

FAMILIES BEHIND BARS: DEFENDING INHERITANCE RIGHTS AGAINST PAY-TO-STAY LAWS

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“The test of our progress is not whether we add more to the abundance of those who have much; it is whether we provide enough for those who have too little.”¹

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1. President Franklin D. Roosevelt, Inaugural Address (Jan. 30, 1937) (transcript available at <https://www.presidency.ucsb.edu/documents/inaugural-address-7> [<https://perma.cc/9HES-GB4P>]).

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INTRODUCTION

Donative freedom, often hailed as the cornerstone of American succession law, is the principle that individuals have the right to freely dispose of their property, even after death.² This concept is deeply ingrained in U.S. law, reflecting the belief that property owners should have ultimate control over the fate of their assets.³ It aligns with ideals of personal liberty and autonomy, thereby reinforcing the idea that individuals, not the state, should determine how wealth is distributed.⁴ Even when an inheritance passes through intestate succession—where property is distributed according to state law rather than the individual's wishes—donative freedom is still an underlying principle.⁵ Because this policy serves as the foundational rationale for the U.S. probate system, any legal conflicts or statutes that undermine or subvert donative freedom should be viewed with heightened scrutiny.

Scrutiny of such laws is especially critical when the primary impact of ignoring the policy of donative freedom is to disadvantage some of society's most vulnerable populations.⁶ A

2. See Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 643 (2014) ("The organizing principle of the American law of succession, both probate and nonprobate, is *freedom of disposition*."); see also RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. a (AM. L. INST. 2003) (stating that testamentary freedom is the "controlling consideration" in inheritance law).

3. Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 882 (2012) (explaining that American inheritance law is fundamentally based on the principle that property owners have the authority to determine how their assets will be distributed upon their death).

4. See *id.* at 882–85 (discussing a federal and state priority-shift toward greater testamentary freedom).

5. See Marissa J. Holob, *Respecting Commitment: A Proposal to Prevent Legal Barriers from Obstructing the Effectuation of Intestate Goals*, 84 CORNELL L. REV. 1492, 1499 (1999) (explaining that probate codes are designed to reflect the typical preferences of testators who pass with a valid will, aiming to ensure property is distributed in line with what a rational owner would have chosen if still alive). Though intestate succession laws enshrine this principle, there is little agreement about how effectively probate codes accomplish this goal. See Jeffrey N. Pennell, *Individuated Determination of a Surviving Spouse's Elective Share*, 23 U.C. DAVIS L. REV. 2473, 2476 (2020).

6. See Weisbord, *supra* note 3, at 878–80. Ignoring policy underpinnings when crafting laws that impact vulnerable populations is a direct example of systemic inequality. Systemic

particularly egregious example of the policy of respecting donative freedom being cast aside comes in the form of pay-to-stay statutes, which charge incarcerated individuals for the cost of their imprisonment.⁷ Most pay-to-stay statutes allow the state to seize inheritance funds from the currently or formerly incarcerated individual to help recoup some of the cost of “housing” them.⁸ Today, most U.S. states enforce these so-called “pay-to-stay” laws, and the financial obligations imposed by these statutes follow people long after they have served their time and repaid any ordered restitution.⁹ Moreover, the families of incarcerated individuals are often harmed when inheritance funds are claimed to help pay the cost of imprisonment to the state.¹⁰

inequality refers to the uneven distribution of wealth, resources, opportunities, and privileges that stems from entrenched discriminatory practices, which are embedded within societal structures and institutions. See Angela Hanks, Danyelle Solomon & Christian E. Weller, *Systematic Inequality*, CTR. FOR AM. PROGRESS (Feb. 21, 2018), <https://www.americanprogress.org/article/systematic-inequality/> [<https://perma.cc/4SDG-6T95>].

7. 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/SCM2-9A9F>]; see also WASH. REV. CODE §§ 72.09.111, 72.09.480 (2024); MICH. COMP. LAWS § 800.401 et. seq. (1984); KY. REV. STAT. ANN. § 532.352 (West 2024); OKLA. STAT. tit. 57, § 549 (2014); CONN. GEN. STAT. § 18-85a (2024); FLA. STAT. § 944.485 (1997); FLA. STAT. § 951.033 (1996); OHIO REV. CODE ANN. § 2929.37 (West 2024) (2006); UTAH CODE ANN. § 17-50-319 (West 2023); ARK. CODE ANN. § 12-41-505 (2021); MINN. STAT. § 641.12 (2010); TENN. CODE ANN. § 40-28-201 (2018); IND. CODE § 36-2-13-15 (2012); COLO. REV. STAT. § 18-1.3-701 (2021); N.H. REV. STAT. ANN. § 30-B:19 (1999); TEX. CODE CRIM. PROC. ANN. art. 42.038 (West 1999).

8. Brittany L. Deitch, *Estate to State: Pay-to-Stay Statutes and the Problematic Seizure of Inherited Property*, 95 U. COLO. L. REV. 839, 844 (2024).

9. A total of forty-five states has some form of pay-to-stay statute. See *id.* at 841. Of these, three explicitly permit the seizure of inherited assets. See CONN. GEN. STAT. § 18-85b(b) (2024); FLA. STAT. § 944.485 (1997); WASH. REV. CODE § 72.09.480(4) (2024). In contrast, twenty-five states do not specify whether inherited assets can be seized. See, e.g., KY. REV. STAT. § 441.265 (2022).

10. See *Beatty v. Gilman*, 718 F. Supp. 3d 166, 176–77 (D. Conn. 2024); see also *Federal Court: Stamford Woman May Sue State Over Prison Debt Law, But Must Substitute Defendants*, ACLU CONN. (Mar. 6, 2023) [hereinafter *Stamford Woman May Sue State Over Prison Debt Law*], <https://www.acluct.org/en/press-releases/federal-court-stamford-woman-may-sue-state-over-prison-debt-law-must-substitute> [<https://perma.cc/55WV-GRRF>]. One poignant example is the story of Teresa Beatty, who became the lead plaintiff in a lawsuit challenging Connecticut’s pay-to-stay law. Teresa Beatty’s story illustrated the devastating impact of pay-to-stay laws on families. Pat Eaton-Robb, *At \$249 Per Day, Prison Stays Leave Ex-Inmates Deep in Debt*, CBS42, (Aug. 27, 2022, 10:04 AM)

Indeed, many incarcerated individuals are parents. In fact, 54% of the incarcerated population are parents to children under eighteen, which represents over 1.2 million parents.¹¹ The financial burden of having a family member incarcerated is compounded by the loss of income that many families experience when a parent or spouse is imprisoned, creating a seemingly endless cycle of hardship.

The impact on children is especially profound, with approximately 2.6 million children having an incarcerated parent at any given time, and more than five million experiencing parental incarceration over the course of their lives.¹² African American children are disproportionately affected, with 11% having an incarcerated parent, compared to 3.5% of Hispanic children and 1.75% of white children.¹³ The incarceration of a parent is linked to a range of adverse outcomes for children, including increased rates of school expulsion, lower likelihood of graduating from college, and exposure to frequent socioeconomic hardship, domestic violence, and parental substance abuse.¹⁴

<https://www.cbs42.com/news/national/ap-at-249-per-day-prison-stays-leave-ex-inmates-deep-in-debt/> [https://perma.cc/393G-VT8V]. Teresa Beatty's story illustrated the devastating impact of pay-to-stay laws on families. *Id.* After her mother's passing in 2020, she had expected to use her inheritance to secure her family's financial future. *See id.* However, the state of Connecticut imposed an \$83,762 lien on her inheritance to recover incarceration costs from a minor drug offense two decades earlier. *Id.* Beatty, who became the lead plaintiff in a lawsuit challenging the law, feared she would be forced to sell her home of fifty-one years, where she lived with her two adult children, a grandchild, and her disabled brother. *Id.* The financial strain left her on the brink of homelessness as she struggled to understand why she was being required to pay her debt to society a second time. *Id.* The state's \$249 daily incarceration fee depleted the inheritance she needed to cover essential family expenses, such as paying off debts and supporting her household. *Id.* This case demonstrated how these laws not only drained inheritances meant to improve a family's future but also destabilized the most vulnerable households, threatening their homes, livelihoods, and long-term security. *See id.*

11. THE PEW CHARITABLE TR., COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 4, 18 (2010) [hereinafter PEW CHARITABLE TRUST REPORT: COLLATERAL COSTS].

12. Bryan L. Sykes & Becky Pettit, *Mass Incarceration, Family Complexity, and the Reproduction of Childhood Disadvantage*, 654 ANNALS AM. ACAD. POL. & SOC. SCI. 127, 128 (2014); THE ANNE E. CASEY FOUND., A SHARED SENTENCE: THE DEVASTATING TOLL OF PARENTAL INCARCERATION ON KIDS, FAMILIES AND COMMUNITIES 1 (2016).

13. Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, 139 DAEDALUS 8, 16 (2010).

14. DAVID MURPHEY & P. MAE COOPER, PARENTS BEHIND BARS: WHAT HAPPENS TO THEIR CHILDREN 5-6 (2015); PEW CHARITABLE TRUST REPORT: COLLATERAL COSTS, *supra* note 11, at 5, 26.

These challenges further entrench cycles of poverty, with children of incarcerated parents often struggling to access the opportunities necessary to escape this vicious cycle.¹⁵ Thus, pay-to-stay laws not only target the financial assets of incarcerated individuals but also ensure that their families remain weighed down by the expenses of incarceration.

The reach of these laws is expansive, permitting the seizure of various financial assets, including wages, tax refunds, civil settlements, and inheritances.¹⁶ This Essay focuses solely on claiming repayment through an inheritance due to the unique nature of donative freedom and its essential role in ensuring financial security for the next generation. The state's intrusion into the inheritance process not only undermines donative freedom but also compounds the generational disadvantages these families face. When pay-to-stay statutes intercept inheritances meant for an incarcerated individual or their family, the state's actions deprive families of the support these laws are designed to offer, undermining the principle that a person's property should benefit their dependents after death, regardless of whether a will was in place. Indeed, those wealthy enough to engage an estate planning attorney might avoid the impact of pay-to-stay statutes on inherited funds using a spendthrift trust.¹⁷ Yet, the very population subject to pay-to-stay laws

15. NEIL DAMRON, POVERTY FACT SHEET: LIFE BEYOND BARS: CHILDREN WITH AN INCARCERATED PARENT 2 (2014).

16. See, e.g., April D. Fernandes, Brittany Friedman & Gabriela Kirk, *The "Damaged" State vs. the "Willful" Nonpayer: Pay-to-Stay and the Social Construction of Damage, Harm, and Moral Responsibility in a Rent-Seeking Society*, 8 RUSSELL SAGE FOUND. J. SOC. SCIS. 82, 90 n.10 (2022) (finding a subset of claims where states sought compensation out of settlement funds with mixed results); 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, 113 (2010).

17. A spendthrift trust is a type of trust that includes a "spendthrift clause," which prevents beneficiaries from transferring their interest in the trust and restricts creditors from accessing the trust assets before they are distributed. ANGELA VALLARIO, THE FUNDAMENTALS OF ESTATE PLANNING (MARYLAND) 248–50 (3d ed. 2024). The purpose of a spendthrift trust is to protect the trust assets from being seized due to the beneficiary's debts or poor financial decisions. *Id.* However, once the money is distributed to the beneficiary, it is no longer protected by the spendthrift provision. *Id.* Importantly, despite the name, the beneficiaries of a spendthrift trust are not

being used to claim an inheritance is the population least able to access estate planning.¹⁸ The tension between pay-to-stay statutes and donative freedom reveals a broader societal conflict: while the law traditionally honors a person's right to decide the fate of their property, the economic burden of incarceration distorts this principle, prioritizing state recovery over familial support.¹⁹ Amidst this tension, pay-to-stay statutes have persisted in eroding donative freedom by allowing the state to seize inheritances where the deceased could not afford or access estate planning.

This Essay aims to argue that abolishing the practice of inheritance seizure to recoup incarceration costs is essential to protect families from further economic harm. To that end, Part I explores the broader landscape of pay-to-stay statutes across the United States, analyzing their role in exacerbating financial hardship for incarcerated individuals and their families. Part II introduces the tension between donative freedom and the state's ability to seize inheritances through these statutes, illustrating how this conflict undermines the fundamental principles of American succession law. Part III advocates first for abolishing the ability to claim an inheritance to cover incarceration costs and, alternately, for reforming pay-to-stay statutes to include mitigating provisions that allow state collection agencies discretion in pursuing inheritance funds, especially when dependents could benefit from them. Additionally, it proposes granting probate courts the ability to override the state's claim to these funds by placing them into a constructive trust for the family, ensuring that the financial support intended for dependents is preserved. The proposed reforms acknowledge the tension between donative freedom and state-imposed financial recovery by introducing flexibility into the system, allowing

necessarily irresponsible or prone to overspending; the designation simply reflects the legal protection that makes their interest in the trust inalienable. *Id.*

18. See *Connections Among Poverty, Incarceration, and Inequality*, INST. FOR RSCH. ON POVERTY (May 2020), <https://www.irp.wisc.edu/resource/connections-among-poverty-incarceration-and-inequality/> [<https://perma.cc/9JNP-8STM>].

19. See *supra* notes 6–10 and accompanying text.

a way to balance these competing interests while safeguarding the economic future of vulnerable families.

I. THE COSTLY LANDSCAPE OF INCARCERATION FEES

The financial demands imposed by the U.S. prison system have created a national crisis, especially for the families of incarcerated individuals. Take, for example, Teresa Beatty, whose story illustrates the real-life consequences of pay-to-stay statutes for families of formerly incarcerated individuals.²⁰ Nearly two decades after serving time on drug charges, Teresa, now a certified nursing assistant, mother, grandmother, and caretaker for her disabled brother, received a devastating financial demand from the state of Connecticut.²¹ After her mother passed away, leaving Teresa a portion of her estate, Connecticut enforced its pay-to-stay statute, demanding over \$83,000 in repayment for Teresa's incarceration costs, including time spent in custody awaiting trial because she could not afford bail.²² This financial burden directly impacted not only Teresa but also her family, whom she supports, placing them at risk of losing their home.²³ Her inheritance, intended to provide stability, was threatened by the state's demand, which prioritized recovering costs over supporting a vulnerable family's financial future.²⁴

Another example of the impact of pay-to-stay statutes comes from Doug Johnson.²⁵ After serving his sentence, Doug inherited a modest sum and hoped to put it toward his daughter's college education—a step he felt would help rebuild their

20. *Beatty v. Gilman*, 718 F. Supp. 3d 166, 176–77 (D. Conn. 2024); see *Stamford Woman May Sue State Over Prison Debt Law*, *supra* note 10.

21. *Beatty*, 718 F. Supp. 3d at 176; *Stamford Woman May Sue State Over Prison Debt Law*, *supra* note 10.

22. *Beatty*, 718 F. Supp. 3d at 176.

23. *Eaton-Robb*, *supra* note 10.

