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Charging Inmates Perpetuates Mass Incarceration

By Lauren-Brooke Eisen

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ACKNOWLEDGEMENTS

The Brennan Center gratefully acknowledges Laura and John Arnold, Democracy Alliance Partners, Ford Foundation, The New York Bar Foundation, Open Society Foundations, Public Welfare Foundation, Rockefeller Family Fund, Vital Projects Fund, and William B. Wiener, Jr. Foundation for their support of the Justice Program. The opinions and views expressed in this document do not necessarily reflect those of the aforementioned individuals or groups.

The author is grateful to Inimai Chettiar, Jessica Eaglin, Alicia Bannon, Johanna Kalb, Abigail Finkelman, Nicole Fortier, Julia Bowling, Adam Klock, and Rachel Shapiro, for their guidance of this project. She especially thanks John Kowal for his editing, input and invaluable feedback on drafts of this report. She also thanks Jeanine Plant-Chirlin, Desiree Ramos Reiner, Jim Lyons, Naren Daniel, Lena Glaser, and Mikayla Terrell for their editing and communications assistance.

This report is adapted from a law review article that appeared in The Loyola University New Orleans Journal of Public Interest Law.

TABLE OF CONTENTS

Introduction	1
How Current Practices of Charging Inmates Perpetuates Mass Incarceration	2
History of Inmate Fees	3
Today's Landscape	3
Are Inmate Fees Bad Policy?	4
I. Constitutional Infirmity	6
II. Policy Recommendations	8
Conclusion	9
Endnotes	10

INTRODUCTION

The American criminal justice system is replete with fees that attempt to shift costs from the government to those accused and convicted of breaking the law. Courts impose monetary sanctions on a “substantial majority of the millions of U.S. residents convicted of felony and misdemeanor crimes each year.”¹ Every aspect of the criminal justice process has become ripe for charging a fee. In fact, an estimated 10 million people owe more than \$50 billion in debt resulting from their involvement in the criminal justice system.² In the last few decades, additional fees have proliferated, such as charges for police transport, case filing, felony surcharges, electronic monitoring, drug testing, and sex offender registration. Unlike fines, whose purpose is to punish, and restitution, which is intended to compensate victims of crimes for their loss, user fees are intended to raise revenue.³ The Justice Department’s March 2015 report on practices in Ferguson, Mo. highlights the overreliance on court fines as a primary source of revenue for the jurisdiction.⁴ *The New York Times* noted that the report found that “internal emails show city officials pushing for more tickets and fines.”⁵

Fees and debts are increasing partially because the criminal justice system has grown bigger. With 2.2 million people behind bars, courts — and all the relevant agencies — have expanded as well. Since the 1970s, incarceration in the U.S. has risen steeply, dwarfing the incarceration rate of any other nation on Earth. The U.S. added about 1.1 million incarcerated people, almost doubling the nation’s incarcerated population, in the past 20 years. The fiscal costs of corrections are high — more than \$80 billion annually — about equivalent to the budget of the federal Department of Education.⁶ A recent report by the Center on Budget and Policy Priorities finds that corrections is currently the third-largest category of spending in most states, behind education and health care.⁷ In fact, somewhat disconcertingly, 11 states spent more of their general funds on corrections than on higher education in 2013.⁸

Fees already on the books have increased.⁹ And, these fees are extending into state and local corrections.

As a result of these runaway costs, counties and states continue to struggle with ways to increase revenue to pay for exorbitant incarceration bills. In 2010, the mean annual state corrections expenditure per inmate was \$28,323, although a quarter of states spent \$40,175 or more.¹⁰ Not surprisingly, departments of corrections and jails are increasingly authorized to charge inmates for the cost of their imprisonment. Although this policy is alarming, less widely understood but equally troubling is the reality that these incarceration fees perpetuate our nation’s addiction to incarceration. This policy brief exposes how the widespread nature of charging fees to those who are incarcerated connects to the larger problem of mass incarceration in this country.

HOW CURRENT PRACTICES OF CHARGING INMATES PERPETUATES MASS INCARCERATION

Almost 7 million people, or 1 in 35 adults, were under the supervision of adult correctional systems at the end of 2013.¹¹ This means that 1 in 35 adults were in prison or jail, or on probation or parole supervision in the community. Compared to just over 4.3 million people under some form of correctional control in 1990,¹² those caught in the maze of our rapidly growing justice system have increased by 58.6 percent in the last three decades.

