability to pay the fees did not affect the prisoner's access to needed services.[109] The Third Circuit additionally held that the facility's taking of Tillman's money for fees was not in violation of the Due Process Clause because of the availability of a prisoner grievance program.[110] Further, the Court held that the facilities assignment of fees against Tillman did not violate Equal Protection because it did not implicate a protected class and was reasonably related to ***337** a legitimate government interest.[111] Interestingly, the Court held that it was legitimate for the government to teach "fiscal responsibility" to inmates, and to have them pay a portion of the state's expenditures incurred by their incarceration.[112]

While the majority of courts have followed Tillman when grappling with the constitutionality of fees assessed against prisoners, Tillman opened the door for a constitutional argument that inmate fees violate the Excessive Fines Clause of the Eighth Amendment. The Tillman Court acknowledged the possibility that the "fees" could be considered "fines" under the Excessive Fines Clause of the Eighth Amendment.

D. Further Litigation Inquiries

New constitutional arguments can bolster advocacy by questioning the legitimacy of jail fees for prisoners. Particularly, academics and creative litigants should look carefully at the cases that have discussed whether fees in jail are rehabilitative or punitive. Once classified as "punitive," they may be treated as "fines" and thereby receive protection under the Excessive Fines

Clause of the Eighth Amendment.

Of particular note, the Third Circuit in Tillman held that even if the Cost Recovery Program is considered a "fine" it is not "excessive;" the court stated," [r]ather than being used to punish, the undisputed evidence shows that the fees are designed to teach financial responsibility."[113] The Third Circuit in Tillman, citing to the Supreme Court's holding in Austin v. United States, recognized that if Tillman's "assessed fees and confiscations. . .'can be explained as serving in part to punish"' the Cost Recovery Program triggers the Excessive Fines Clause - "even if they may also be understood to serve remedial purposes."[114] However, the Third Circuit based its decision on the undisputed record in the lower court confirming the program was purely rehabilitative and in no way punitive in nature.[115] Nevertheless, the Third Circuit in Tillman addressed the issue and stated that even if the program constituted "fines," the $4,000 debt was not deemed excessive because it still remained "a ***338** sum that is less than one-twentieth the legally permissible fine."[116]

Recent case law in Eighth Amendment jurisprudence analyzing forfeiture cases has noted that a punitive forfeiture violates the Excessive Fines Clause "if it is grossly disproportional to the gravity of the offense that it is designed to punish."[117] Since Eighth Amendment jurisprudence analyzing fines under the Excessive Fines Clause has focused on the principle of proportionality, this is another doctrinal opening for additional litigation. In the forfeiture line of cases, the Supreme Court has held that the amount of forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.[118] However, the U.S. Supreme Court has noted that the history of the Excessive Fines Clause, although pointing toward a proportionality view, does not suggest how disproportionate to the gravity of the offense a fine must be in order to be deemed constitutionally excessive.[119] Using this line of reasoning, creative litigants could possibly bring specific challenges in cases where an inmate's fees are significantly more than the legally permissible statutory fine for the inmate's crime.

Litigants should continue to argue that there are numerous cases where inmate fees are disproportional to their crime. For example, in New York State, the misdemeanor crime of driving while impaired by the combined influence of drugs or alcohol carries with it a jail sanction of up to one year and a fine of up to $1,000.[120] Hypothetically, if an individual sentenced under this ***339** statute racked up jail fees in excess of $1,000 during their stay, there would be a compelling case to be made that the fees are excessive under the Eighth Amendment due to the fine's disproportion to the maximum statutory fine.