24. *Id.*

25. *Beatty*, 718 F. Supp. 3d at 176–77; see *Additional Connecticut Residents Join Lawsuit Over Prison Debt Law*, ACLU CONN. (Apr. 21, 2023), <https://www.acluct.org/en/press-releases/additional-connecticut-residents-join-lawsuit-over-prison-debt-law> [<https://perma.cc/D2MD-Y4EJ>].

family's future.²⁶ However, the state intervened, demanding repayment for the cost of his incarceration, effectively redirecting his inheritance away from his family's needs.²⁷ Doug's and Teresa's stories are just two of many examples of how pay-to-stay statutes are used across the United States to seize funds from formerly incarcerated individuals to recoup incarceration costs.

A. *Rationale for Pay-to-Stay Statutes*

At their core, pay-to-stay statutes are laws that enable states to recoup incarceration costs by charging formerly incarcerated individuals for their time in prison. In 1846, Michigan introduced the nation's first correctional fee law, permitting counties to charge people incarcerated in their county for any medical care provided.²⁸ Nearly a century later, Michigan enacted the first pay-to-stay statute in 1935, primarily as a response to the fiscal challenges of the Great Depression.²⁹ This statute allowed the state to collect payments directly from incarcerated individuals to help offset incarceration costs.³⁰ Initially, this law aimed to reduce the financial burden on taxpayers by shifting the costs of imprisonment to those who had served time, which laid the

26. *Additional Connecticut Residents Join Lawsuit Over Prison Debt Law*, *supra* note 25.

27. *See Beatty*, 718 F. Supp. 3d at 176–77.

28. 1846 Mich. Pub. Acts 148 Chapter 171 § 801.4; *see* Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, BRENNAN CTR. FOR JUST. (July 31, 2014) [hereinafter Eisen, *Paying for Your Time*], <https://www.brennan-center.org/our-work/research-reports/paying-your-time-how-charging-inmates-fees-behind-bars-may-violate> [https://perma.cc/L4SJ-YY2B].

29. Deitch, *supra* note 8, at 848; *see also* MICH. COMP. LAWS § 800.401 (1935); Sarah McClure, Comment, *Get Out of Jail Free? A Survey of Pay-to-Stay Statutes Through a Constitutional Lens*, 16 EST. PLAN. & CMTY. PROP. L.J. 219, 222 (2023). In the decades that followed, particularly during the 1970s and 1980s when incarceration rates surged, other states adopted similar laws. Deitch, *supra* note 8, at 848. The underlying reason for this increase is the high cost of mass incarceration. *Id.* at 849–50. From 1977 to 2020, state and local spending on corrections rose dramatically from \$19 billion to \$86 billion annually. *Id.* This, coupled with the overall \$200 billion spent on the criminal justice system annually, pushed states to look for new funding solutions. *Id.* at 848–49. Their answer was to shift part of the financial burden onto incarcerated individuals by making them pay for their own imprisonment. *Id.* at 848. The rapid expansion of these laws can be linked directly to the economic pressures states face in managing the high costs of mass incarceration. *Id.*

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

foundation for similar statutes across other states.³¹ By the 1970s and 1980s, prison populations surged due to the War on Drugs and tough-on-crime policies, which resulted in longer and more frequent sentences.³² In response, many states adopted pay-to-stay laws as a fiscal strategy to help manage the rising expenses of their correctional systems.³³ By the 1990s, these statutes had become widespread across the United States.³⁴

With incarceration rates at an all-time high, the challenge of funding the U.S. prison system has only grown in significance. The prison population boom that began in the 1970s has continued, and today, despite a small downward trend in recent years, the United States has the highest incarceration rate globally, with over 1.2 million individuals behind bars as of 2022.³⁵ Between 1970 and 2012, incarceration rates surged by 700%, increasing the financial strain on state governments.³⁶ The Vera Institute of Justice estimated that in 2010, the total taxpayer cost for state prisons across forty states was approximately \$39 billion.³⁷ Today, this cost is estimated to be close to \$80.7 billion.³⁸ This figure reflects only part of the story, as many hidden costs—such as medical care, pensions, and post-release

31. See Deitch, *supra* note 8, at 848; McClure, *supra* note 29, at 223.

32. See Deitch, *supra* note 8, at 848; McClure, *supra* note 29, at 223.

33. See McClure, *supra* note 29, at 223; see also Deitch, *supra* note 8, at 849–51 (describing the “broader shift” in the 1980s and 1990s).

34. See Deitch, *supra* note 8, at 850.

35. *Prison Population by State*, WORLD POPULATION REV., <https://worldpopulationreview.com/state-rankings/prison-population-by-state> [<https://perma.cc/DSW2-KZMU>] (last visited Feb. 11, 2025); CHRISTIAN HENRICHSON & RUTH DELANEY, *THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 2* (2012); see also Emily Widra, *States of Incarceration: The Global Context*, PRISON POL’Y INITIATIVE (June 2024), <https://www.prisonpolicy.org/global/2024.html> [<https://perma.cc/AJ24-KUAQ>].

36. HENRICHSON & DELANEY, *supra* note 35, at 2.

37. *Id.* at 6. “Vera determined that prison costs outside the corrections budget fall under three categories: (1) costs that are centralized for administrative purposes, such as employee benefits and capital costs; (2) inmate services funded through other agencies, such as education and training programs; and (3) the cost of underfunded pension and retiree healthcare plans.” *Id.* at 3.

38. *Economics of Incarceration*, PRISON POL’Y INITIATIVE (Jan. 23, 2025, 9:00 AM), https://www.prisonpolicy.org/research/economics_of_incarceration/ [<https://perma.cc/SEL7-TJWV>].

services—are often excluded from corrections budgets.³⁹ As incarceration rates and associated costs continue to rise, state governments face increasing challenges in sustaining the prison system.

Against this backdrop, many states have continued to uphold their pay-to-stay laws.⁴⁰ Under these laws, incarcerated individuals are charged fees for their confinement, including room, board, medical expenses, and sometimes additional costs related to their time in prison.⁴¹ Although these laws vary from state to state, the underlying principle is that incarcerated individuals, as ‘users’ of the correctional system, should bear some financial responsibility for the expenses incurred during their incarceration.⁴² Policymakers often frame this practice as a form of financial reimbursement, aiming to relieve taxpayers by shifting some of the system’s operating costs to those directly using its resources.⁴³ Another rationale is that these fees incentivize incarcerated individuals to recognize the financial impact of incarceration on the state, aligning with broader goals of fiscal accountability.⁴⁴ Furthermore, advocates argue that these fees are legally permissible because they function as a form of reimbursement rather than punishment, allowing them to avoid double punishment challenges that are often framed as

39. HENRICHSON & DELANEY, *supra* note 35, at 6.

40. Ileana Wachtel, *How One State’s Repeal of a Prison ‘Pay-to-Stay’ Law Could Guide National Reform*, USC DORNSIFE (Dec. 18, 2024), <https://dornsife.usc.edu/news/stories/pay-to-stay-prison-reform-research-could-guide-change/> [<https://perma.cc/F6MP-ZFAG>] (“Nearly every state requires incarcerated individuals to pay for room, board, and basic services.”).

41. See Deitch, *supra* note 8, at 856. Under pay-to-stay laws, incarcerated individuals may be charged for daily room and board, medical co-pays for healthcare services, and fees for hygiene products or other basic necessities. See McClure, *supra* note 29, at 236. Some states also impose charges for transportation to court appearances, participation in work release programs, and even utilities like electricity within prison housing units. See *id.* at 223.

42. Deitch, *supra* note 8, at 850 n.35; see also McClure, *supra* note 29, at 236 (listing the expenses that different states charge for incarceration).

43. Megan Schumann, *States Unfairly Burdening Incarcerated People With “Pay-to-Stay” Fees*, RUTGERS (Nov. 20, 2020), <https://www.rutgers.edu/news/states-unfairly-burdening-incarcerated-people-pay-stay-fees> [<https://perma.cc/Z69K-JZ8U>].

44. See *id.*

excessive fines under the Eighth Amendment of the U.S. Constitution.⁴⁵

Given these rationales, pay-to-stay statutes have persisted as an accepted component of the criminal justice system, justified by the dual goals of fiscal responsibility and user accountability. States have developed various pay-to-stay statutes, tailoring them to different aspects of incarceration costs, from daily room and board charges to fees for medical and administrative services.⁴⁶ Understanding the types of pay-to-stay statutes currently in place across the United States provides insight into how each state approaches the financial demands of its correctional systems and highlights the diversity of methods used to allocate these costs back to incarcerated individuals.

B. *Types of Pay-to-Stay Statutes*

To understand the breadth and complexity of pay-to-stay statutes, it is essential to examine the different forms these laws take. They can be broadly classified based on the specific costs they target and the types of assets states pursued for repayment. Although each state's approach varies, most statutes fall into common categories that define which confinement expenses are charged to incarcerated individuals and outline the methods for collecting these debts.⁴⁷

One of the most common forms of pay-to-stay statutes charges inmates for the cost of their daily upkeep in prison.⁴⁸ This includes expenses for their room and meals during their confinement.⁴⁹ Some states impose a flat daily fee, while others calculate fees based on the actual costs of housing each inmate.⁵⁰

45. *See id.*

46. *See supra* note 7 and accompanying text.

47. Though this Essay does not assign specific categories to the types of pay-to-stay statutes, scholar Brittany L. Deitch categorizes the statutes into two primary 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." *See* Deitch, *supra* note 8, at 851.

48. *See* Deitch, *supra* note 8, at 852–58.

49. *See id.* at 856.

50. *See id.*

For example, in Vermont, wages from work-release programs are used to offset some of the costs,⁵¹ while in states like Missouri, inmates may be charged up to 10% of the total costs for their room and board, or the full amount for two years, whichever is lower.⁵²

Several states also charge inmates for the medical care they receive while incarcerated.⁵³ These charges can range from small copays for doctor visits to significant fees for medical procedures.⁵⁴ For example, South Carolina charges inmates a \$5 copay for each medical treatment they receive.⁵⁵ Other states may charge inmates the cost of medical services, depending on the nature of the treatment and the state's policies.⁵⁶ In addition to room, board, and medical costs, some states include charges for other services and expenses related to incarceration. This can include fees for participation in prison programs, such as education or vocational training, or for the use of commissary

51. VT. STAT. ANN. tit. 28, § 755 (2005).

52. MO. REV. STAT. § 217.831(3).

53. See, e.g., Emily Widra, *New Research Links Medical Copays to Reduced Healthcare Access in Prisons*, PRISON POL'Y INITIATIVE (Aug. 29, 2024), <https://www.prisonpolicy.org/blog/2024/08/29/fees-limit-healthcare-access> [<https://perma.cc/6RXF-QPJX>].

54. See Deitch, *supra* note 8, at 852–59.

55. S.C. CODE ANN. § 24-13-80(B)(2) (2010) (stating that the administrator can deduct money from an inmate's account to “defray the costs paid by a municipality or county for medical services for an inmate, which have been requested by the inmate, if the deduction does not exceed five dollars for each occurrence of treatment received by the inmate.”). South Carolina also authorizes other means of collecting room and board payments from inmates that are working:

Unless otherwise provided by law, the employer of a prisoner authorized to work at paid employment in the community under Sections 24-3-20 to 24-3-50 or in a prison industry program provided under Article 3 of this chapter shall pay the prisoner's wages directly to the Department of Corrections The Director of the Department of Corrections, or the local detention or correctional facility manager, if applicable, shall deduct the following amounts from the gross wages of the prisoner: (3) Thirty-five percent must be used to pay the prisoner's child support obligations pursuant to law, court order, or agreement of the prisoner. These child support monies must be disbursed to the guardian of the child or children or to appropriate clerks of court, in the case of court ordered child support, for application toward payment of child support obligations, whichever is appropriate. If there are no child support obligations, then twenty-five percent must be used by the Department of Corrections to defray the cost of the prisoner's room and board.

S.C. CODE ANN. § 24-3-40(A)(3) (2017) (emphasis added).

56. See Deitch, *supra* note 8, at 853–54.

services.⁵⁷ These fees are typically deducted from wages earned through inmate work programs or from money deposited in inmate accounts by family members.⁵⁸

Inmates who participate in work programs often have a portion of their wages garnished to cover incarceration costs.⁵⁹ Depending on the state, these deductions can range from a small percentage of earnings to a significant portion, with some states taking up to 50% of an inmate's earnings.⁶⁰ Additionally, inmates frequently receive money from family and friends deposited into their prison accounts.⁶¹ Many states deduct incarceration-related fees directly from these accounts before the inmate has access to the funds.⁶² This method allows states to collect costs even if the inmate is not working while incarcerated.

In some states, pay-to-stay statutes allow for the seizure of inmate assets beyond commissary funds or earnings from work programs.⁶³ This can include seizing an inheritance an inmate receives via will or intestate succession to cover the costs of imprisonment.⁶⁴ For example, in Connecticut, the state can file a lien on a prisoner's inheritance to recoup the costs of their incarceration.⁶⁵ This practice allows the state to collect funds beyond what the inmate may have in their prison account or

57. *See id.* at 852–59. Take South Dakota's statute, for example:

Each inmate under the jurisdiction of the Department of Corrections is 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. However, if the secretary of corrections determines after considering the net income, net worth, number of dependents, and any existing obligations of the inmate, that the inmate is unable to pay, the secretary may waive all or part of the payment for the costs of the inmate's confinement.

S.D. CODIFIED LAWS § 24-2-28 (2004).

58. *See* Deitch, *supra* note 8, at 858–60.

59. *Id.* at 852–53.

60. Leah Wang, *Prison Disciplinary Fines Only Further Impoverish Incarcerated People and Families*, PRISON POL'Y INITIATIVE (Feb. 7, 2024), <https://www.prisonpolicy.org/blog/2024/02/07/disciplinary-fines/> [<https://perma.cc/LK77-5E94>].

61. Deitch, *supra* note 8, at 859.

62. *Id.* at 852–53.

63. *See supra* note 9 and accompanying text.

64. *See* Deitch, *supra* note 8, at 861–65.