Mass incarceration was a distinct response by policymakers to both the social turmoil of the 1960s — a troubling era for many Americans because of protests, riots, and acts of civil disobedience related to both the civil rights movement and the Vietnam War — and the increasing crime rate of the 1970s and 1980s. Specific criminal justice policies that increased the number of people incarcerated include the expansion of mandatory minimums, truth-in-sentencing, “three strikes you’re out” laws, the elimination of parole, and federal funding for prison construction.

As budgets grew tighter and jurisdictions balked at increases in taxes, the burden to raise revenue for the criminal justice system gradually shifted toward those who found themselves as defendants in court and inmates in jails and prisons. The country’s criminal justice costs — mostly policing, jails, prisons, and courts — rose from \$35 billion in 1982 to more than \$265 billion in 2012 — a growth of over 650 percent.¹³ With this dramatic growth, those caught in this net are burdened with additional fees, many of which are charged simply for being in the criminal justice system. Forty-three states and the District of Columbia allow fees to be charged for using a public defender, and 44 states charge individuals for using probation services.¹⁴ As more and more counties face strapped budgets, and in an attempt to save taxpayer dollars, private probation companies have profited from requiring probationers to pay out of their own pockets for drug treatment, electronic monitoring, and myriad other services they are required to participate in as a condition of their supervision.¹⁵ Probation fees often run about \$80 to \$100 a month. Though many of these other charges are small, they add up. Additional, more costly fees compound the problem. For example, a monthly electronic monitoring system can cost as much as \$300 a month. A defendant can emerge from the system owing thousands of dollars in fees.

Some individuals are leaving jails and prisons with a mountain of debt, much of it stemming from the fees they incurred behind bars, where a short telephone call home can cost as much as \$20. These former inmates can face aggressive collection tactics, including additional fines, driver’s license suspension, or, in some cases, re-incarceration. Often, former inmates must depend on family members to pay the bills or are forced to prioritize criminal justice debt over other pressing needs such as feeding, clothing, and housing family members who are reliant on their income. Some of these fees are collected while an inmate is incarcerated through deductions from the inmate’s bank or commissary account. In some situations, however, the fees are collected through civil litigation aimed at a prisoner’s assets or estate upon release. This debt can create a barrier to successful reentry.

HISTORY OF INMATE FEES

Charging inmates fees is not new.

Michigan passed the first correctional fee law in 1846 when it authorized counties to charge inmates for the cost of medical care.¹⁶ Today, at least 35 states authorize either state or correctional facilities to charge inmates for medical fees such as co-pays or fees for procedures.

Booking fees have also increased in recent years. The Fayette County Jail in Kentucky recently raised booking fees from \$20 to \$35 per inmate, a move intended to almost double revenues to the jail from booking fees to \$406,000.¹⁷ At least five other county jails in Kentucky charge booking fees between \$10 and \$70.

But fees for medical care and booking are just the beginning. What is perhaps most surprising are the “room and board” fees that more than half the states permit. Known as “pay to stay,” the idea originated in the mid-1990s as a solution to skyrocketing costs at correctional facilities partly due to overcrowded jails and prisons.¹⁸ A newspaper article published in the *Chicago Tribune* by a law clerk for an Eighth Circuit judge in 1994 appears to be one of the earliest mentions of this new way of recouping funds from inmates for their stay in prison. The author wrote, “We should, I believe, make prisoners pay rent. It's okay to laugh. The idea strikes me as funny—mostly, I suppose, due to the assumption that prisoners on the whole probably can't afford to pay rent.”¹⁹ The irony is obvious here: while advocating for this bold new idea, the author admits its inherent unworkability.