Another strong challenge to these practices lies with litigants who can challenge fees where officials have described their intent as punitive. This opening is ripe for litigation after Tillman in jurisdictions where policymakers and jail and prison officials have made it clear that their fees are partly or wholly punitive in nature. Creative litigants should delve into the history and rationale for inmate fees in certain jurisdictions and bring challenges to those policies where it is evident that the motivation behind the fees is punitive. Punitive fees place themselves squarely within the Eighth Amendment's Excessive Fines Clause. These fines are unnecessarily excessive because an inmate is already deprived of his or her liberty pursuant to incarceration. It is overly punitive because the inmate has already been punished through deprivation of liberty and therefore additional fees are disproportionate and excessive. There are costs associated with removing a group of citizens from the community and forcing them to live separate and apart from society. There is a credible argument to be made that once society has determined to remove a group of individuals from the community, it is then "excessive" and "disproportionate" to charge them daily fees, booking fees, and even medical and other fees while their liberty is deprived and the justice system has already imposed a sentence for their crimes. Although this is at odds with much of the current case law on this issue, there is room to challenge prevailing assumptions (both factually and legally) in order to urge courts to rule that these fees are unconstitutional under the Excessive Fines Clause of the Eighth Amendment. As part of their Eighth Amendment challenge, litigants may also want to look at the "evolving standards of decency" jurisprudence when challenging fees that prisoners are required to pay behind bars. In the 1958 case of Trop v. Dulles, the Court struck down a law that allowed Trop, a native-born American, to be stripped of his citizenship for the crime of wartime desertion.[121] Emphasizing the flexibility in the wording of the ***340** Eighth Amendment, Justice Warren wrote that "the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[122] Although this standard has traditionally been applied in the context of the Cruel and Unusual Clause of the Eighth Amendment, Justice Warren's words could equally refer to the entire Eighth Amendment, thus applicable to the Excessive Fines Clause. Given the enormous growth of the correctional population in the U.S. in addition to the statistics indicating that 80 percent of those incarcerated are indigent,[123] one could argue that the "evolving standards of decency" should carry the day in order to protect a huge swath of poor inmates from becoming burdened with debt while incarcerated.

Conclusion

The incarceration rate in the U.S. has exponentially increased since 1970.[124] From 1980 to 2008, the number of people incarcerated in America quadrupled from roughly 500,000 to 2.3 million people.[125] This growth has created a staggering price tag. It is understandable that jails and prisons would look to offset costs for housing these individuals. However, it is unreasonable to require population whose debt to society is already being paid by the sentences imposed, 80 percent of whom are indigent, to chip in to foot the bill.

Advocates need a stronger leg to stand on when arguing that ***341** these fines are bad policy. While many arguments are compelling, jurisdictions forced to tighten belts continue to implement policies charging inmates fees while behind bars. With the help of additional case law raising questions about the constitutionality of these practices, even if not successful in court, their arguments can serve as thought-provoking catalysts for policymakers. Hopefully legislators can grapple with these issues when enacting statutes authorizing fines for those behind bars. While the Excessive Fines Clause of the Eighth Amendment provides only one narrow opening for litigation, it serves as an example of research and litigation that is ripe for creative litigants and academics to take on.

Footnotes

[1] Counsel, Brennan Center for Justice

[2] Dylan Woolf Harris, County to Charge Inmates for Food, Doctor, Elko Daily Free Press (February 6, 2014, 6:00 AM), http://elkodaily.com/news/county-to-charge-inmates-for-food-doctor/article_b69992e8-8ee8-11e3-82ee-001a4bcf887a.html.

[3] Dale Parent, Nat'l Inst. of Justice, Dep't of Justice, Recovering Correctional Costs Through Offender Fees1 (1990), available at https:// www.ncjrs.gov/pdffiles1/Digitization/125084NCJRS.pdf.

[4] Office of Sheriff Macomb Cnty. Mich., Inmate Reimbursement "Pay-to-Stay" Program, available at http:// www.macombsheriff.com/images/pdfs/reimbpay2stayonlinepam.pdf.

[5] Id. Due to budget cuts, work release was suspended in 2010.

[6] See Inmate Reimbursement "Pay-to-Stay" Program, supra note 3 (the jail's policy states that a prisoner is never denied medical and dental services because of an inability to pay. In the past 26 years, the county has collected almost $18 million from prisoners, and it is estimated that the current cost of operating the jail costs about $38 million a year, approximately $94.32 a day per prisoner).

[7] Barbara Krauth, et al., Nat'l Inst. of Corrections, Dep't of Justice, Fees Paid by Jail Inmates: Fee Categories, Revenues, and Management Perspectives in a Sample of U.S. Jails 2 (2005), available at https:// s3.amazonaws.com/static.nicic.gov/Library/021153.pdf ("Of the 224 survey responses, 202 jurisdictions charge fees to inmates for at least some programs, functions, or services.").

[8] Pew Ctr. on the States, Prison Count 2010: State Population Declines for the First Time in 38 Years 1 (2010), available at http:// www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_ corrections/Prison_Count_2010.pdf.