65. CONN. GEN. STAT. ANN. § 18-85a(b) (West 2024).

wages earned through work programs.⁶⁶ While some states explicitly allow for the seizure of inherited assets, others leave the specifics of asset seizure more ambiguous.⁶⁷ This often depends on how the state structures its debt recovery processes.⁶⁸ In some cases, states may wait until an inmate or former inmate comes into possession of significant assets—such as an inheritance, settlement, or lottery winnings—before attempting to collect on the debts owed from incarceration.⁶⁹ Some states even allow collection efforts to continue for up to twenty years, and while governments may pause active attempts to collect, the debt itself does not disappear and remains subject to standard debt collection laws, including potential wage garnishment or liens on future assets.⁷⁰

Pay-to-stay statutes were developed as a response to the rising costs of incarceration and the increasing number of people incarcerated in the United States.⁷¹ While the specifics of these laws vary from state to state, their common goal is to shift some of the financial burden of incarceration from taxpayers to incarcerated individuals themselves.⁷² Understanding the mechanisms behind pay-to-stay statutes is crucial to appreciating their broader role within the U.S. criminal justice system. As of 2024, only Hawaii, New Hampshire, Illinois, California, and Maine have repealed or lack pay-to-stay statutes, while every other state enforces some form of these laws.⁷³ Despite the variation

66. See Deitch, *supra* note 8, at 865–66; McClure, *supra* note 29, at 221.

67. See Deitch, *supra* note 8, at 844.

68. See generally McClure, *supra* note 29 (examining state differences in pay-to-stay statutes).

69. Deitch, *supra* note 8, at 865.

70. See Daniel P. Smith, *Unveiling Hidden Injustice: The Truth Behind ‘Pay-To-Stay’ Prison Policies*, USC DORNSIFE (Feb. 12, 2024), <https://dornsife.usc.edu/news/stories/pay-to-stay-prison-policy-captive-money-lab/> [<https://perma.cc/BY6D-J3L3>].

71. See Lauren-Brooke Eisen, *America’s Dystopian Incarceration System of Pay to Stay Behind Bars*, BRENNAN CTR. FOR JUST. (Apr. 19, 2023) [hereinafter Eisen, *America’s Dystopian Incarceration System of Pay*], <https://www.brennancenter.org/our-work/analysis-opinion/americas-dystopian-incarceration-system-pay-stay-behind-bars> [<https://perma.cc/N4YW-CH2K>].

72. *Id.*

73. McClure, *supra* note 29, at 225. While Hawaii is the only state to have never passed a pay-to-stay statute, its crime policy has led to extreme overcrowding that requires sending

in form and application, one outcome remains consistent: by seizing funds from formerly incarcerated individuals, these statutes often perpetuate cycles of poverty.⁷⁴ The expansion of incarceration not only created financial strains on state budgets but also imposed lasting economic hardships on the families of those affected.⁷⁵ The financial toll of these laws extends beyond individuals to impact entire families, creating a ripple effect that compounds the challenges of reentry and economic stability.⁷⁶

C. *The Financial Burden Incarceration Places on Families*

Pay-to-stay laws in their current forms not only deprive incarcerated individuals of funds they might otherwise use to support their families, but also place significant financial strain on their loved ones, who often bear the costs of maintaining contact and providing for their incarcerated family members' needs. Beyond merely recouping incarceration costs, these statutes often intensify existing economic hardships, leaving families in severe financial distress.⁷⁷ Methods of collection—such as garnished wages and seized inheritances—strip away essential resources that families rely on for basic stability and survival. The following section will delve into how pay-to-stay statutes affect not only the incarcerated but also their loved ones, who frequently bear the lasting financial burden these laws create.

inmates to other states for their sentences. *Id.* These unlucky Hawaiians are subject to the other state's statute. *Id.*

74. Alexandra Natapoff, *Gideon's Servants and the Criminalization of Poverty*, 12 OHIO ST. J. CRIM. L. 445, 446 (2015).

75. Dara Lind, *At Least 2 States Let Prisons Charge the Families of Dead Ex-prisoners for Their Food and Health Care*, VOX, <https://www.vox.com/2015/5/26/8660001/prison-jail-cost> [<https://perma.cc/J4XU-Z6K9>] (Oct. 16, 2015, 12:44 PM).

76. HENRICHSON & DELANEY, *supra* note 35, at 3 ("Incarcerated men and women also bear economic and social costs associated with prison—as do their families and communities."). See PEW CHARITABLE TRUST REPORT: COLLATERAL COSTS, *supra* note 11, at 22. As a 2005 study concluded, "[i]ncarceration impacts the life of a family in several important ways: it strains them financially, disrupts parental bonds, separates spouses, places severe stress on the remaining caregivers, leads to a loss of discipline in the household, and to feelings of shame, stigma, and anger . . ." Ricardo E. Barreras, Ernest M. Drucker & David Rosenthal, *The Concentration of Substance Use, Criminal Justice Involvement, and HIV/AIDS in the Families of Drug Offenders*, 82 J. URB. HEALTH 162, 168 (2005).

77. See PEW CHARITABLE TRUST REPORT: COLLATERAL COSTS, *supra* note 11, at 22.

Families of incarcerated individuals often bear the brunt of their incarcerated family member's financial burdens. Research indicates that about 65% of families with an incarcerated member struggle to meet basic needs such as housing and food.⁷⁸ This hardship stems largely from the loss of income from the incarcerated individual, compounded by mounting criminal justice debts and fees related to court costs, legal representation, and pay-to-stay charges.⁷⁹ Incarceration is particularly devastating for children and spouses, who frequently depend on the incarcerated person's financial support to maintain stability.⁸⁰

Studies have shown that one in twenty-eight children have a parent currently incarcerated, with minority communities disproportionately affected.⁸¹ The immediate removal of a parent from the household places their children at a significant economic disadvantage, leading to long-term financial insecurity.⁸² Research shows that during a father's incarceration, the average family's income drops by 22% compared to the year before his imprisonment.⁸³ Beyond the initial loss of income, families often face additional financial strain as they try to cover prison-related costs, including commissary accounts, transportation for

78. *Who Pays? The True Cost of Incarceration on Families*, FINES & FEES JUST. CTR. (Sept. 13, 2015), <https://finesandfeesjusticecenter.org/articles/who-pays-true-cost-incarceration-families/> [<https://perma.cc/6SMT-UJFG>]; see also Natapoff, *supra* note 74, at 446 (describing how encounters with the criminal justice system make families poorer).

79. See Andolena, *supra* note 16, at 102.

80. Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, 278 NAT'L INST. JUST. J., May 2017, at 1, 3.

81. Isabel Coronado, *We Are Not Collateral Consequences: Children of Incarcerated Parents*, NEXT100 (Feb. 10, 2020), <https://thenext100.org/we-are-not-collateral-consequences-children-of-incarcerated-parents/> [<https://perma.cc/QN53-4UW5>]; see also Martin, *supra* note 80, at 2. A closer examination of the numbers, however, reveals that communities of color are more at risk: Data from 2007 (the most recent data available) show that African American children and Hispanic children were 7.5 times more likely and 2.3 times more likely, respectively, than white children to have an incarcerated parent. Also, 40% of all incarcerated parents were African American fathers. The burden of parental incarceration on these communities has changed over time. For example, about 15% of African American children born in the 1970s had a parent who was incarcerated. Twenty years later, the rate had nearly doubled to 28%. *Id.*

82. See Martin, *supra* note 80, at 3 ("One study found that the family's income was 22 percent lower during the incarceration period and 15 percent lower after the parent's re-entry.").

83. *Id.*; Coronado, *supra* note 81.

visits, and phone calls, all of which are often expensive.⁸⁴ The physical distance between prisons and family homes adds to this burden.⁸⁵ Incarcerated individuals are often held hundreds of miles from their families, making visits infrequent and costly, especially for those without access to reliable transportation.⁸⁶ Travel costs, lost wages from time taken off work, and high phone call rates compound the already overwhelming financial and emotional strain.⁸⁷ Such costs add up over time, deepening the family's financial burden and depleting resources that might otherwise support basic needs or children's education.

Even after a parent is released, the economic strain often continues. Formerly incarcerated individuals face numerous barriers to employment and housing, with many encountering restrictions that prevent them from accessing jobs, public assistance, or stable housing—resources essential for family reintegration and stability.⁸⁸ Research estimates there are over 44,000 legal barriers impacting reentry, making it challenging for individuals to support their families post-incarceration.⁸⁹ This lack of stability perpetuates economic insecurity and can have long-lasting effects on children, who may experience emotional and psychological stress, as well as disruptions to their education and social life.⁹⁰ Many children might live with the fear that financial pressures could drive their parents back into behaviors

84. See CONSUMER FIN. PROT. BUREAU, JUSTICE-INVOLVED INDIVIDUALS AND THE CONSUMER FINANCIAL MARKETPLACE 17 (2022).

85. See Coronado, *supra* note 81.

86. Jaime Joyce, *Let's Make It Easier for Kids to Visit Incarcerated Parents*, THE MARSHALL PROJECT (May 10, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/05/10/let-s-make-it-easier-for-kids-to-visit-incarcerated-parents> [<https://perma.cc/43FP-38MV>].

87. Hedwig Lee, Lauren C. Porter & Megan Comfort, *Consequences of Family Member Incarceration: Impacts on Civic Participation and Perceptions of the Legitimacy and Fairness of Government*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 44, 46 (2014).

88. *Id.*; TERRY-ANN CRAIGIE, AMES GRAWERT, CAMERON KIMBLE & JOSEPH E. STIGLITZ, CONVICTION, IMPRISONMENT, AND LOST EARNINGS: HOW INVOLVEMENT WITH THE CRIMINAL JUSTICE SYSTEM DEEPENS INEQUALITY 14–15 (2020).

89. Jaboa Lake, *Preventing and Removing Barriers to Housing Security for People with Criminal Convictions*, CTR. FOR AM. PROGRESS (Apr. 14, 2021), <https://www.americanprogress.org/article/preventing-removing-barriers-housing-security-people-criminal-convictions/> [<https://perma.cc/3TCC-8SD2>].

90. See DAMRON, *supra* note 15.

that once contributed to their incarceration, perpetuating a cycle that often affects multiple generations.⁹¹

These factors together contribute to an ongoing cycle of economic hardship for both incarcerated individuals and their families, making it difficult to break free from poverty's grip and reinforcing the generational impacts of incarceration.

D. *The Limited Financial Benefit to States*

While pay-to-stay statutes are justified as a means to recoup incarceration costs, evidence suggests that the financial return to states is minimal relative to the costs of maintaining prison systems.⁹² Studies indicate that even with rigorous collection efforts, the revenue generated through pay-to-stay fees is only a fraction of the overall expenditure on incarceration.⁹³ Though little data is available as to exactly how much states manage to collect, the data that is available makes it clear that the vast majority of these fees are going uncollected due to the limited financial means of incarcerated individuals and their families.⁹⁴ This negligible recoupment raises serious questions about the efficacy of pay-to-stay statutes as a sustainable funding mechanism for correctional budgets.⁹⁵

The minimal financial gain to states through pay-to-stay statutes stands in stark contrast to the significant harm inflicted on families who must shoulder these debts.⁹⁶ Families often

91. See generally Martin, *supra* note 80 (discussing the plethora of mental and financial hardships children of incarcerated parents may face, including “monetary hardship . . . [less] stable housing, [and] significant increases in depression.”).

92. See April D. Fernandes, Brittany Friedman & Gabriela Kirk, *The “Damaged” State vs. the “Willful” Nonpayer: Pay-to-Stay and the Social Construction of Damage, Harm, and Moral Responsibility in a Rent-Seeking Society*, 8 RUSSELL SAGE FOUND. J. SOC. SCI. 82, 85, 91 (2022).

93. See Lind, *supra* note 75.

94. See *id.* One county in Minnesota had to revamp its pay-to-stay program because the revenue generated did not cover the expenses of administering the program. *Id.*

95. See *id.*

96. See *id.*; see also Eisen, *America’s Dystopian Incarceration System of Pay*, *supra* note 71 (explaining the effects of the pay-to-stay system on inmates and their families). Families of incarcerated individuals often bear significant financial burdens to support their loved ones during imprisonment. *Id.* These expenses include covering the costs of phone calls, which can be exorbitant due to high rates set by prison communication systems. *Id.* Additionally, families

experience severe financial hardship as they cover basic needs, support incarcerated loved ones, and deal with unexpected legal fees.⁹⁷ In cases such as Teresa Beatty's, Connecticut's enforcement of pay-to-stay laws demanded over \$83,000 from her inheritance to cover her son's incarceration costs, stripping away resources she intended to use to support her family.⁹⁸ Similarly, Doug Johnson had hoped to use his inheritance for his daughter's college expenses, only to see it pursued by the state to offset incarceration-related debts.⁹⁹ For these families, the costs of pay-to-stay laws are more than financial; they represent lost opportunities and deepened poverty for future generations.

When weighing the limited revenue against the harm inflicted, it becomes clear that pay-to-stay statutes fall short of their intended goals.¹⁰⁰ Although policymakers argue that these statutes reduce taxpayer burdens and create accountability, the small amount recovered does not adequately offset the systemic costs of incarceration.¹⁰¹ Instead of alleviating the financial

frequently send money for commissary purchases, enabling inmates to buy essential items like hygiene products, food, and clothing, often sold at inflated prices. *Id.* Travel expenses for in-person visits add to the financial strain, especially when prisons are located far from the family's home, necessitating expenditures on transportation, lodging, and meals. *See generally* FAMILIES OUTSIDE, PAYING THE PRICE 1, 5 (2023). Moreover, some correctional facilities charge inmates for medical services, leading families to cover healthcare-related fees to ensure their loved ones receive necessary treatment. Eisen, *America's Dystopian Incarceration System of Pay*, *supra* note 71.

97. *See* Eisen, *America's Dystopian Incarceration System of Pay*, *supra* note 71. Many incarcerated individuals must pay for basic needs and services, such as communicating with loved ones, or accessing educational resources while working for minimal wages—often less than a dollar an hour—only to have a portion of their earnings deducted to cover the cost of their incarceration. *Id.* This is not a scene from a dystopian science fiction story, but the harsh reality faced by those behind bars and the millions of family members who are left to shoulder these financial burdens.

98. *Beatty v. Gilman*, 718 F. Supp. 3d 166, 176–77 (D. Conn. 2024); *see Stamford Woman May Sue State Over Prison Debt Law*, *supra* note 10.

99. *Beatty*, 718 F. Supp. 3d at 176–77; *see Stamford Woman May Sue State Over Prison Debt Law*, *supra* note 10.

100. Lind, *supra* note 75.

101. *Id.*; *see also* Eisen, *America's Dystopian Incarceration System of Pay*, *supra* note 71 (“[A]sking those caught up in our criminal legal system to support government agencies is an inefficient way for the government to raise revenue.”). Due to widespread inability to pay, billions in fines and fees remain unpaid each year. *See id.* In 2021, the Fines and Fees Justice Center reported national court debt reaching \$27.6 billion. *Id.* Additionally, a Brennan Center report from 2019 showed that, between 2012 and 2018, Florida, New Mexico, and Texas together

strain on the state, pay-to-stay statutes contribute to a cycle of poverty that ultimately places greater demand on social services, perpetuating rather than solving financial dependency.¹⁰² The experiences of individuals like Teresa and Doug highlight how these statutes fail to serve their intended purpose while imposing disproportionate harm on vulnerable families.

Together, the rationale and structure of pay-to-stay statutes reveal a system intended to shift incarceration costs from taxpayers to incarcerated individuals.¹⁰³ Yet, as explored, the financial burden of these laws reaches beyond prison walls, often forcing families already facing economic hardship to shoulder new, significant costs.¹⁰⁴ For families dependent on an incarcerated person's support, the cumulative impact of pay-to-stay fees, court costs, and additional expenses can be devastating. In many cases, families must make difficult choices between essential needs like housing, food, and education and the high costs required to maintain even basic contact with their loved ones in prison.¹⁰⁵ With minimal benefit to state budgets, these statutes instead exacerbate cycles of poverty, stripping away resources needed for family stability and compounding economic hardships across generations.