Yet the unworkable idea became policy. Whether it was related to the *Chicago Tribune* article remains a mystery, but by 2004, one survey found that approximately one-third of county jails and more than 50 percent of state correctional systems had instituted “pay-to-stay” fees, charging inmates for their own incarceration.²⁰

TODAY'S LANDSCAPE

Today, due to extreme overcrowding in some jails, there are a handful of states that offer inmates the chance to pay to serve their time at a facility that is more akin to a hotel than a county jail. Some who are convicted of certain nonviolent, misdemeanor crimes and sentenced to jail in Burbank, California can serve their time in a city jail instead of the Los Angeles County Sheriff's Department jail. This “upgrade” to a relatively small, new, clean and local jail is available for \$100 per day.²¹ California is home to numerous facilities such as the one in Burbank. A facility in Orange County charges \$82 a day²² and the Fremont Police Detention Facility's Pay-to-Stay program charges \$155 daily.²³ A sergeant at the Seal Beach Detention Center in California recently stated, “We cater to good people who make bad choices.”²⁴

There has been no comprehensive study in the last decade examining jail and prison fees. The most current information appears to come from a 2005 National Institute of Justice (NIJ) national survey of 224 jails. The survey indicated that at that time, 90 percent of responding jails charged inmates some sort of fee. Today, these fees range from \$1.25 for meals in Maricopa, Ariz., to the \$68.76 per day charged by the Corrections Center of Northwest Ohio. At that rate, it will cost an inmate more than \$25,000 per year to stay in jail. This disturbing trend increasingly forces inmates to pay for basic services, including meals, toilet paper, clothing, dental fees, medical co-payments, telephone fees, video visitation fees, and Internet fees.

The Corrections Center of Northwest Ohio states on its website that their policy is to “assess a reception fee and a Pay-for-Stay fee to convicted persons to offset the costs associated with the housing of that person. The Corrections Commission of Northwest Ohio recognizes the importance of offender accountability, the cost of incarceration and its increasing tax burden on the citizens of Northwest Ohio.”²⁵ Its website even provides a phone number for their pay-to-stay coordinator, and also explains that they have contracted with Intellitech Corporation for collection services and inmates will receive a bill upon release from the collections company.

The Brennan Center analyzed state statutes from all 50 states and found that as of 2015, at least 43 states authorize room and board fees and at least 35 states authorize medical fees to be charged to inmates in either state or county correctional facilities.

ARE INMATE FEES BAD POLICY?

Fee opponents have long maintained that charging inmates is simply bad policy. Perhaps most compelling, some argue that the community as a whole has chosen to remove these individuals from society. Therefore, society should be prepared to pay the costs of feeding, housing, and providing medical attention for inmates. As a collective decision, society should bear the collective cost.²⁶ Incarcerated individuals are deprived of their liberty by the state, therefore it is unjust to punish them again by charging them for a multitude of services, let alone their stay. The logic flows around the idea that inmates are “involuntary consumers” and “correctional clients are not permitted to forego the services, consume less of them, or obtain them elsewhere.”²⁷

Another compelling reason not to charge inmates is the burden on families. Experts estimate that at least 80 percent of individuals in jail are indigent.²⁸ And, in most cases, the inmates’ families pay these fees, a reality that makes it difficult for families already suffering from the loss of income from an incarcerated family member.

And, when it comes to medical fees charged to inmates, they can serve as a deterrent to seeking proper medical care. An article in the National Prison Project Journal noted, “Often prisoners will do without hygiene items or medical treatment rather than have their families deposit funds that will be immediately confiscated to satisfy prison charges.”²⁹ The chilling effect of this policy deters inmates from seeking medical attention with detrimental and expensive results. In 2011–2012, half of state and federal prisoners and local jail inmates reported ever having a chronic medical condition.³⁰ Communicable diseases spread easily behind bars: Inmates are continuously being detained and released into the community, and inmates live in close quarters with one another, oftentimes double and triple bunked in a small cell. The spread of communicable diseases in jail and prison affects not only inmates, but also correctional officers, maintenance personnel, volunteers, medical personnel, and family and friends who visit the facilities.

And in an exercise in futility, this debt is often never collected. As the ACLU of Ohio has reported, “collection agencies often promise that they will bring in large revenues for local officials, but data suggests that low-income people are no more likely to pay their fees when collection agencies are used.”³¹ In Fairfield County, Ohio, for example, the jail abandoned using collection agencies in 2012, after nine years of using them. They concluded that collection agencies were so ineffective in collecting fees owed that it wasn’t worth the cost.

There are also reports of harsh practices to force the formerly incarcerated to pay the facilities. For example, in Oklahoma and Texas, if an inmate successfully sues the jail and collects monetary damages, any fees owed are taken from the reward. And, a handful of states authorize correctional facilities to collect from inmates' future earnings.