[9] See Roy Walmsley, Int'l Ctr. for Prison Studies, World Prison Population List 1, 3 (9th ed. 2011), available at http://www.idcr.org.uk/wp-content/uploads/2010/09/WPPL-9-22.pdf (showing that, as of May 2011, the United States incarcerates 2.29 million of the 10.1 million prisoners around the world).

[10] See Tracey Kyckelhahn, Bureau of Justice Statistics, Dep't of Justice, State Corrections Expenditures, FY 1982-20101 (rev. 2013), available at http://www.bjs.gov/content/pub/pdf/scefy8210.pdf ("Between 1982 and 2001, total state corrections expenditures increased each year, rising from $15.0 billion to $53.5 billion in real dollars. Between 2002 and 2010, expenditures fluctuated between $53.4 billion and $48.4 billion.").

[11] See infra Part III.

[12] U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.").

[13] Laura Bauer, Some Inmates Pay for Their Crimes and Jail Stays, KansasCity.com (Apr. 24, 2009), http:// www.jocosheriff.org/modules/showdocument.aspx?documentid=47 (Maricopa County, Arizona charges inmates $1.25 a day for meals in the county jail).

[14] Nate Rawlings, Welcome To Prison, Will You Be Paying Cash Or Credit?, Time (Aug. 21, 2013), http://nation.time.com/2013/08/21/welcome-to-prison-will-you-be-paying-cash-or-credit/.

[15] Diane Turbyfill, County Spent $1.9 Million on Jail Health Care, Will New Law Help?, Gaston Gazette (Nov 2, 2013, 6:57 PM), http:// www.gastongazette.com/spotlight/county-spent-1-9-million-on-jail-health-care-will-new-law-help-1.229341 (Gaston County, North Carolina charges inmates $20 for medical and dental visits.).

[16] Assoc. Press, Nevada County's Plan to Charge Inmates for Jail Meals Draws Lawsuit Threat, Fox News (Feb. 8, 2014), http:// www.foxnews.com/us/2014/02/08/nevada-county-plan-to-charge-inmates-for-jail-meals-draws-lawsuit-threat/ (''Why should the people of Elko County pay for somebody else's meals in jail?' said Commissioner Grant Gerber, a backer of the plan who thinks the fees should be higher.").

[17] Alexes Harris et al., Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States, 115 Am. J. Soc. 1753, 1756 (2010).

[18] See Kim Shayo Buchanan, It Could Happen to "You": Pay-to-Stay Jail Upgrades, 106 Mich. L. Rev. First Impressions 60 (2007), available at http://www.michiganlawreview.org/narticles/it-could-happen-to-you-pay-to-stay-jail-upgrades.

[19] See Alicia Bannon et al., Brennan Ctr. Justice, Criminal Justice Debt: A Barrier to Reentry 7 (2010), available at http:// www.brennancenter.org/sites/default/files/legacy/Fees%20and%CCC20Fines% 20FINAL.pdf.

[20] Harris et al, supra note 17, at 1759.

[21] Kyckelhahn, supra note 10, at 4.

[22] Parent, supra note 2, at 1 ("Specifically, statutes authorized fees charged to probationers in 28 states, to jail inmates in 26 states, to parolees in 15 states, and to prison inmates in 39 states.").

[23] See, e.g., Philip P. Pan, Pr. George's Considers Fee for Jail Food; Corrections Chief's Plan Troubles Local ACLU, Wash. Post, June 1, 1998, at B01; Desiree Evans, Doing Time on Their Own Dime: More States Charge Inmates for Stays in Jail, Prison, Inst. for S. Stud. (May 19, 2009), http:// www.southernstudies.org/2009/05/doing-time-on-their-own-dime-more-states-charge-inmates-for-stays-in-jail-prison.html.

[24] Evans, supra note 23.

[25] Krauth et al., supra note 7.

[26] 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, 100 (2010).