II. THE STRUGGLE FOR DONATIVE FREEDOM AGAINST PAY-TO-STAY LAWS

In this context, the notion of donative freedom, or the right to transfer property and financial support to one's heirs, becomes a critical lifeline for families. For families weighed down by both systemic economic challenges and the unique financial burdens tied to incarceration, inheritance offers hope—a chance

accumulated nearly \$1.9 billion in uncollected court debt. *Id.* This debt consists of countless small amounts owed by people who may never be financially able to settle them. *Id.*

102. Lind, *supra* note 75.

103. See Eisen, *America's Dystopian Incarceration System of Pay*, *supra* note 71 (discussing how state legislatures take advantage of prisoners, who have “no choice but to foot the bill for the government's own increasing costs of jail and prison administration[.]”).

104. See *supra* Section I.C.

105. See *supra* notes 89–90 and accompanying text.

to break free from the cycle of poverty or at least receive some relief from the financial strain they face. However, pay-to-stay statutes, with their broad power to seize funds, directly undermine this principle.¹⁰⁶ As states pursue the funds from even modest inheritances to cover incarceration costs, families lose essential financial opportunities intended for their support. The following section will examine this conflict, exploring how pay-to-stay laws infringe upon the fundamental right of donative freedom, ultimately keeping vulnerable families in a state of financial instability.

An inheritance intended for an incarcerated individual can provide crucial financial support in multiple ways. If an incarcerated person receives an inheritance, it can be used to cover their own costs, such as commissary expenses, medical fees, or other necessities, which would otherwise fall to their family members to support.¹⁰⁷ This financial relief can lessen the burden on loved ones who are already struggling to make ends meet while providing for their incarcerated relative.¹⁰⁸ Additionally, since many incarcerated individuals have limited means of earning income,¹⁰⁹ inheriting assets can allow them to contribute directly to their dependents, offering financial stability and helping cover essential needs like rent, education, or daily living expenses. Furthermore, if an incarcerated person wishes to leave an inheritance to their family after passing, this transfer can serve as a vital lifeline to cover the needs of their surviving family members. Whether the inheritance is intended to ease the financial load on the family by covering the

106. See *Beatty v. Gilman*, 718 F. Supp. 3d 166, 176–77 (D. Conn. 2024); *Stamford Woman May Sue State Over Prison Debt Law*, *supra* note 10 (describing inheritances being seized under pay-for-stay schemes instead of for their intended purposes).

107. See *Stamford Woman May Sue State Over Prison Debt Law*, *supra* note 10.

108. Signe-Mary McKernan, Caroline Ratcliffe, Margaret Simms & Sis Zhang, *Do Financial Support and Inheritance Contribute to the Racial Wealth Gap?*, URB. INST. 1 (2012), <https://www.urban.org/sites/default/files/alfresco/publication-pdfs/412644-Do-Financial-Support-and-Inheritance-Contribute-to-the-Racial-Wealth-Gap-.PDF> [<https://perma.cc/PS9W-PXGU>].

109. 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.prison-policy.org/blog/2022/02/08/employment/> [<https://perma.cc/3UH6-QVS6>].

incarcerated person's costs, to provide income during incarceration, or to support dependents after the person's death, the loss of this resource undermines the concept of donative freedom in the American estate transfer system.

A. *Donative Freedom as a Critical Foundation of Estate Transfer Law*

Donative freedom, the right of individuals to decide how their assets are distributed after death, is a foundational principle of the American estate transfer system.¹¹⁰ This concept emphasizes individual autonomy, granting property owners the ability to shape their legacy and provide for their heirs in a manner that reflects their personal values and priorities.¹¹¹ It is grounded in the belief that individuals who have worked to accumulate wealth should have the ultimate authority to determine its use and distribution, underscoring a respect for personal liberty and the fruits of one's labor.¹¹² The idea is that wealth earned through hard work and careful planning should remain under the control of the owner, even beyond their lifetime, to benefit loved ones, charitable causes, or other chosen beneficiaries.¹¹³

Historically, this principle has been deeply woven into American law, with roots in Enlightenment thought. Philosophers like John Locke argued that property rights are a natural extension of human freedom and self-determination, emphasizing that individuals have an inherent right to control and

110. Sitkoff, *supra* note 2, at 643 (explaining that the American law of succession, both probate and nonprobate, is organized around the principle of freedom of disposition).

111. See John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 491 (1975) (describing donative freedom as the fundamental principle of succession law).

112. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmts. a, c (AM. L. INST. 2003) (asserting that American law does not empower courts to broadly assess the wisdom, fairness, or logic behind a donor's decisions on how to distribute their property).

113. See *id.*; Sitkoff, *supra* note 2, at 643.

dispose of their property.¹¹⁴ These ideas heavily influenced the development of legal doctrines in the United States, which prioritize the individual's right to direct the transfer of their wealth.¹¹⁵ Over time, donative freedom has become a cornerstone of estate planning, protected through mechanisms such as wills, trusts, and the probate process.¹¹⁶ These legal structures aim to uphold the intent of the decedent and ensure that their wishes are respected, reinforcing the broader societal commitment to individual autonomy and the importance of legacy in family and community life.¹¹⁷

The importance of donative freedom extends beyond individual autonomy; it serves as a stabilizing force for families and contributes to economic continuity.¹¹⁸ Inheritances often act as a lifeline, providing critical financial support during difficult times.¹¹⁹ They help dependents, such as children and spouses, pay off debt, secure housing, fund education, and build generational wealth.¹²⁰ For many families, an inheritance represents one of the few opportunities to break cycles of poverty and establish a more secure future.¹²¹ Even modest inherited wealth can have a profound impact, enabling families to cover essential

114. See LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* 43 (Dedi Felman ed., 2002) (explaining Locke's theory as encompassing the essential right to freely use our individual talents and efforts, to collaborate voluntarily with others for shared advantage, and to freely distribute what we have rightfully earned); see also Susanna L. Blumenthal, *The Deviance of the Will: Policing the Bounds of Testamentary Freedom in Nineteenth-Century America*, 119 HARV. L. REV. 959, 968 (2006) (describing Blackstone's "grounding of testamentary rights" as deriving from natural law philosophers such as John Locke and Hugo Grotius, among others).

115. See MURPHY & NAGEL, *supra* note 114, at 43.

116. See Sitkoff, *supra* note 2, at 643.

117. See *id.* at 643–44.

118. See Stephen Duane Davis II & Alfred L. Brophy, *The Most Solemn Act of My Life: Family, Property, Will, and Trust in the Antebellum South*, 62 ALA. L. REV. 757, 767 (2011) ("[Representative Daniel] Webster saw in the United States' equitable division of property the keys to our country's stability and progress.").

119. McKernan et al., *supra* note 108.

120. See *id.*; *Five Steps to Building Generational Wealth*, DEP'T FIN. PROT. & INNOVATION, <https://dfpi.ca.gov/news/insights/five-steps-to-building-generational-wealth/> [<https://perma.cc/86WK-8HXN>] (July 29, 2024, 5:22 PM).

121. See McKernan et al., *supra* note 108, at 2; Deitch, *supra* note 8, at 858 ("[T]he likely outcome of [pay-to-stay statutes] is to keep the person in a cycle of poverty.").

expenses, invest in higher education, or achieve homeownership—a key driver of economic stability and wealth accumulation.¹²² Homeownership, in particular, remains a cornerstone of economic security, and inherited wealth can provide the necessary financial foundation to make this possible.¹²³

Without the support of inherited assets, families often continue renting, missing out on opportunities to build equity and long-term financial stability.¹²⁴ Additionally, the inability to use an inheritance for educational purposes deprives children of a reliable path to upward mobility, as access to higher education is strongly linked to increased earning potential and better job opportunities.¹²⁵ In this way, inherited wealth fosters upward economic mobility and provides families with a chance to secure a stable financial future, making it an essential component of breaking generational cycles of economic disadvantage.¹²⁶

The principle of donative freedom is deeply intertwined with the concept of intergenerational wealth transfer, which has long been a crucial mechanism for economic stability and upward mobility in the United States.¹²⁷ Testamentary freedom, which grants individuals the right to determine how their property is distributed after death, ensures that wealth can be passed

122. *Five Steps to Building Generational Wealth*, *supra* note 120; *see, e.g.*, Deitch, *supra* note 8, at 858; McClure, *supra* note 29, at 225; McKernan et al., *supra* note 108 (each generally describing how the perpetual poverty cycle is exacerbated by removing poor families' access to their transferable wealth).

123. *See* Caitlin Young, Michael Neal & Janneke Ratcliffe, *A Landscape Scan of Homeownership for Households of Color*, URB. INST. 1–2 (2022), <https://livingcities.org/wp-content/uploads/2024/03/A-Landscape-Scan-of-Homeownership-for-Households-of-Color.pdf>.

124. *See id.*

125. Sofoklis Goulas, *Twelve Facts About the Economics of Education*, BROOKINGS, at 2–3, 8–9 (June 2024), https://www.hamiltonproject.org/wp-content/uploads/2034/06/20240627_THP_EducationFacts_PDF.pdf.

126. *See id.* (demonstrating the value of access to higher education for earning capacity).

127. *See* Sitkoff, *supra* note 2; Laura Feiveson & John Sabelhaus, *How Does Intergenerational Wealth Transmission Affect Wealth Concentration?*, BD. OF GOVERNORS OF FED. RESRV. SYS., <https://www.federalreserve.gov/econres/notes/feds-notes/how-does-intergenerational-wealth-transmission-affect-wealth-concentration-20180601.html> [<https://perma.cc/7KF6-DGF4>] (June 1, 2018).

from one generation to the next.¹²⁸ This transfer of assets provides essential financial support for family members, offering opportunities to secure housing, fund education, or start businesses that can uplift entire families.¹²⁹ The ability to shape one's legacy in this way reflects a core societal value, emphasizing both individual rights and the broader social benefits of wealth continuity within families.¹³⁰

Inherited assets are especially significant for historically marginalized communities, such as Black and Hispanic families, who face persistent barriers to wealth accumulation.¹³¹ The racial wealth gap in the United States is stark and well-documented, with these communities owning significantly less wealth compared to their white counterparts.¹³² Intergenerational transfers of wealth are one of the few means available to help bridge this gap and create opportunities for economic advancement.¹³³ By allowing families to invest in education, achieve homeownership, or relieve financial burdens, inherited wealth can have a transformative impact, offering a path to long-term financial security and stability.¹³⁴

At its core, donative freedom embodies a societal commitment to respecting the wishes of property owners while

128. See *id.* (explaining that the American law of succession, both probate and nonprobate, is organized around the principle of freedom of disposition).

129. McKernan et al., *supra* note 108.

130. See Adam J. Hirsch & William K.S. Wang, *Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 43–44, 52–54 (1992).

131. See Edward N. Wolff, *Household Wealth Trends in the U.S., 1962 to 2016: Has Middle Class Wealth Recovered?* 24–26 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24085, 2017), https://www.nber.org/system/files/working_papers/w24085/w24085.pdf.

132. See *id.*; Liz Mineo, *Racial Wealth Gap May Be a Key to Other Inequities*, HARV. GAZETTE (June 3, 2021), <https://news.harvard.edu/gazette/story/2021/06/racial-wealth-gap-may-be-a-key-to-other-inequities/> [<https://perma.cc/5HDL-R7ZU>]; THOMAS SHAPIRO, TATJANA MESCHÉDE & SAM OSORO, INST. ON ASSETS & SOC. POL'Y, THE ROOTS OF THE WIDENING RACIAL WEALTH GAP: EXPLAINING THE BLACK-WHITE ECONOMIC DIVIDE 1 (2013).

133. See Wolff, *supra* note 131, at 22.

134. See McKernan et al., *supra* note 108, at 2. The large transfers of wealth emblematic of inheritances generally go towards home payments or education, which means they disproportionately generate future wealth as well as instant wealth at the time of inheritance. *Id.* The large transfers coming off the Baby-Boomer generation stand to further exacerbate the problem if unaddressed. *Id.*

acknowledging the profound impact that inheritance can have on families and communities.¹³⁵ It balances the rights of the individual with the collective good, as the distribution of wealth across generations fosters economic mobility and stability.¹³⁶ However, this principle also brings into focus issues of equity and access, as wealthier individuals are better positioned to employ estate planning tools that safeguard their assets.¹³⁷ Despite these complexities, donative freedom remains a defining feature of the American estate transfer system, reinforcing the idea that individuals should have control over their legacy and the economic future of their loved ones.¹³⁸

B. Pay-To-Stay Statutes Undermine Donative Freedom

Against that backdrop, pay-to-stay statutes significantly threaten the foundational policy of donative freedom within the American estate transfer system.¹³⁹ By permitting states to seize assets, including inheritances, to recoup the costs of incarceration, these laws disrupt the long-standing legal tradition that allows individuals to determine how their property should be distributed after death.¹⁴⁰ The core purpose of the estate transfer system is to honor the wishes of the deceased and ensure that their assets are used to benefit their chosen heirs.¹⁴¹ However, pay-to-stay statutes subvert this purpose, prioritizing state interests over the intentions of the property owner and compromising the autonomy that is supposed to be protected by succession law.¹⁴²

135. See Danaya C. Wright, *The Demographics of Intergenerational Transmission of Wealth: An Empirical Study of Testacy and Intestacy on Family Property*, 88 UMKC L. REV. 665, 666–68 (2020).

136. See Sitkoff, *supra* note 2, at 644.

137. See Wright, *supra* note 135, at 709.

138. See JACQUELINE L. ANGEL, INHERITANCE IN CONTEMPORARY AMERICA: THE SOCIAL DIMENSIONS OF GIVING ACROSS GENERATIONS 77 (2008) (claiming “[i]t isn’t just money” and that “our emotional ties are intimately linked to material exchanges”).