Despite these issues, lawmakers and taxpayers applaud fee charges. There are two leading arguments in support of laws permitting inmate fees. The most often cited rationale for charging these fees is to offset burgeoning incarceration budgets. But the simple reality is that imposing fees has had mixed results, at best. Some counties have found that administrative costs are greater than what they have collected from jail fees.³² Some agencies report actual revenues from their fee-based operations are as low as 6 percent of the fees assessed.³³ Other programs, like one in Olmsted County, Minn., have outright failed. The Minnesota program was revamped because administrative costs surpassed revenue. A number of agencies have noted their lack of staff capacity to effectively monitor and collect fees.³⁴

The second most commonly touted justification for charging inmates fees is based on the theory that forcing inmates to pay for their own incarceration “teaches them a lesson.” Some policy makers and correctional officials make the argument that charging inmates for their stay is grounded in rehabilitation or deterrence. Recently, Utah State Representative Paul Ray (R) objected to a judge’s ruling that the Davis County Jail is not legally entitled to take money from inmates’ commissary accounts under the jail’s “pay-to-stay” policy. Ray justified the practice by stating, “They’re giving them money to buy treats with, to buy commissaries, all these extras in the jail, and the county is saying, ‘No, wait a minute. You have a debt to society that you’re gonna pay before you buy those Twinkies.’”³⁵ And Sheriff Jim Pitts in Elko County, Nev., recently commented about his jail’s plan to require inmates to pay a \$6 daily fee for food, \$10 for each doctor’s visit and \$5 for booking by stating, “We’re not the Hilton.”³⁶

I. CONSTITUTIONAL INFIRMITY

The debate around charging fees to inmates while they serve their sentences has also played out in the courts. For decades, inmates have brought an assortment of constitutional challenges to a variety of fees. These include: health care fees, booking fees, room-and-board fees, and charges incurred while inmates are held pre-trial. And for decades, state and federal courts have largely upheld these fees, finding no constitutional violations.

Inmates have raised both due process and equal protection arguments. Many have also argued these practices violate the cruel and unusual punishment clause of the Eighth Amendment. In almost all cases, courts have sided with the agencies implementing these practices.

But advocates opposing these fees have overlooked a significant doctrinal opening to conduct challenges under the U.S. Constitution. Litigation centered on the Eighth Amendment's excessive fines clause offers a unique opportunity to argue that charging inmates fees while incarcerated is unconstitutional. The distinction between "fees" and "fines" is a fuzzy one for inmates. It is important to think about the reasoning behind some of these charges in order to challenge them as unconstitutional.

The Eighth Amendment provides "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."³⁷ Scant case law exists on the excessive fines clause. To the extent that the U.S. Supreme Court has interpreted the clause, it has done so over the last two decades primarily in civil and criminal forfeiture cases.

In recent case law reviewing forfeiture cases, courts have held that a punitive forfeiture violates the excessive fines clause "if it is grossly disproportional to the gravity of the offense that it is designed to punish."³⁸ As Eighth Amendment jurisprudence examining fees under the excessive fines clause has similarly developed to emphasize the principle of proportionality, this provides an innovative doctrinal opening for litigation on inmates' fees when they significantly exceed the legally permissible statutory fine for an inmates' crime.

A seminal case, *Tillman v. Lebanon County Correctional Facility*, opened the door for an argument that inmate fees could violate the excessive fines clause when their amount may be considered punitive. In that case, Leonard Tillman, a former prisoner in an Ohio County jail, brought suit after he incurred a \$4,000 debt from the assessment of a fee of \$10 per day for housing costs stemming from his incarceration in a county facility for state parole violations. The fee was assessed pursuant to a Cost Recovery Program. The Third Circuit ruled that the \$4,000 assessed in fees were not punitive. Instead, the court held they were rehabilitative in nature.³⁹ Even if the amount assessed were considered a "fine," and not a "fee," the Third Circuit held it was not "excessive" because the fines were not out of proportion to the maximum fine of \$100,000 for Tillman's convicted offense — possession with intent to deliver approximately 29 grams of cocaine. Using this line of reasoning, creative litigants could possibly bring specific challenges in cases where an inmate's fees are significantly more than the legally permissible statutory fine for the inmate's crime.