[27] Nancy Petersen, Proposal Would Have Chesco Inmates Pay Room And Board They'd Be Charged $2 A Day. The Aim: To Teach Responsibility. It's Gaining Among The Prison Board, Philly.com (Sept. 13, 1995), http:// articles.philly.com/1995-09-13/news/25718535_1_prison-board-inmates-domestic-relations-charges ('I think we have a two-fold responsibility to the taxpayers ....One is to collect as much as we can in terms of user fees from the inmates at the prison. The other is to attempt to rehabilitate the prisoners so that they are not a future burden yet again on the taxpayers. You do that by teaching them financial responsibility.") (quoting Chester County Controller Joseph Carpenter); Inmates' Jail Fee Yields Little Green for Min., St. Paul Pioneer Press (Sept. 19, 2003), available at http:// www.corrections.com/articles/10529-inmates-jail-fee-yields-little-green-for-minn- ("During the past year, at least one-quarter of Minnesota counties started charging for room and board. Dubbed 'pay to stay,' the purpose was two-fold: bring in money to help offset ever-rising jail costs and send a message to criminals that 'if you do the crime, you pay to do the time."').

[28] N.Y. State Dep't of Corr. Servs., Inmates Pay $4M Annually in Fines, Fees to Taxpayers, Crime Victims, DOCS Today, Apr. 2004, at 4 (Former New York Corrections Commissioner Glenn Goord explains that fees "teach inmates ... to deter misconduct that often-times endangers staff or other inmates, or to teach inmates that there is a cost associated with the privileges that they seek.").

[29] Todd Bensman, States Making Inmates Pay for Services in Jail, Dallas Morning News, May 15, 1998, at 35A (quoting an Iowa Sheriff who favors pay-to-stay).

[30] Jennifer Medina, In California, a Plan to Charge Inmates for Their Stay, N.Y. Times (Dec. 11, 2011), http://www.nytimes.com/2011/12/12/us/in-riverside-california-a-plan-to-charge-inmates.html?_r=0.

[31] Julia Silverman, Oregon Prisoners Must Pay for Jail Stay, Assoc. Press, May 21, 2004.

[32] Michelle M. Sanborn, The Pay-to-Stay Debate: Inmates Must Take Financial Responsibility, Corrections Today, Aug. 2003, available at http:// www.aca.org/publications/ctarchivespdf/aug03/pnt-counter.pdf.

[33] Dean v. Lehman, 18 P.3d 523, 533 (Wash. 2001).

[34] Sanborn, supra note 32.

[35] Krauth et al., supra note 7, at 15.

[36] Sara B. Miller, Is it Fair and Legal for Inmates to Foot their Room and Board? Christian Sci .Monitor (July 21, 2004), http:// www.csmonitor.com/2004/0721/p02s01-usju.html.

[37] Pay to Stay Jail Programs Growing, https:// www.prisonlegalnews.org/24855_displayArticle.aspx (last visited Mar. 17, 2014).

[38] Bauer, supra note 13.

[39] Room & Board, Pennington Cnty. Jail, http:// www.penningtoncountysheriff.com/Jail/room-and-board.html (last visited Mar. 17, 2014).

[40] P.J. Reilly, Lancaster County Prison Board Seeking Ways to Recoup Costs, Lancaster Online (Sept. 12, 2013, 7:06 PM), http:// lancasteronline.com/article/local/677903_Lancaster-County-Prison-Board-seeking-ways-to-recoup-costs.html.

[41] Mary Beth Lane & Josh Jarman, Poor Inmates Leave Jails Short on Pay-To-Stay Fees, Columbus Dispatch (June 27, 2013, 4:52 AM), http:// www.dispatch.com/content/stories/local/2013/06/27/poor-inmates-leave-jails-short-on-pay-to-stay-fees.html ("Franklin County charges inmates $40, which comes out of the inmate's commissary fund. Inmates who cannot afford the fee are not charged, Sheriff Zach Scott said. 'If their family later drops $200 in their commissary account, though, we'll take the $40 out of it first.'").

[42] Tyler Buchanan, Report Fuels Debate Over Charging Inmates Jail Fees, Athens Ohio Today.com (Jan. 15, 2014, 1:17 PM), http:// www.athensohiotoday.com/news/report-fuels-debate-over-charging-inmates-jail-fees/article_04c5258d-9dd4-5b4d-ae11-3ce836f9c380.html.

[43] Bauer, supra note 13.

[44] Turbyfill, supra note 14 ("The local jail spent $1.9 million for a medical services contract in 2012. Inmates paid a little more than $7,000 toward that expense.").

[45] Kevin Krause, Dallas County Jail Begins Charging Inmates Fee for Medical Services, Dallas News (June 5, 2012, 2:20 PM), http:// crimeblog.dallasnews.com/2012/06/dallas-county-jail-begins-charging-inmates-fee-for-medical-services.html/.