139. See Deitch, *supra* note 8, at 862–63.

140. See *id.* at 865–66.

141. See *supra* notes 104–07 and accompanying text.

142. See Deitch, *supra* note 8, at 862–64.

The estate transfer system is designed to provide certainty and stability for families, enabling wealth to be passed down in a way that reflects the values and priorities of the deceased.¹⁴³ When pay-to-stay statutes are enforced, this stability is shattered.¹⁴⁴ The disruption of estate plans undermines the reliability of the estate transfer system, creating an environment where the decedent's carefully considered decisions can be overridden by the state.¹⁴⁵ This not only compromises the principle of donative freedom but also erodes trust in the legal mechanisms designed to uphold it.¹⁴⁶

Moreover, the existence of pay-to-stay statutes introduces an element of unpredictability into estate planning.¹⁴⁷ Property owners who wished to provide for their families after death may have their efforts rendered futile if the state steps in to claim the assets.¹⁴⁸ This undermines the broader policy goals of the estate transfer system, which aim to facilitate the orderly and intentional transfer of wealth.¹⁴⁹ The ability of the state to redirect inheritances away from the decedent's intended beneficiaries fundamentally alters the landscape of estate planning, making it difficult for individuals to feel confident that their wishes will be respected.¹⁵⁰ In doing so, pay-to-stay statutes weaken the very foundation of donative freedom and challenge the integrity of the estate transfer system.¹⁵¹

Even in the context of intestate succession, where an individual dies without a will, and the estate is distributed according to state law, pay-to-stay statutes still undermine the policy of donative freedom. Intestate succession laws are designed to

143. *See id.*

144. *Compare id.* (describing the cultural importance of passing down wealth in a family), with *Additional Connecticut Residents Join Lawsuit Over Prison Debt Law*, *supra* note 25 (describing how pay-to-stay claims took a former prisoner's college fund for his daughter).

145. *See* Deitch, *supra* note 8, at 862–64.

146. *See id.* at 867.

147. *See id.*

148. *See id.*

149. *See id.*

150. *See id.* at 862–64.

151. *See id.*; *supra* Section I.A.

approximate what most people would want to happen to their assets if they were to pass away unexpectedly.¹⁵² The distribution hierarchy typically prioritizes close family members, such as spouses, children, and parents, reflecting societal values that emphasize the importance of family and the transfer of wealth to immediate kin.¹⁵³ By intervening and redirecting these assets to cover incarceration costs, pay-to-stay statutes interfere with the default intentions embedded in intestate succession laws.¹⁵⁴

The principle behind intestate succession is to provide a predictable and fair means of asset distribution that aligns with widely held social norms. When states use pay-to-stay statutes to seize assets from an intestate estate, they disrupt this carefully crafted framework, undermining the system's goal of ensuring financial stability for surviving family members and maintaining economic security for the decedent's heirs.¹⁵⁵ Even though the decedent did not formally express their wishes through a will, the intestate succession process still reflects a presumed intent to support and provide for loved ones.¹⁵⁶ Thus, pay-to-stay statutes violate the policy of donative freedom and the underlying principles of the estate transfer system, whether an estate is distributed through a will or by the rules of intestate succession.

Moreover, wealthy families with the knowledge and financial resources to engage in sophisticated estate planning can effectively shield their assets from pay-to-stay laws through various legal mechanisms. One of the most powerful tools at their disposal is the spendthrift trust, which protects a beneficiary's inheritance from being seized by creditors, including the state.¹⁵⁷ Spendthrift trusts are structured to limit the

152. See Holob, *supra* note 5, at 1498–99; see, e.g., UNIF. PROB. CODE § 2-101 (amended 2019).

153. See Holob, *supra* note 5, at 1498–99.

154. See Deitch, *supra* note 8, at 862; *supra* Section I.A.

155. See Holob, *supra* note 5, at 1500–01.

156. See *id.* at 1502.

157. Robert H. Sitkoff, *Freedom of Disposition in American Succession Law* 13 (Harv. L. Sch. John M. Olin Ctr., Discussion Paper No. 960, 2018) (explaining that a spendthrift trust prevents

beneficiary's direct access to the assets, thereby preventing creditors from claiming those funds to satisfy debts.¹⁵⁸ By placing their wealth in a spendthrift trust, affluent families can ensure that inherited assets remain insulated from claims, even if the intended recipient has criminal justice debts.¹⁵⁹ This allows families to safeguard generational wealth and maintain financial stability despite any financial liabilities that might otherwise threaten to diminish their legacy.¹⁶⁰

Beyond spendthrift trusts, wealthy individuals can use a range of other estate planning strategies to avoid the impact of pay-to-stay laws.¹⁶¹ These methods may include irrevocable trusts, family limited partnerships, or charitable foundations, all of which can be used to manage and protect assets while still providing for loved ones.¹⁶² Irrevocable trusts, for example, transfer ownership of assets out of the estate, making them inaccessible to creditors.¹⁶³ Family limited partnerships allow families to consolidate and control their wealth in a way that

a beneficiary from transferring their interest, and creditors are unable to claim it, even if the beneficiary is entitled to receive a mandatory distribution).

158. *Id.*

159. *Id.*; see Deitch, *supra* note 8, at 864.

160. Deitch, *supra* note 8, at 864.

161. See *supra* notes 155–59 and accompanying text; see also Ty Livingston, *Mastering Estate Planning: Key Strategies for Wealthy Individuals*, BLUENOTARY (Sept. 17, 2024) <https://bluenotary.us/estate-planning-for-wealthy-individuals/> [<https://perma.cc/3RBR-NDK2>] (discussing estate planning strategies for wealthy individuals that can “help maximize wealth preservation”).

162. Livingston, *supra* note 161.

163. See ANGELA VALLARIO, *THE FUNDAMENTALS OF ESTATE PLANNING (MARYLAND)* 233–36 (3d ed. 2024); see also Julia Kagan, *Irrevocable Trusts Explained: How They Work, Types, and Uses*, INVESTOPEDIA, <https://www.investopedia.com/terms/i/irrevocabletrust.asp> [<https://perma.cc/AXC5-CHP3>] (Mar. 4, 2025) An irrevocable inter vivos trust is a type of trust created during the settlor's lifetime that cannot be modified, amended, or revoked after its creation. *Id.* It is commonly used as an estate-freezing tool for transferring assets when the settlor prefers not to make an outright transfer. *Id.* The establishment of an irrevocable inter vivos trust is considered a taxable event for gift tax purposes, and the carryover basis rules apply to the transferred assets. See *id.* These trusts are often used for purposes such as holding life insurance policies, making charitable donations, reducing the taxable estate, or qualifying for Medicaid by spending down assets. See *id.*

minimizes exposure to external claims.¹⁶⁴ Charitable foundations, on the other hand, can be used to fulfill philanthropic goals while offering tax and asset protection benefits.¹⁶⁵ These advanced strategies require the expertise of estate planning attorneys and significant financial investment, making them available primarily to those with substantial resources.¹⁶⁶ As a result, wealthy families can strategically bypass the financial consequences of pay-to-stay laws, preserving their assets for future generations, while families without such resources remain vulnerable to state claims and economic hardship.¹⁶⁷

Families with incarcerated members often belong to the most vulnerable and economically disadvantaged segments of society.¹⁶⁸ These families are more likely to face financial

164. See *What Is a Family Limited Partnership?*, ASSET PROT. PLANNERS, <https://www.assetprotectionplanners.com/services/family-limited-partnership/definition/> [https://perma.cc/E93U-8U87] (last visited Apr. 3, 2025). A Family Limited Partnership (“FLP”) is a legal entity created to hold and manage family-owned assets such as real estate, investments, or businesses. *Id.* It consists of general partners, who control and manage the partnership, and limited partners, who have an ownership interest but limited control and liability. *Id.* FLPs are commonly used for estate planning, asset protection, and facilitating the transfer of wealth to the next generation while maintaining control over the assets. See *id.* FLPs offer several advantages, such as minimizing estate taxes, shielding assets from creditors, and simplifying family wealth distribution. *Id.* General partners can gift limited partnership interests to family members, potentially reducing the taxable value of their estate. *Id.* However, general partners retain the authority to make significant management decisions, ensuring that the assets remain under centralized control despite being shared within the family. *Id.*

165. See *How to Start a Charitable Foundation*, EST. PLANNING, <https://www.estateplanning.com/setting-up-a-charitable-foundation> [https://perma.cc/SJ2P-ZQRM] (Aug. 18, 2023). Creating a charitable foundation offers significant estate planning benefits by enabling individuals to leave a lasting philanthropic legacy while achieving strategic financial advantages. *Id.* By establishing a foundation, donors can reduce their taxable estate and potentially lower income tax liability through charitable deductions. *Id.* Foundations also provide flexibility in controlling how and when funds are distributed, ensuring that donations align with the donor’s long-term charitable goals. *Id.* Additionally, contributions to a foundation can grow tax-free, maximizing the impact of the charitable assets. *Id.* This structure allows families to instill philanthropic values across generations while preserving wealth in a way that benefits both the community and the estate. *Id.*

166. See Weisbord, *supra* note 3, at 878, 899, 909–10.

167. *Id.* at 909–10.

168. See Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, DAEDALUS, Summer 2010, at 8, 8–11; see also Martin, *supra* note 80, at 1. Estimates suggest that 1.7 to 2.7 million children in the U.S. have experienced parental incarceration, putting 11% of all children at risk. *Id.* at 2. While parenthood rates among incarcerated individuals mirror those in the general

instability, lower levels of education, and limited access to legal resources.¹⁶⁹ For many of these families, the idea of engaging in sophisticated estate planning is out of reach.¹⁷⁰ They are unlikely to have the financial resources to consult with estate planning attorneys or establish protective structures like spendthrift trusts.¹⁷¹ Instead, their assets—often meager but essential—are left unprotected and susceptible to seizure under pay-to-stay laws.¹⁷²

The disparity between wealthy families who can shield their assets and those who cannot highlights a systemic inequality embedded in the ability of pay-to-stay laws to claim inheritance funds as a method of recouping the costs of incarceration. Pay-to-stay laws create a dual reality. For the affluent, the principle of donative freedom is preserved, allowing them to control and protect their assets through strategic planning.¹⁷³ For lower-income families, however, this principle is effectively cast aside.¹⁷⁴ The policy of donative freedom, which is supposed to protect the wishes of the deceased and support family stability, becomes a privilege reserved for those with the means to defend

population, the burden is not evenly distributed. *Id.* African American children are 7.5 times more likely, and Hispanic children are 2.3 times more likely than white children to have an incarcerated parent. *Id.* Additionally, African American fathers make up 40% of all incarcerated parents. *Id.* This disparity has worsened over time, with the percentage of African American children with an incarcerated parent nearly doubling from 15% for those born in the 1970s to 28% by the 1990s, underscoring the generational and economic toll on marginalized communities. *Id.*

169. See generally Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L.J. 36 (2009) (using data-driven analysis to suggest that socio-demographic factors can indicate whether a person is likely to die with or without a will and examining the implications of this distinction).

170. See M. Akram Faizer, *Bridging the Divide: A Proposal to Bring Testamentary Freedom to Low-Income and Racial Minority Communities*, 99 TEX. L. REV. 20, 22–23 (2020) (advocating for a two-part strategy to reduce disparities in wealth transfer, including modernizing state laws to permit electronic wills and introducing a holistic test to determine the testator's probable intent rather than default intestate rules).

171. See Allison Anna Tait, *The Law of High-Wealth Exceptionalism*, 71 ALA. L. REV. 981, 984–85 (2020) (exploring how high-wealth families are better able to protect their assets by creating their own self-governing protections like private trusts).

172. See Faizer, *supra* note 170, at 21, 40; *supra* Section I.A.

173. See Weisbord, *supra* note 3, at 878.

174. See *id.*

it.¹⁷⁵ This selective application of donative freedom exacerbates existing social and economic inequalities, reinforcing a system where wealth and privilege afford greater legal protections.¹⁷⁶ The result is a stark contrast in outcomes: wealthy families are able to pass down generational wealth and maintain economic security, while vulnerable families are left to bear the full brunt of state claims, further entrenching economic disparities across generations.¹⁷⁷ Thus, pay-to-stay statutes reveal a profound and troubling disparity in how the principle of donative freedom is upheld in the American estate transfer system.

The inequities highlighted by pay-to-stay statutes necessitate a reconsideration of how we balance state interests with the protection of individual rights and family stability. As the discussion shifts to legislative reforms, it is crucial to explore measures that would prevent the unjust seizure of inheritances, ensuring that all families—regardless of socioeconomic status—can benefit from the generational wealth transfers that are fundamental to economic opportunity and stability. Addressing this issue is essential for creating a more equitable system that respects the autonomy of property owners and provides vulnerable families with the financial security they deserve.

III. LEGISLATIVE REFORM TO PRESERVE INHERITANCE RIGHTS FOR VULNERABLE FAMILIES

In light of the issues highlighted in the previous sections concerning donative freedom and systemic inequality, the legislative reforms proposed here aim to rectify the injustices perpetuated by pay-to-stay statutes. These statutes, which permit states to claim inheritances intended for the financial support of families, subvert the foundational principle of donative freedom by prioritizing state cost recovery over the economic stability of vulnerable families.¹⁷⁸ Legislative action is necessary to

175. *See id.*

176. *See id.*

177. *See id.*

178. *See* Deitch, *supra* note 8, at 866.

restore equity and uphold the American estate transfer system's core values.

The proposed reforms focus on prohibiting states from using pay-to-stay statutes to claim inheritance funds.¹⁷⁹ This legislative change would address the specific harm identified in earlier sections: the perpetuation of economic disadvantage among families with incarcerated members, who are already disproportionately affected by systemic inequities.¹⁸⁰ By removing inheritances from the pool of assets subject to state claims, these reforms would ensure that families can retain vital resources intended to provide stability and opportunities for future generations.¹⁸¹ The significance of this protection cannot be overstated, as inheritance often represents one of the few chances for upward mobility available to families impacted by incarceration.

The next section will outline concrete legislative strategies for achieving these goals, considering possible broad reforms or targeted measures that protect family inheritances. By doing so, these legislative efforts can strike a balance between state fiscal interests and the preservation of donative freedom, ultimately promoting a more just and equitable system for all.

A. *The Case for Legislative Reform to Uphold Donative Freedom and Economic Equity*

Legislative reform has emerged as the most effective path forward for addressing the inequities created by pay-to-stay statutes. States like Illinois and New Hampshire have successfully repealed their pay-to-stay laws through proactive legislative measures rather than relying on court challenges.¹⁸² These legislative efforts have proven to be one of the few approaches that have effectively eliminated or mitigated the harmful

179. See discussion *infra* Section III.A.

180. See Natapoff, *supra* note 74, at 446–47.

181. See Deitch, *supra* note 8, at 868–69; McClure, *supra* note 29, at 239.

182. See Eisen, *America's Dystopian Incarceration System of Pay*, *supra* note 71.

impact of these statutes,¹⁸³ demonstrating that decisive legislative action is necessary to create meaningful change.

Of the states that no longer have active pay-to-stay laws, only Hawaii never had such a law on the books.¹⁸⁴ The remaining states have recognized the detrimental effects of pay-to-stay statutes on families, prompting them to eliminate these laws through legislative reform.¹⁸⁵ Illinois serves as a prime example. Historically, Illinois allowed its Department of Corrections to sue former inmates for costs incurred during their incarceration, particularly targeting financial windfalls like inheritances.¹⁸⁶ The practice placed enormous financial burdens on individuals who had already served their sentences, trapping them in cycles of debt and making it nearly impossible for them to regain financial stability.¹⁸⁷ However, criminal justice advocates successfully pushed for legislative reform, resulting in the repeal of these statutes.¹⁸⁸ The change was driven not by legal

183. See Wachtel, *supra* note 40. In 2019, Illinois repealed its pay-to-stay law, lifting significant financial burdens from formerly incarcerated individuals and their families. *Id.* Before the repeal, people like Melvin Moore, who was sued for \$338,650 in incarceration costs, faced severe hardships, including losing most of his inheritance and becoming homeless. *Id.* The repeal has since helped prevent similar outcomes, supporting smoother reintegration for those reentering society and serving as a model for reform in other states. *Id.*

184. See McClure, *supra* note 29, at 225.

185. See *id.* at 225–26; see also Eisen, *Paying for Your Time*, *supra* note 28, at 320.

186. See Eisen, *America's Dystopian Incarceration System of Pay*, *supra* note 71.

187. 730 ILL. COMP. STAT. 5/3-7-6 (repealed 2020); McClure, *supra* note 29, at 251; see also Peters Ends “Pay to Stay” with New Law, ILL. S. DEMOCRATIC CAUCUS (Aug. 12, 2019, 4:01 AM), <https://www.illinoissenatedemocrats.com/caucus-news/41-senator-robert-peters-news/153-peters-ends-pay-to-stay-with-new-law> [<https://perma.cc/D94R-NT43>].

These folks served their time and were released from prison, so their punishment should be over. There’s no reason to continue punishing them and risk sabotaging their return to society by imposing a financial burden This practice affects people and communities of color at a wildly disproportionate rate It is a regressive, harmful, and predatory action that places additional undue hardships on folks who, at no fault of their own, are already at a disadvantage at birth due to the unjust systemic racial biases that exist. “Pay to stay” has no place in a just society, and I’m proud to have led the charge in the Senate to end it. I commend the governor for taking the necessary actions to abolish it once and for all.

Id. (quoting Illinois State Senator Robert Peters).

188. See Peters Ends “Pay to Stay” with New Law, *supra* note 187; see also Smith, *supra* note 70.

victories in court but by public pressure and recognition of the statutes' long-term detrimental effects on families.¹⁸⁹

Similarly, New Hampshire's legislative efforts to repeal pay-to-stay laws reflect a growing awareness of the economic hardships these statutes impose.¹⁹⁰ Much like Illinois, New Hampshire's reforms were driven by concerns over the financial burden on families of incarcerated individuals.¹⁹¹ As the state moved towards broader criminal justice reform, repealing these statutes became a priority.¹⁹² It was clear that the laws disproportionately impacted marginalized communities, perpetuating cycles of poverty and making reentry into society more difficult for former inmates.¹⁹³ Maine followed suit, recognizing that while pay-to-stay statutes were designed to reimburse the state for the costs of incarceration, they ended up inflicting long-term financial harm on inmates and their families.¹⁹⁴ As part of larger criminal justice reforms, these states realized that the continued enforcement of these laws undermined both economic stability and the reintegration process for formerly incarcerated individuals.

189. See *Wachtel*, *supra* note 40; see also *Smith*, *supra* note 70.

190. See Holly Ramer, *N.H. to End 'Pay to Stay' for Prison Inmates*, SEACOASTONLINE, <https://www.seacoastonline.com/story/news/2019/07/16/nh-to-end-pay-to/4681989007/> [<https://perma.cc/ZEF3-XYEA>] (July 16, 2019, 12:13 PM); see also McClure, *supra* note 29, at 225.

191. See Ramer, *supra* note 190.

Eric Cable, who served four years for negligent homicide, argued he was billed in retaliation for suing the state for alleged medical malpractice. The American Civil Liberties Union of New Hampshire, which had assisted Cable, said both sides have agreed to drop their lawsuits. Henry Klementowicz, the ACLU's attorney, said he was glad to see the so-called pay to stay law "consigned to the dustbin of history where it belongs."

Id.

192. See *Criminal Justice Reform in New Hampshire*, NOLAN CTR. FOR JUST., <https://conservativejusticereform.org/state/new-hampshire/> [<https://perma.cc/KCL2-MRDX>] (last visited Apr. 12, 2025).

193. See *New Hampshire Profile*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/profiles/NH.html> [<https://perma.cc/D8VB-H745>] (last visited Apr. 3, 2025).

194. See ME. STAT. tit. 17-A, § 1751 (repealed 2022).

The experiences of states like Illinois and New Hampshire suggest that legislative action is the most viable path forward.¹⁹⁵ Advocates can work with lawmakers in other states to pursue two potential approaches to reform: (1) the full repeal of pay-to-stay statutes,¹⁹⁶ or (2) targeted reforms that bar the use of inheritances to collect incarceration debts. This Essay focuses on the second approach, emphasizing the importance of protecting inheritances from state claims. By removing the ability to seize inheritances, these targeted reforms would help ensure that families are not deprived of critical financial resources meant to support dependents and foster economic stability. This reform

195. See Wachtel, *supra* note 40. Numerous constitutional challenges to pay-to-stay laws have been raised and have failed in courts around the nation. See *Beatty v. Gilman*, 718 F. Supp. 3d 166, 174 (D. Conn. 2024) (rejecting an Eighth Amendment challenge because the fines were not “grossly disproportional” to the gravity of the offense); see also *Dean v. Lehman*, 18 P.3d 523, 535 (Wash. 2001) (en banc) (determining that Washington’s pay-to-stay statute does not violate the Takings Clause); *Ilkanic v. City of Fort Lauderdale*, 705 So.2d 1371, 1371 (Fla. 1998) (holding that Florida’s pay-to-stay law did not violate Due Process); *Tillman v. Lebanon Cnty. Corr. Facility*, 221 F.3d 410, 417 (3d Cir. 2000). Highlighting multiple constitutional claims, the plaintiff in *Tillman* argued that the facility’s daily incarceration fee of \$10 violated the Eighth Amendment’s Excessive Fines and Cruel and Unusual Punishment Clauses, the Fourteenth Amendment’s Due Process Clause, and the Equal Protection Clause. *Id.* However, the Third Circuit rejected these claims for several reasons. *Id.* The court found that the fees were intended to be rehabilitative rather than punitive, and since they did not deprive *Tillman* of basic necessities or increase his sentence, they did not constitute cruel or unusual punishment. *Id.* at 420–21. The court also ruled that the fee was proportional to the offense, dismissing the excessive fines claim. *Id.* at 420. For the due process argument, the court deemed the prison’s grievance procedure an adequate post-deprivation remedy. *Id.* at 416. Lastly, the court rejected the equal protection claim, finding no intentional discrimination in charging fees inconsistently due to administrative errors and excluding “trusty” inmates who worked for reduced fees. *Id.* at 423–24. The court’s deference to the administrative justifications underscored the uphill battle plaintiffs face in challenging pay-to-stay programs. See *id.* at 421–22.

196. Wachtel, *supra* note 40. The most comprehensive solution to address the financial harm caused by pay-to-stay statutes is their outright repeal. See *id.* Eliminating these laws would prevent states from pursuing incarcerated or formerly incarcerated individuals for debts related to their imprisonment, as demonstrated by successful legislative reforms in states like Illinois. See *id.* Such measures prioritize the economic rehabilitation of former inmates, recognizing that financial stability is crucial for successful reintegration into society. *Id.* Additionally, repeal acknowledges the disproportionate impact these statutes have on marginalized communities, where the financial burden of incarceration often falls on families already struggling economically. *Id.* While the broader issues surrounding pay-to-stay statutes are significant, this Essay specifically focuses on legislative measures aimed at protecting inheritances from state claims, as inheritance plays a vital role in supporting family stability and breaking cycles of poverty. See *infra* Section III.A.

would also restore donative freedom to families with incarcerated relatives.

1. *Targeted Legislative Reforms*

Because many states may not be ready to fully repeal pay-to-stay statutes, targeted legislative reforms offer a more realistic and effective means of mitigating the harm these laws cause. One crucial area for reform is preventing the state from using inheritances to collect debts related to incarceration. In states that continue to enforce pay-to-stay statutes, the practice of seizing inheritances has been particularly damaging.¹⁹⁷ It undermines the financial stability of families and violates the principle of donative freedom, a cornerstone of American inheritance law.¹⁹⁸ Legislative reforms that bar the seizure of inheritances to pay incarceration debts would do more than simply shield inheritances—they would protect the very financial future of families affected by the incarceration of a loved one. As discussed, inheritance often represents one of the few opportunities for financial stability, especially for dependents like children and spouses, who may rely on these assets to secure housing, pay for education, or alleviate outstanding

197. See McKernan et al., *supra* note 108. For more examples, see *Beatty v. Gilman*, 718 F. Supp. 3d 166, 174 (D. Conn. 2024). On the first filing, three plaintiffs—Teresa Beatty, Karl Weissinger, and Michael Llorens—faced severe financial consequences after the state of Connecticut seized their inheritances to recoup incarceration costs. *Id.* at 174–75. Teresa Beatty, already living in a multigenerational household that included her disabled brother, feared losing her family home. Complaint at 3–5, *Beatty v. Gillman*, 718 F. Supp. 3d 166 (D. Conn. 2024) (No. 22 Civ. 380). In the amended *Beatty v. Gilman* complaint, Natasha Tosado and Doug Johnson joined the lawsuit after Connecticut sought to seize their inheritances to cover incarceration costs. *Beatty*, 718 F. Supp. 3d at 175. Tosado, who served nearly two years in prison, faced a \$44,028.98 claim against a settlement from her late son’s estate, following his death in a police incident. *Id.* at 176. Doug Johnson, incarcerated from 2002 to 2004, faced a \$74,652.58 lien against his inheritance after his father’s passing, which threatened to deplete his \$10,000 share entirely. *Id.* All the plaintiffs endured severe financial setbacks, as the state’s actions undermined their inheritances, intensifying their post-incarceration economic hardships. *Id.* at 183.

198. Eva E. Subotnik, *Copyright and the Living Dead?: Succession Law and the 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 Testamentary Freedom*, 62 SMU L. REV. 1783, 1783 (2009) (discussing that the aspirations of testamentary freedom have historically and presently failed to serve interracial and nontraditional families).

debts.¹⁹⁹ When states seize these assets, the effect is to extend the punishment of incarceration beyond the individual who served time to their family members, effectively putting them “behind bars” financially.²⁰⁰

Implementing legislative reforms that specifically bar the seizure of inheritances offers a crucial and balanced solution to the inequities perpetuated by pay-to-stay statutes. This approach respects the sanctity of testamentary intent—the fundamental right of individuals to decide how their assets will be distributed after death—without requiring the politically challenging step of fully repealing pay-to-stay laws. A proposed statutory provision could read something to the effect of:

No state agency or department shall place a lien, claim, or encumbrance on any inheritance received by a beneficiary for the purpose of recovering incarceration-related costs. Inheritance assets shall be exempt from collection efforts related to incarceration fees. This exemption shall apply regardless of the beneficiary’s financial status or prior obligations to the state.

This language preserves the integrity of the decedent’s wishes while protecting vulnerable families from undue financial hardship.²⁰¹ Adding such precise language prohibiting the state from collecting incarceration debts from inherited assets will uphold a long-standing legal principle while simultaneously addressing fiscal inefficiencies. By explicitly safeguarding inheritances from state claims, this legislative change would

199. Faizer, *supra* note 170, at 43.

200. See Eisen, *Paying for Your Time*, *supra* note 28.

201. This proposed provision is just one example, as most states would need to tailor the language to fit within their existing statutory framework. Generally, the intent is to remove inheritances from the list of collectible assets under pay-to-stay laws. However, challenges may arise when inheritance funds are mingled with other non-exempt assets, creating complexities in enforcement and application—issues that fall beyond the scope of this Essay. See Scott A. Chernich, *When an Inheritance Gets Entangled in a Bankruptcy Proceeding*, *Smart Estate Planning Can Help*, FOSTER SWIFT (Oct. 31, 2018), <https://www.fosterswift.com/communications-using-estate-planning-bankruptcy-proceeding.html> [<https://perma.cc/3N58-J5VN>].

reinforce the foundational principle of donative freedom, ensuring that wealth transfer is not a privilege reserved only for the affluent.²⁰² Instead, it provides all families, regardless of socioeconomic status, with the opportunity to benefit from intergenerational wealth. This protection can be transformative, as inheritances often represent one of the few opportunities for lower-income families to break cycles of poverty.²⁰³

2. *Mitigating Provisions*

For states that are unwilling to include language specifically banning the collection of inheritances outright, a viable alternative is to incorporate mitigating provisions into pay-to-stay statutes.²⁰⁴ These provisions would allow the state discretion to refrain from collecting an inheritance when doing so would create undue financial hardship, particularly when a surviving spouse or dependents rely on the inheritance for their economic stability. While the preferred legislative reform remains a complete ban on inheritance collections, incorporating mitigating factors provides a more politically feasible approach that still offers significant protections for vulnerable families.

Some existing statutes already contain mitigating language that can serve as models for these types of reforms. For instance, South Dakota law holds that each inmate under the jurisdiction of the Department of Corrections is liable for the cost of their confinement, covering expenses such as room and board, medical services, and vocational training.²⁰⁵ However, the Secretary of Corrections has the authority to waive all or part of these payments after evaluating factors like the inmate's net income, net worth, number of dependents, and existing financial obligations.²⁰⁶ This provision demonstrates how a state can consider

202. See Deitch, *supra* note 8, at 866–67.

203. See Natapoff, *supra* note 74, at 446–47.

204. See *e.g.*, S.D. CODIFIED LAWS § 24-2-28 (2025).

205. *Id.*

206. *Id.*

the financial impact on dependents and adjust collection efforts to prevent undue hardship.²⁰⁷

Adopting similar mitigating language in other states could create a more compassionate and equitable framework. These provisions would require state agencies to assess whether an inheritance is crucial for a family's financial well-being, particularly for surviving spouses and dependents.²⁰⁸ By doing so, the law would ensure that inheritances intended to secure housing, pay off debts, or fund education are not taken away, thereby preventing families from falling deeper into financial instability. This approach recognizes the critical role that inheritances play in fostering economic self-sufficiency and breaking cycles of poverty.

Incorporating mitigating factors offers a pragmatic solution for states unwilling to fully repeal their pay-to-stay statutes. These reforms ensure that wealth transfer remains a meaningful and accessible means of supporting families affected by incarceration. They also uphold the principle of donative freedom, making it clear that protecting the economic future of vulnerable families should be a priority, even when balanced against the state's interest in recovering costs.

Moreover, both proposed legislative reforms—barring the seizure of inheritances and incorporating mitigating provisions—are not only about fairness but also fiscal responsibility. The cost of enforcing pay-to-stay collections can often outweigh the revenue generated, making the practice economically inefficient.²⁰⁹ By allowing families to retain their inheritances,

207. *See id.*

208. States could develop a framework to assess whether an inheritance is essential to a family's financial stability, particularly for surviving spouses and dependents. For guidance, they could look to South Dakota's approach, which evaluates family financial needs by considering factors such as the number of legal dependents and household income relative to the federal poverty line. *See id.* This process could be tied to existing mechanisms used for determining eligibility for government benefits, ensuring a consistent and equitable method for identifying when an inheritance serves as a crucial lifeline rather than discretionary income.