[46] Id.

[47] See Phil Schaenman et al., Urban Inst., Opportunities For Cost Savings In Corrections Without Sacrificing Service Quality: Inmate Health Care 14 (2013) ("A survey of state corrections health systems in 2009 found that the vast majority of states assess some type of medical co-payment, which often is not applied if the individual is indigent, has a chronic disease, needs emergency care, suffered a work-related injury, or is staff-ordered.").

[48] See Leah A. Plunkett, Captive Markets, 65 Hastings L.J. 57, 61 (2013).

[49] Jennifer Steinhauer, For $82 a Day, Booking a Cell in a 5-Star Jail, N.Y. Times (Apr. 29, 2007), http://www.nytimes.com/2007/04/29/us/29jail.html? pagewanted=print&_r=0.

[50] Editorial Board, California's Continuing Prison Crisis, N.Y. Times (Aug. 10, 2013) http://www.nytimes.com/2013/08/11/opinion/sunday/californias-continuing-prison-crisis.html?_r=0.

[51] Brown v. Plata, 131 S. Ct. 1910 (2011).

[52] California Prison's 'Pay-To-Stay' Option Offers 'Quieter' Rooms For $155 A Day, Huffington Post (July 28, 2013, 4:05 PM), http:// www.huffingtonpost.com/2013/07/28/california-prison-pay-to-stay_n_3667573.html.

[53] Pay-to-Stay, City of Fullerton Police, http:// www.ci.fullerton.ca.us/depts/police/programs/jail/pay&uscore;to_stay.asp (last visited Feb. 21, 2014) (The website states that this is a fee-based program available to qualified men who have been convicted and sentenced to serve time in a city jail. They are only able to accept inmates who have been convicted of a non-violent misdemeanor crime).

[54] Staff Report 1345, Alternative Confinement Program - Consideration of a Fremont Detention Facility Alternative Confinement ('Pay-to-Stay') Program and Adoption of a Resolution Setting Corresponding Rates, City of Freemont California, http://fremontcityca.iqm2.com/Citizens/Detail_LegiFile.aspx? ID=1345 (last visited Feb. 21, 2014); see also Steinhauer, supra note 48 ("For roughly $75 to $127 a day, these convicts--who are known in the self-pay parlance as 'clients'--get a small cell behind a regular door, distance of some amplitude from violent offenders and, in some cases, the right to bring an iPod or computer on which to compose a novel, or perhaps a song.").

[55] Special Comm'n to Study Feasibility of Establishing Inmate Fees, Inmate Fees As a Source of Revenue: Review of Challenges 100 (2001) (Appendix J containing info regarding the collection process and considerations).

[56] See Sharon Dolovich, Cruelty, Prison Conditions, and the Eighth Amendment, 84 N.Y.U. L. Rev. 881, 892 (2009) ("The state's carceral burden is the price society pays for the decision to incarcerate convicted offenders...If society prefers, it can choose not to incarcerate. But if it wants the benefits of incarceration, society must bear the burden, even if this choice should oblige the state to provide for the needs of people in prison in ways it routinely fails to do for needy people in the free world.").

[57] According to the American Bar Association (ABA), researchers estimate that anywhere from sixty to ninety percent of criminal defendants need publicly-funded attorneys, depending on the jurisdiction. Marea Beeman, Am. Bar Ass'n, Using Data To Sustain And Improve Public Defense Programs 2 (2012), available at http://www.americanbar.org/content/dam/aba/administrative/legal_ aid_indigent_defendants/ls_sclaid_def_sustaining_and_improving_public_ defense.authcheckdam.pdf; Bureau Justice Assistance, Dep't Justice, Contracting For Indigent Defense Services 3, n.1 (2000), available at https:// www.ncjrs.gov/pdffiles1/bja/181160.pdf (stating that sixty to ninety percent of all cases involve indigent defendants and thus use court-appointed counsel); see also Eve Brensike Primus, Procedural Obstacles to Reviewing Ineffective Assistance of Trial Counsel Claims in State and Federal Postconviction Proceedings, Criminal Justice, Fall 2009, available at http:// www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_ newsletter/crimjust_cjmag_24_3_primus.authcheckdam.pdf ('With public defenders representing 80 percent of criminal defendants nationwide, the indigent defense crisis is a problem that our criminal justice system can no longer afford to ignore.'); Caroline Wolf Harlow, Bureau Justice Statistics, Dep't Justice, Defense Counsel In Criminal Cases 1 (2000), available at http:// bjs.ojp.usdoj.gov/content/pub/pdf/dccc.pdf (finding over 80% of people charged with a felony in state courts are represented by public defenders).

[58] Supra note 57.

[59] Am. Civil Liberties Union, In for a Penny: The Rise of America's New Debtor's Prisons 9 (2010), available at http://www.aclu.org/files/assets/InForAPenny_web.pdf#page=6.

[60] "The addiction to incarceration has had very real consequences-- creating a growing class of individuals with criminal convictions unable to obtain employment or housing, and trapped in perpetual poverty. As these individuals struggle under the weight of reentering society, many see no hope and instead return to crime." Am. Civil Liberties Union Ohio, Adding It Up: The Financial Reality of Ohio's Pay-to-Stay Jail Policies 2 (2013), available at http://www.acluohio.org/wp-content/uploads/2013/06/AddingItUp2013_06.pdf; see also "[F]ormerly incarcerated people face tremendous challenges finding and maintaining legitimate job opportunities because of low levels of education, limited work experience and vocational skills, poor attitudes, and a general reluctance of employers to hire people with convictions." Amy L. Solomon et al., Justice Policy Center, Urban Institute, Life After Lockup: Improving Reentry from Jail to the Community 15 (2008), available at https:// www.ncjrs.gov/pdffiles1/bja/220095.pdf.

[61] "'We're talking about saddling a population that has nothing with debt, and then telling them they're supposed to successfully re-enter society and be productive,' said Rebecca Vallas, an attorney with Community Legal Services, which provides legal assistance to poor Philadelphia residents." Lisa Riordan Seville & Hannah Rappleye, Sentenced to Debt: Some Tossed in Prison Over Unpaid Fines, NBC News, (May 27, 2013, 12:43 AM), http://inplainsight.nbcnews.com/_news/2013/05/27/18380470-sentenced-to-debt-some-tossed-in-prison-over-unpaid-fines?lite.

[62] See Pat Nolan, Inmate User Fees: Fiscal Fix or Mirage?, Am. Corr. Assoc. (Aug. 2003), available at http://www.aca.org/publications/ctarchivespdf/aug03/pnt-counter.pdf (citing to the National Prison Project Journal).

[63] Nolan, supra note 62. (Inmates have no control over who they live with and are exposed to many communicable diseases. With the rapid spread of hepatitis C among inmates, it makes no sense to discourage inmates from seeking treatment when that merely results in further spreading the disease.).

[64] See Bannon et al., supra note 19.

[65] Nat'l Inst. Corr., Dep't Justice, Fees Paid by Jail Inmates: Findings From The Nation's Largest Jails (1997), available at http://static.nicic.gov/Library/013599.pdf.

[66] Id. at 17-18 ("According to some agencies, the burden of tracking accounts and collecting fees is not matched by the revenues generated. One agency is considering rescinding its policy of charging for services because 'the process is cumbersome and unworkable' and 'does not enhance the goals and objectives of the department."').

[67] Krauth et al., supra note 7, at 40.

[68] See New Jersey v. Thomas, Nos. 09-2610(RMB), 09-4478(RMB), 2010 WL 715394, 8 (D.N.J. Feb. 24, 2010) (The court held that inmate's assertion that an imposition of a $50 user fee from his prison account for payment of medical fees is not a violation of due process and his rights against unreasonable seizures).

[69] See Berry v. Lucas County Board of Commissioners, No. 3:08cv3005, 2010 WL 480981, 6 (N.D. Ohio Feb. 4, 2010) (The court held that the booking fee of $100 is not a punitive confiscation of property by the sovereign and serves a legitimate non-punitive purpose, which is to recoup the costs of incarceration, and not as a means of punishment.).