209. *See Pay-to-Stay Jail Fees Just Don't Add Up*, ACLU OHIO (June 26, 2013), <https://www.acluohio.org/en/press-releases/pay-stay-jail-fees-just-dont-add>

whether through outright protection or mitigating measures that account for financial hardship, states can reduce the need for public assistance programs and ultimately alleviate financial pressure on social services.²¹⁰ These reforms offer a sustainable and compassionate approach that benefits both families and the state, ensuring that vulnerable populations are not punished further by losing critical financial support meant to provide stability and opportunity.

By addressing these statutes through targeted legislative reform, states can better protect the financial security of families and promote more equitable outcomes for those affected by incarceration. Specifically, adding language that either bars the seizure of inheritances for debt recovery or introduces mitigating factors to safeguard families facing economic hardship demonstrates a commitment to prioritizing the long-term well-being of families over short-term fiscal gains. These reforms uphold the principle of donative freedom, ensuring that vulnerable populations have the opportunity to achieve financial stability and break the cycle of poverty. This approach emphasizes that the state values family stability and economic self-sufficiency, providing a more compassionate and sustainable path forward.

[<https://perma.cc/WX6M-3MR5>]; see also Fernandes et al., *supra* note 16, at 91 (explaining the financial burden of bringing civil suits against incarcerated individuals who avoid paying their expenses).

210. See Deitch, *supra* note 8, at 848–49; see also Lisa Adkins & Martijn Konings, *Inheritance, Not Work, Has Become the Main Route to Middle-Class Home Ownership*, THE GUARDIAN (Nov. 9, 2020, 3:00 PM), <https://www.theguardian.com/commentisfree/2020/nov/09/inheritance-work-middle-class-home-ownership-cost-of-housing-wages> [<https://perma.cc/4L8U-L4A3>]. An inheritance can provide a significant financial boost, enabling individuals to purchase a home, fund an education, or cover essential expenses that foster long-term stability. This influx of money can serve as a stepping stone into the middle class, reducing economic vulnerability. See *id.* As individuals move into higher income brackets, their reliance on government support often decreases, contributing to greater financial independence and upward mobility. David Cooper, *Balancing Paychecks and Public Assistance*, ECON. POL'Y INST. (Feb. 3, 2016), <https://www.epi.org/publication/wages-and-transfers/> [<https://perma.cc/2X8L-RP7B>].

B. *Constructive Trusts as a Collateral Attack When Legislative Reform Isn't Viable*

While barring the seizure of inheritances through legislative reform would provide significant relief to families impacted by pay-to-stay statutes, there is a third, albeit more radical and less ideal, option that states could consider: the implementation of constructive trusts as an equitable remedy in narrowly defined situations where the states claim over inherited funds violates the “good conscience” of equity.²¹¹

A constructive trust is an equitable remedy imposed by courts to prevent unjust enrichment, where a person wrongfully holds property that, in fairness, should belong to another.²¹² Unlike express trusts, which are intentionally created by the parties involved, a constructive trust arises by operation of law and is designed to restore property to its rightful owner when someone has acquired it through improper means or *under circumstances where retaining it would be unjust*.²¹³ It functions as a legal fiction, where the party holding the property is deemed a trustee for the benefit of the rightful beneficiary.²¹⁴ Courts typically use constructive trusts to address situations involving fraud, duress, or breach of fiduciary duty.²¹⁵ Thus, this would admittedly be a unique and creative situation to apply the use of a constructive trust.²¹⁶

211. See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55 (AM. L. INST. 2011); Gabriela Kirk-Werner, April D. Fernandes & Brittany Friedman, *Pay-to-Stay as Statecraft*, 2024 WIS. L. REV. FORWARD 1, 1 (discussing instances where state agents violate fundamental rights in the collection of revenue).

212. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55 (AM. L. INST. 2011). “A constructive trust is a fiction imposed as an equitable device for achieving justice. It lacks the attributes of a trust, and is not based on any intention of the parties.” *Healy v. Comm’r*, 345 U.S. 278, 282–83 (1953).

213. *Healy*, 345 U.S. at 282–83 (emphasis added).

214. *Id.*

215. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55 (AM. L. INST. 2011); see also Michael Traynor, *The Restatement (Third) of Restitution & Unjust Enrichment: Some Introductory Suggestions*, 68 WASH. & LEE L. REV. 899, 902–03 (2011).

216. See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55 (AM. L. INST. 2011). “A constructive trust is the formula through which the conscience of equity finds

While constructive trusts are often imposed when there is evidence of fraud, misrepresentation, bad faith, or overreaching, courts have used them more liberally when necessary to resolve an injustice. For example, in *Nelson v. Nelson*, the Kansas Supreme Court held that unjust enrichment alone could justify a constructive trust, even without proof of actual or constructive fraud.²¹⁷ Courts have also applied this remedy in cases where legal title to property has been obtained through undue influence, duress, or mistake, depending on the jurisdiction.²¹⁸ In some instances, constructive trusts can be imposed even when the property was acquired through legitimate means.²¹⁹ Washington courts have similarly recognized that constructive trusts are appropriate in situations involving conduct that falls short of actionable fraud.²²⁰ This remedy is often seen as a flexible tool that courts may use when other remedies are unavailable.²²¹

expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee." *Id.*

217. *Nelson v. Nelson*, 205 P.3d 715, 729 (Kan. 2009).

218. Wendy S. Goffe, *Oddball Trusts and the Lawyers Who Love Them or Trusts for Politicians and Other Animals*, 46 REAL PROP. TR. & EST. L.J. 543, 584–85 (2012).

219. *See Faulknier v. Shafer*, 563 S.E.2d 755, 758 (Va. 2002).

Constructive trusts arise, independently of the intention of the parties, by construction of law; being fastened upon the conscience of him who has the legal estate, in order to prevent what otherwise would be a fraud. They occur not only where property has been acquired by fraud or improper means, but also where it has been fairly and properly acquired, but it is contrary to the principles of equity that it should be retained, at least for the acquirer's own benefit.

Leonard v. Counts, 272 S.E.2d 190, 194 (Va. 1980) (quoting 1 MINOR ON REAL PROPERTY § 462, at 616 (2d ed. Ribble 1928)). As discussed, unfortunately, pay-to-stay statutes have been viewed as a legitimate exercise of government authority, allowing states to recoup incarceration costs from former prisoners. However, a constructive trust serves as an equitable remedy that prevents the government from unjustly benefiting from such actions, even when they are legally permissible. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55 (AM. L. INST. 2011).

220. *Viewcrest Coop. Ass'n, Inc. v. Deer*, 422 P.2d 832, 834 (Wash. 1967) ("It is not required, in order to impose a constructive trust, that the plaintiff must prove that he was deprived of his property through acts constituting actionable fraud.").

221. Steve Davis, *Constructive Trust the Most Flexible Remedy*, THE ARK. LAW., Winter 2023, at 1, 26.

Furthermore, constructive trusts are frequently applied when fiduciaries breach their duties and unjustly profit at the expense of beneficiaries.²²² In *Beatty v. Guggenheim Exploration Co.*, for instance, New York's highest court held that a fiduciary's improper acquisition of property should result in a constructive trust to benefit the rightful party.²²³ These trusts have also been applied in situations involving coercion or theft, where one party unlawfully acquires property and must return it under the court's supervision.²²⁴ In the same vein, courts have long applied the private law of trusts to hold public officials to fiduciary standards, particularly through the public trust doctrine.²²⁵ When a public official breaches these fiduciary duties for personal gain, courts can impose a constructive trust to recover the wrongful profits, even if the public has not suffered a direct loss.²²⁶ This mechanism ensures accountability and acts as a deterrent against future misconduct.²²⁷ Public officials, like private agents, are barred from self-dealing and must disgorge any profits gained from such breaches, regardless of whether actual damages occurred.²²⁸

Applying constructive trust principles against public officials, though used in different legal contexts, illustrates that the

222. *Id.*

223. *Beatty v. Guggenheim Expl. Co.*, 122 N.E. 378, 380 (N.Y. 1919).

224. *See Lane Cnty. Escrow Serv., Inc. v. Smith*, 560 P.2d 608, 610 (Or. 1977); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 (AM. L. INST. 2011).

225. *See* Kimberly Breedon & A. Christopher Bryant, *Restoring Trust with Trusts: Constructive and Blind Trusts as Remedies for Presidential Violations of the Constitution's Emoluments Clause*, 11 ALB. GOV'T L. REV. 281, 295 (2018); *see also* Arthur Lenhoff, *The Constructive Trust as a Remedy for Corruption in Public Office*, 54 COLUM. L. REV. 214, 215 (1954).

226. *See* Breedon & Bryant, *supra* note 225, at 298–99. It is important to note that a constructive trust can be an appropriate remedy in cases of corruption by public officials, even if no direct financial loss has been suffered by the government. *Id.* at 298 n.76. For instance, in *United States v. Carter*, 217 U.S. 286 (1910), a constructive trust was imposed on an Army officer's gains from self-dealing, despite the Army not suffering financial harm. Similarly, in *Snepp v. United States*, 444 U.S. 507 (1980), the court recognized a constructive trust for breach of fiduciary duty by a former CIA official, even though the government had not experienced any monetary loss. Moreover, *United States v. Kearns*, 595 F.2d 729, 734 (D.C. Cir. 1978), emphasized that the goal of a constructive trust is not necessarily to recover specific funds, but rather to ensure the loyalty of government agents.

227. *See* Breedon & Bryant, *supra* note 225, at 295–96; *see also* Lenhoff, *supra* note 225, at 214.

228. *See* Breedon & Bryant, *supra* note 225, at 295.

concept of imposing constructive trust on a government actor is not new.²²⁹ Courts have long used constructive trusts to address situations where public officials violated fiduciary duties or engaged in self-dealing, even when there is no evidence of direct financial harm.²³⁰ For example, in *United States v. Carter*²³¹ and *Snepp v. United States*,²³² courts imposed constructive trusts on public officials who had profited from breaches of fiduciary duty, reinforcing that such officials hold their positions in trust for the public.²³³ These cases demonstrate that courts recognize the public trust doctrine and apply equitable remedies like constructive trusts to prevent unjust enrichment, even when applied to state actors. Thus, extending this principle to prevent governments from unjustly seizing assets like inheritances under pay-to-stay statutes is not an entirely novel application, even if the underlying reasoning is entirely new.

Applying the principle of a constructive trust to prevent governments from unjustly seizing inheritances under pay-to-stay statutes would represent a new and necessary extension of this equitable remedy. While courts have historically imposed constructive trusts to address breaches of fiduciary duty by public officials, using this approach to counteract systemic inequality highlights a novel application.²³⁴ Here, the harm being remedied is not self-dealing or traditional fiduciary misconduct but the inequitable impact of government policies that undermine donative freedom for society's most vulnerable members. A constructive trust in this context would address the systemic disadvantage faced by families unable to employ sophisticated estate planning, ensuring that inheritances intended for economic stability are protected while still allowing state governments to recover costs in more appropriate and equitable ways. By imposing a constructive trust on the inheritance, courts

229. See *id.*; see also Lenhoff, *supra* note 225, at 215.

230. See Breedon & Bryant, *supra* note 225, at 295–96; see also Lenhoff, *supra* note 225, at 214.

231. See *Carter*, 217 U.S. at 306.

232. See *Snepp v. United States*, 444 U.S. 507, 510 (1980).

233. See Breedon & Bryant, *supra* note 225, at 298 n.76.

234. See notes 213–24 and accompanying text.

could ensure that these assets are used to support the dependents rather than being seized by the state to cover incarceration debts. This approach would prevent the state from unjustly depriving vulnerable families of financial resources intended for their benefit, mirroring how constructive trusts prevent wrongful holders from benefiting from their misconduct.²³⁵

In essence, in areas where a complete repeal of pay-to-stay statutes or outright protections for inheritances may not be politically feasible, states could add provisions to their probate codes that mandate the creation of a constructive trust when a current or former prisoner is set to have their inheritance claimed for pay-to-stay debt and has dependent beneficiaries. Although this approach does not fully eliminate the financial burden imposed by pay-to-stay laws, it would ensure that the inheritance is safeguarded for the benefit of the dependents rather than being used to pay incarceration debts.

In proposing a constructive trust to balance the state's interest in recovering incarceration costs against the need to preserve inheritances for vulnerable families, courts would need to consider a variety of equitable factors. First, courts could evaluate the income level of the beneficiaries, particularly when those inheriting funds are from low-income households. Families that already struggle economically should be prioritized to retain the inheritance, preventing them from falling into deeper financial hardship, which could require state assistance in the

235. Kirk-Werner et al., *supra* note 211, at 2–3. Pay-to-stay fees exemplify stategraft as states exploit legal systems and procedural imbalances to extract funds from incarcerated individuals, often violating due process. *Id.* In states like Illinois and Michigan, this practice is referred to as “civil lawfare,” where civil law mechanisms are strategically used to prey on vulnerable populations with limited access to legal resources. *Id.* at 3. Studies have shown that incarcerated individuals facing lawsuits for pay-to-stay fees frequently lack access to legal information, support, and the ability to participate meaningfully in their defense. *Id.* Many inmates expressed that they were unaware of their court hearings, lacked access to prison law libraries, and were confused by the legal procedures surrounding fee collection. *Id.* Some even argued that seized assets were shared with family members who were not responsible for their incarceration. *Id.* In at least twenty-two states, a portion of inmates' wages is collected to cover these fees, often without clear communication or understanding from those affected. *Id.* By using civil and administrative proceedings to recoup fees, states violate the due process rights of incarcerated individuals, leaving them confused and burdened by sudden debts. *Id.*

future. A related consideration is the severity of the incarceration-related debt. Courts should evaluate whether the amount the state seeks to recover is proportional to the financial status of the family. If the debt is minimal compared to the inheritance or the overall financial needs of the family, equity could lean toward preserving the inheritance for family members.

Courts should also consider whether any existing estate planning documents, such as wills or trusts, are already in place. If the deceased had put measures in place to protect their assets for the benefit of dependents, the need for a constructive trust may be diminished. However, in situations where no such protection exists, the imposition of a constructive trust would ensure that the decedent's intent to provide for their family is honored. This approach offers protection to families who, due to financial constraints, may not have had the resources or knowledge to engage in formal estate planning. Given that low-income families often face barriers to accessing comprehensive estate planning tools,²³⁶ the implementation of a constructive trust would serve as a critical safeguard.