[70] See Reynolds v. Wagner, 128 F.3d 166, 183 (3d Cir. 1997) (affirming grant of summary judgment in favor of state correction officials on a complaint alleging an equal protection violation stemming from a now-discontinued experimental program to charge room and board based on an inmate's level of income or in a state prison); see also Christiansen v. Clarke 147 F.3d 655 (8th Cir. 1998); Federal law acknowledges that a prisoner's wages might be subject to deductions for room and board. 18 U.S.C. § 1761 (c)(2)(B); see also Browder v. Ankrom, No. 4:05cv-p9-m, 2005 WL 1026045, 6 (W.D. Ky. Apr. 25, 2005) (holding that a housing or per diem fee pursuant to a state statute or policy are not true deprivations of property because such funds are deducted in exchange for services rendered or goods provided); see also Sickles v. Kentucky, 439 F. Supp.2d 751, 757 (E.D. Ky. 2006) (holding that deduction of fees from county jail prisoners' prison canteen accounts pursuant to Kentucky statute authorizing county jailers to adopt prisoner fee and expense reimbursement policies for expenses incurred by reason of prisoner's confinement did not violate procedural due process because they are not afforded a pre-deprivation hearing before the fees are assessed and deducted).

[71] See Barnes v. Brown County, No. 11-cv-00968, 2013 WL 1314015, 4 (E.D. Wis. Mar. 30, 2013) (The court held that a pretrial detainee's Fourteenth Amendment due process rights were not violated when a Brown County jail charged him $20 a day even when he was held pretrial).

[72] Sickles v. Campbell Cnty., 439 F. Supp. 2d 751, 752 (E.D. Ky. 2006) (upholding the right of two jails in Kentucky to deduct money directly from commissary accounts of jail prisoners); Dean v. Lehman, 18 P.3d 523 (Wash. 2001) (upholding the legality of automatic deduction of funds from inmates accounts).

[73] Slade v. Hampton Rds. Reg'l Jail, 407 F.3d 243, 246-47 (4th Cir. 2005) (finding this policy is not a violation of due process because the charge does not amount to a punishment).

[74] See Allen v. Leis, 213 F. Supp. 2d 819 (S.D. Ohio 2002)

[75] U.S. Const. amend. VIII.

[76] Dep't of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767, 803 (1994).

[77] United States v. Bajakajian, 524 U.S. 321, 327 (1998).

[78] Id. at 335.

[79] See Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 266-67; Nicholas M. McClean, Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause, Hastings Const. L.Q. 833-902 (2013) (noting that essentially no Supreme Court case law exists addressing the Excessive Fines Clause prior to the modern era).

[80] Magna Carta, Ch. 20, 21, reprinted in 1 The Statutes At Large: From Magna Carta to the End of the Eleventh Parliament of Great Britain 8-9 (Danby Pickering ed., 1762) (stating that fines should be graded according to offense seriousness and also should not deprive the offender of his livelihood).

[81] Commonwealth v. Morrison, 9 Ky. 75, 79 (1819); McClean, supra note 79 at 871.

[82] United States v. Bajakajian, 524 U.S. 321, 327-34 (1998).

[83] See Alexander v. United States, 509 U.S. 544, 548-59 (1993).

[84] Bajakajian, 524 U.S. at 324-25.

[85] Id.

[86] United States v. Bajakajian, 524 U.S. 321, 334 (1998).

[87] Id. at 339-40.

[88] Tillman v. Lebanon Cnty. Corr. Facility, 221 F.3d 410 (3d Cir. 2000).

[89] See Joshua Michtom, Making Prisoners Pay for Their Stay: How a Popular Correctional Program Violates the Ex Post Facto Clause, 13 B.U. Pub. Int. L.J. 187, 187-202 (2004) (examining the Tillman case and providing a comprehensive discussion about the constitutional implications of whether pay-to-stay, when imposed independently of criminal sentencing, is an ex post facto violation).

[90] Tillman, 221 F.3d at 413.

[91] Id.

[92] Tillman v. Lebanon Cnty. Corr. Facility, 221 F.3d 410 413 (3d Cir. 2000).

[93] Id. at 414. (Pursuant to the Cost Recovery Program, which was adopted by the Lebanon County Prison Board on June 19, 1996, any funds generated through this program go toward the county's general fund, which pays the facility's operating costs.)

[94] Tillman v. Lebanon Cnty. Corr. Facility, 221 F.3d 410, 413 (3d Cir. 2000).

[95] Id. at 415 (Tillman also argued the jail violated the Equal Protection Clause because some prisoners in the jail were not charged the daily fee).

[96] Id.

[97] Id. (The Magistrate Judge held that "although prisoners could avoid medical fees by declining to seek treatment, they could not avoid residing in an institution. That fact and the amount of debt created a triable question of fact regarding cruel and unusual punishment. Second, it could not be shown as a matter of law that the fees were not excessive fines in violation of the Eighth Amendment. Third, the defendants failed to demonstrate what due process, if any, was provided to the plaintiff. Finally, the Court held that it lacked sufficient information to conclude that there was no material question of fact regarding any equal protection claim.").