The presence of spouses, partners, or dependent children should be a heavily weighted factor in determining whether constructive trust is appropriate. Families, especially those relying on the financial support of an incarcerated individual, should not bear the additional burden of debt collection stemming from the individual's criminal activity. Courts should recognize that the punitive nature of pay-to-stay statutes disproportionately impacts these dependents, who often already face financial instability due to the incarceration of their family member. Moreover, this approach aligns with broader public policy objectives aimed at preserving family stability and reducing the societal costs associated with poverty. When states seize inheritance meant for dependent family members, the ripple effects often lead to increased reliance on public assistance

236. See Sarah C. Stewart, *How Adopting Uniform Rules for Electronic Signing and Acknowledgment of Formal Wills and Non-Testamentary Estate Planning Documents Can Increase Access to Estate Plans*, 37 QUINNIPIAC PROB. L.J. 161, 165 (2024).

programs, further burdening the state.²³⁷ By placing inheritance in a constructive trust, courts can ensure that families are not impoverished due to incarceration costs and that dependent children and spouses have access to necessary financial support. If courts prioritize safeguarding dependents, it reduces the long-term societal and economic consequences that come with destabilizing these families.²³⁸ As such, this factor should weigh heavily in favor of creating a constructive trust when the inheritor has financial obligations to spouses, partners, or dependent children.

Further, courts could take into account the length of time since the incarceration. If a significant period has passed, the state's attempt to collect old debts could be seen as inequitable, particularly if the individual has reintegrated into society and their family has become reliant on their financial contributions.²³⁹ Relatedly, courts should assess the impact of the seizure on the family's future financial security. If losing an inheritance would prevent the family from achieving financial stability—whether through homeownership, paying off debts, or securing education for children—then a constructive trust could be implemented to safeguard the inheritance for these essential uses.

237. See Naomi F. Sugie, *Punishment and Welfare: Paternal Incarceration and Families' Receipt of Public Assistance*, 90 SOC. FORCES 1403, 1423 (2012). The expansion of the criminal justice system over the last forty years has not only increased regulation of offenders but has also unintentionally deepened government involvement in the lives of their families through increased reliance on programs like food stamps and Medicaid/SCHIP. *Id.*

238. See Heather D. Hill, Jennifer Romich, Marybeth J. Mattingly, Shomon Shamsuddin & Hilary Wething, *An Introduction to Household Economic Instability and Social Policy*, 91 SOC. SERV. REV. 371, 372 (2017); Sharon Wolf & Taryn Morrissey, *Economic Instability, Food Insecurity, and Child Health in the Wake of the Great Recession*, 91 SOC. SERV. REV. 534, 535 (2017).

239. A significant period for evaluating the fairness of collecting incarceration-related debts could reasonably align with the statute of limitations for civil claims, such as breach of contract, which typically ranges from three to six years in many states. See, e.g., N.D. CENT. CODE § 41-02-104 (2025); N.Y.C.P.L.R. § 213 (2025); N.J. STAT. ANN. § 12A:2-725 (West 2025); CAL. CIV. PROC. CODE § 337 (2025). This timeframe reflects a balance between allowing the state a reasonable window to collect debts and recognizing the individual's right to financial stability after reintegration. What should be avoided, however, are indefinite timelines or excessively long periods, such as Connecticut's twenty-year collection period for judgments, which undermine the principles of fairness and place undue financial strain on families long after the individual has reestablished their life post-incarceration. See CONN. GEN. STAT. §52-380a(d) (2025).

Often, the length of time since the incarceration will relate to the impact of the seizure on the family's future financial security.²⁴⁰

Incorporating the factors discussed and any additional factors deemed relevant into the consideration of whether to impose a constructive trust allows courts to balance the state's interest in cost recovery with the need to protect the financial security of families who rely on inheritances. While the primary factors might focus on the presence of spouses, partners, or dependent children and the existence of estate planning tools, other relevant factors could be considered as well. Furthermore, this approach offers a middle ground for states that are unwilling to fully ban the seizure of inheritances but still want to ensure that they are not unjustly punishing families who were not involved in the crime. By limiting the seizure of assets in cases where dependents will be negatively impacted, this framework respects both the state's need to recoup costs and the equitable need to protect families from further financial harm. States could still collect debts in cases where these factors do not weigh in favor of the family, allowing for a more nuanced and fair approach to pay-to-stay statutes.

The next important consideration is determining who should serve as the beneficiary of the proposed constructive trusts. A constructive trust designed to protect inheritances for families of incarcerated individuals can take several forms, depending on the specific circumstances of the case and the policy goals. One approach would be for the constructive trust to pass the inheritance directly to a spouse or children if the purpose of the trust is to ensure that the financial stability of the family is preserved. In this scenario, the trust could be structured in such a way that the assets bypass state claims and are designated solely for the benefit of dependent beneficiaries, such as spouses or children. The goal here is to ensure that these individuals, who may be economically disadvantaged or

240. See MINDY HERMAN-STAHN, MARNI L. KAN, TASSELI MCKAY, INCARCERATION AND THE FAMILY: A REVIEW OF RESEARCH AND PROMISING APPROACHES FOR SERVING FATHERS AND FAMILIES 3-5 (2008).

dependent on the inheritance for basic needs like housing, education, or healthcare, are prioritized. By doing so, the trust could ensure that the state's interest in recouping incarceration costs does not override the decedent's intent to provide for their family.

Alternatively, the trust could distribute assets on a needs-based basis or through periodic disbursement to the dependents. This would prevent the immediate seizure of the inheritance while still allowing the state to pursue some recovery over time, but only after ensuring that the dependents' needs are met first. This approach would maintain a balance between the government's desire to recover debts and the fundamental purpose of inheritance, which is to protect and provide for the deceased's family. It recognizes that the spouse and children are the rightful heirs, whose welfare should take precedence over state financial interests, particularly when the inheritance is essential for their financial survival. The constructive trust would operate under specific terms to ensure that the inheritance is used to maintain the financial stability of the family rather than being diverted to state coffers.

After considering the option of constructive trusts as a way to protect families from the financial burden of pay-to-stay statutes, it is important to address broader counterarguments surrounding these proposed reforms. One likely argument against the imposition of constructive trusts is that families could—and arguably should—create testamentary trusts or other estate planning instruments that would protect assets from pay-to-stay statutes without the need for court or state involvement. While this may be an appropriate approach for wealthier families with the resources to afford estate planning, the reality is that the vast majority of families impacted by these statutes do not have the financial means to engage in such planning.²⁴¹ According to research, low-income families are disproportionately affected by incarceration, and they often lack access to the legal

241. See Faizer, *supra* note 170, at 21–22; see also Eisen, *Paying for Your Time*, *supra* note 28, at 321.

and financial resources necessary to establish complex estate planning tools like trusts.²⁴² These families are more concerned with immediate survival.²⁴³ For instance, 55% of Americans with an annual household income of \$75,000 or higher have a will, while only 31% of those earning less than \$30,000 have one.²⁴⁴ Unfortunately, the likelihood of having a will also varies significantly across socioeconomic and racial groups, the very groups with the highest incarceration rates.²⁴⁵ At present, 28% of non-white adults are likely to have wills, compared to 51% of white adults.²⁴⁶ This disparity illustrates the challenges faced by low-income families, who are already vulnerable due to systemic inequalities and may not even be aware of the protections available to them through estate planning.

In contrast, though an admittedly more radical suggestion, a constructive trust imposed by the state when an incarcerated or formerly incarcerated individual is set to inherit offers a more practical solution for these vulnerable families.²⁴⁷ Such a trust would protect the inheritance from being seized under pay-to-stay laws without requiring families to engage in expensive or inaccessible legal processes. Courts could assess the need for a constructive trust on a case-by-case basis whenever states assert a pay-to-stay claim against an estate, considering the non-exhaustive factors previously discussed. This approach not only addresses the financial and informational barriers faced by these families but also ensures that inheritances are used to support dependents rather than being seized by the state for incarceration debts.

242. See Eisen, *Paying for Your Time*, *supra* note 28, at 328; Faizer, *supra* note 170, at 21–22.

243. See Astrid Andre, *Can Estate Planning be Used to Help Preserve Economic Assets in Low-Income Communities?*, SHELTERFORCE (Mar. 1, 2019), <https://shelterforce.org/2019/03/01/can-estate-planning-preserve-economic-assets-in-low-income-communities/> [https://perma.cc/PTG4-XWN5].

244. *Id.*

245. See Martin, *supra* note 80, at 2.

246. See Andre, *supra* note 243.

247. See Davis, *supra* note 221, at 26–27.

Another counterargument one might raise is that state governments rely on these statutes to recoup incarceration costs.²⁴⁸ Critics may argue that limiting collections, particularly from inheritances, would reduce a key revenue source and shift the burden onto taxpayers.²⁴⁹ However, evidence suggests that the amount recovered from these debts is often minimal compared to the administrative costs of collection.²⁵⁰ Additionally, stripping inheritances from vulnerable families forces them to rely more heavily on public assistance, ultimately increasing taxpayer costs.²⁵¹ Moreover, it perpetuates “stategraft” by claiming “financial resources to replenish public coffers” off the backs of “segments of the population poorly positioned to fight back.”²⁵² It ignores the principle of testamentary freedom, a bedrock of American inheritance law.²⁵³

An alternative argument, grounded in principles of fairness, suggests that barring inheritance seizures provides preferential treatment to families of incarcerated individuals compared to other debtors subject to asset seizures. However, families of incarcerated individuals face unique systemic burdens, including financial instability and poverty, often due to no fault of their own.²⁵⁴ Unlike other types of debt, these families are not directly responsible for the behavior that led to the debt, yet they disproportionately bear its consequences as the state strips away

248. See Eaton-Robb, *supra* note 10.

249. *Id.*; Michelle M. Sanborn, *The Pay-to-Stay Debate: Inmates Must Take Financial Responsibility*, CORRECTIONS TODAY (Aug. 2003), <https://www.scribd.com/document/93013382/Sanborn-on-Prison> [<https://perma.cc/V2UV-47HJ>]; Deitch, *supra* note 8, at 848–49.

250. See Deitch, *supra* note 8, at 871–72.

251. See Sugie, *supra* note 237, at 1421–23.

252. Kirk-Werner et al., *supra* note 211, at 1. “Stategraft refers to the practice by which ‘state agents transfer property from persons to the state in violation of the state’s own laws or basic human rights.’” *Id.*

253. See Kevin Noble Mailliard, *The Color of Testamentary Freedom*, 62 SMU L. REV. 1783, 1784 (2009).

254. See JEREMY TRAVIS, ELIZABETH CINCOTTA MCBRIDE & AMY SOLOMON, FAMILIES LEFT BEHIND: THE HIDDEN COSTS OF INCARCERATION AND REENTRY 1, 5 (2005) (“Incarceration can also damage the financial situations of the families left behind. Most parents (71%) in state prison were employed either full- or part-time in the month preceding their arrest.”); see also Martin, *supra* note 80, at 1.

any hope of financial recovery from the devastation of incarceration. Protecting inheritances would offer these families a chance to break out of poverty without eliminating the state's ability to pursue other forms of debt collection.

And, of course, one common argument in favor of pay-to-stay statutes is that incarcerated individuals should be held accountable for the costs of their incarceration, as they are being punished for crimes they committed, and taxpayers should not have to shoulder that burden.²⁵⁵ Proponents of this view argue that it is fair for those responsible for their actions to pay for the consequences.²⁵⁶ However, this perspective overlooks the fact that pay-to-stay statutes often extend punishment beyond the individual to their families, who played no role in the crime.²⁵⁷ Many of these families, already burdened by the loss of a loved one's income and presence, suffer further financial instability when inheritances meant to support them are seized.²⁵⁸ The proposed reforms would still allow states to collect costs but would protect inheritances, recognizing that these funds are essential for the economic stability of families who are already disadvantaged. Similar to South Carolina's approach, where deductions from inmate wages for room and board are reduced or redirected if the individual has child support obligations,²⁵⁹ proposed reforms could prioritize family financial needs by exempting inheritances that are crucial for dependents' well-being. Just as child support obligations take precedence over cost recovery, protecting inheritances acknowledges the economic realities of disadvantaged families and ensures that state collection efforts do not exacerbate financial hardship for those who rely on these funds for basic stability. Moreover, individuals who have served their sentences have theoretically paid their debt to society, and continuing to impose financial

255. Eaton-Robb, *supra* note 10; Sanborn, *supra* note 249.

256. See Deitch, *supra* note 8, at 848–49.

257. See *id.* at 886–87.

258. See *id.*

259. S.C. CODE ANN. § 24-13-40(A)(3) (2025).

penalties can hinder their reintegration and exacerbate cycles of poverty and recidivism.²⁶⁰ A more equitable approach would support policies that help formerly incarcerated individuals and their families rebuild their lives, ultimately reducing the broader societal costs of crime and incarceration without unfairly penalizing those left behind.

Ultimately, legislative reforms offer the most effective solution to address the financial burdens imposed by pay-to-stay statutes. Two key legislative approaches provide a way forward: (1) barring the seizure of inheritances to recover incarceration costs and (2) implementing constructive trusts to protect inheritances for families with dependents. These solutions balance the state's interest in cost recovery with the need to shield vulnerable families from further financial harm, offering a more just and practical approach to breaking cycles of poverty and ensuring economic stability for those most affected.

CONCLUSION

The current system of pay-to-stay statutes imposes undue financial burdens on families, particularly when states claim inheritances meant to support dependents of incarcerated or formerly incarcerated individuals. Legislative reform offers the most promising solution for addressing these inequities and protecting families from further economic harm. Central to these reforms is the preservation of donative freedom—the fundamental right of individuals to decide how their assets will be distributed after death. By safeguarding this principle, we can ensure that inheritances serve their intended purpose: providing financial stability and opportunities for loved ones.

States like Illinois, New Hampshire, and Maine have demonstrated that targeted legislative action can successfully eliminate or mitigate the impact of pay-to-stay statutes. These reforms emphasize the importance of protecting donative

260. See U.S. COMM'N ON C.R., *COLLATERAL CONSEQUENCES: THE CROSSROADS OF PUNISHMENT, REDEMPTION, AND THE EFFECTS ON COMMUNITIES* 4–6 (2019).

freedom to secure family stability over cost recovery, setting a precedent for other states to follow. By explicitly barring the seizure of inheritances, lawmakers can uphold this essential right, ensuring that wealth transfer remains a means of economic security and upward mobility, especially for those already at a disadvantage. Constructive trusts offer an additional safeguard, protecting inheritances for dependents while still allowing states to recover costs in a more balanced and equitable manner.

Ultimately, the tension between pay-to-stay statutes and donative freedom underscores a critical societal conflict: while American law has long upheld an individual's right to determine the distribution of their assets, the financial demands of incarceration compromise this principle by prioritizing state cost recovery over familial economic support. This Essay argues that abolishing the practice of seizing inheritances to cover incarceration debts is essential to prevent further financial harm to vulnerable families. Legislative reforms that explicitly bar inheritance seizures would help restore donative freedom and ensure that wealth transfer serves its intended purpose of supporting dependents and fostering economic stability. Furthermore, implementing provisions like constructive trusts introduces necessary flexibility, allowing states to recover costs more equitably while prioritizing the financial well-being of families. By addressing this conflict, these reforms strike a balance that upholds donative freedom and promotes a fairer, more compassionate legal framework.