[98] Id.

99 Id.

100 Tillman v. Lebanon Cnty. Corr. Facility, 221 F.3d 410, 415 (3d Cir. 2000).

101 Id. at 416.

102 Id.

103 Tillman v. Lebanon Cnty. Corr. Facility, 221 F.3d 410, 416 (3d Cir. 2000).

104 Id.

105 Id. at 420.

106 Id. (noting that the fees were "designed to teach financial responsibility," and that there was not an increase in the fee in connection to the "gravity of the offense," and the prisoner was not held for a longer period of time for a failure to pay the fee).

107 Id.

108 Tillman v. Lebanon Cnty. Corr. Facility, 221 F.3d 410, 420 (3d Cir. 2000).

109 Id. at 418 (the Third Circuit also commented that if Tillman "truly cannot meet his financial obligations, then his concerns would be more appropriately addressed in a federal bankruptcy court. That he is unhappy to be saddled with debt is understandable, but in the present circumstances, does not implicate the Cruel and Unusual Punishments Clause." Id. at 420.

110 Id. at 422.

111 Tillman v. Lebanon Cnty. Corr. Facility, 221 F.3d 410, 423 (3d Cir. 2000).

112 Id. at 423.

113 Id. at 420.

114 Id. (citing Austin v. United States, 509 U.S. 602, 620-21 (1993)).

115 Id.

116 Tillman v. Lebanon Cnty. Corr. Facility, 221 F.3d 410, 420-21 (3d Cir. 2000).

117 United States v. Bajakajian, 524 U.S. 321, 322 (1998); see also Austin 509 U.S. at 622-623. (In Austin, a state court found Austin guilty of intent to distribute cocaine and defendant's property was seized under state forfeiture law since it was used to commit the crime. Austin argued that forfeiture of his property violated the Eighth Amendment's Excessive Fines Clause. The Supreme Court held that the crucial question is whether the forfeiture is monetary punishment, with which the Excessive Fines Clause is particularly concerned. Because sanctions frequently serve more than one purpose, the fact that a forfeiture serves remedial goals will not exclude it from the Clause's purview, so long as it can only be explained as serving in part to punish. The Supreme Court determined that both civil and criminal real estate forfeitures under federal statutes constitute punitive fines and therefore that they must be limited by the Excessive Fines Clause. The Court declined to establish a test for determining whether a forfeiture is constitutionally 'excessive,' leaving that to the lower courts.).

118 See Bajakajian, 524 U.S. 321; Austin 509 U.S. 602.

119 Bajakajian, 524 U.S. at 336.

120 N.Y. Veh. & Traf. Law § 1192 (McKinney 2009).

121 Trop v. Dulles, 356 U.S. 86 (1958)

122 Trop v. Dulles, 356 U.S. 86, 101.

123 Paul Butler, Gideon's Muted Trumpet, N.Y. Times (Mar. 17, 2013), http://www.nytimes.com/2013/03/18/opinion/gideons-muted-trumpet.html?_r=0 (noting that over 80 percent of defendants are indigent. Extrapolating from this, it is fair to say that 80 percent of those incarcerated are indigent).

124 See Pub. Safety Performance Project, Pew Charitable Trusts, Public Safety, Public Spending: Forecasting America's Prison Population 2007-2011 (2007), available at http:// www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/State-based_ policy/PSPP_prison_projections&uscore;0207.pdf ("After a 700-percent increase in the U.S. prison population between 1970 and 2005, you'd think the nation would finally have run out of lawbreakers of put behind bars." Id. at i).

125 See Id.; Bureau Justice Statistics, U.S. Dep't Justice, Growth in the Total Correctional Population During 2008 Was The Slowest in Eight Years (2008), available at http:// www.bjs.gov/content/pub/press/p08ppus08pr.pdf ("At yearend 2008, 7.3 million men and women were under correctional supervision, including 70 percent (about 5.1 million) who were supervised in the community on probation or parole and 30 percent (about 2.3 million) who were held in the custody of prisons or jails, the U.S. Department of Justice's Bureau of Justice Statistics (BJS) announced today." Id. at 1).

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