There are instances where inmates' fees may be disproportionate to their crime. For example, in New York State, the misdemeanor crime of driving while impaired by the combined influence of drugs or alcohol carries with it a jail sanction of up to one year and a fine of up to \$1,000. Hypothetically, if an individual sentenced under this statute racked up jail fees in excess of \$1,000 during their stay, there would be a compelling case to

be made that the fees are excessive under the Eighth Amendment due to the fine's disproportion to the maximum statutory fine.

Another strong challenge to these practices lies with litigants who can contest fees where officials have described their intent as punitive. This opening is ripe for litigation after *Tillman* in jurisdictions where policymakers and jail and prison officials have made it clear that their fees are partly or wholly punitive in nature. Punitive fees place themselves squarely within the Eighth Amendment's excessive fines clause. These fines are unnecessarily excessive because an inmate is already deprived of his or her liberty pursuant to incarceration. It is overly punitive because the inmate has already been punished through deprivation of liberty and therefore additional fees are disproportionate and excessive.

Litigants can also turn toward the "evolving standards of decency" jurisprudence when challenging inmate fees. In the 1958 case of *Trop v. Dulles*, the U.S. Supreme Court struck down a law that allowed Trop, a native-born American, to be stripped of his citizenship for the crime of wartime desertion.⁴⁰ Emphasizing the flexibility in the wording of the Eighth Amendment, Justice Warren wrote that "the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."⁴¹ Although this standard has traditionally been applied in the context of the cruel and unusual punishment clause of the Eighth Amendment, Justice Warren's words could equally refer to the entire Eighth Amendment, thus applicable to the excessive fines clause.

Given the massive growth of the correctional population in the U.S., one could argue that the "evolving standards of decency" should carry the day to protect poor inmates from becoming burdened with debt while incarcerated.

II. POLICY RECOMMENDATIONS

The incarceration rate has more than quintupled since 1970. This is the result of our decades-long dependence on incarceration as our primary way to combat crime. A vastly expanded prison population has necessitated an accompanying growth in prison facilities, correctional officers, health care providers, and other services related to corrections. It is no surprise that governments have looked for new ways to pay for the soaring costs of incarceration. But the solution to these escalating expenditures should not come from inmates and their families. While solutions are not easy, there are opportunities to minimize fees charged to those behind bars.

Governments should take action to minimize fees charged to those behind bars. Specifically, policymakers should:

- ***Revisit collection practices:*** Once inmates leave correctional custody, accumulated debts create a prolonged involvement with the justice system. Chasing down formerly incarcerated people, the majority of whom are poor, to collect these debts is often ineffective. These collection efforts often cost more than jurisdictions recoup in revenue. Jurisdictions should look critically at the efficacy of their collection practices.
- ***Limit the scope of statutes:*** Many laws are written vaguely or provide excessive leeway, allowing correctional facilities and sheriffs to charge exorbitant fees to inmates. Criminal justice statutes should be amended to set reasonable limits on the discretion to assess such fees.
- ***Improve indigency waivers in statutes:*** Many state statutes allow for waivers of medical and other fees if the inmate is indigent or has less than a specific amount in their commissary accounts. However, some statutes are silent on the subject. All statutes should require that corrections promulgate rules authorizing waiver of fees in circumstances where the inmate is indigent.
- ***Set caps on criminal justice debt:*** Setting caps on how much criminal justice debt one can owe will curb spiraling debts. These fines are also counterproductive to ensuring inmates' best reintegration into society. Many individuals are saddled with court fees, child support, and perhaps even restitution. Piling on a bill from their time behind bars pushes some individuals into a world of insurmountable debt.
- ***Conduct a national survey and share the results:*** A national survey of policies at county jails and state departments of corrections would help determine how widespread this practice is currently. It is difficult to convince policymakers of the need to enact legislation to combat these practices without an accurate depiction of how widespread the problem is in each jurisdiction.

Our nation's high incarceration rates arose from deliberate policy choices over the past few decades. Our dependence on incarceration has taxed state and local budgets from coast to coast. It is time for us to take a collective breath and think thoughtfully about how to fund the nation's jails and prisons in a way that reflects values of fairness, equality, and the real purpose of punishment.

CONCLUSION

During the quarter century since 1990, incarceration rates have exploded, increasing over 90 percent and adding about 1.1 million additional people to the prison population. This growth in the number of Americans behind bars has created a staggering price tag. It is understandable that jails and prisons would look to offset costs for housing these individuals. However, it is unreasonable to require a population whose debt to society is already being paid by the sentences imposed, 80 percent of whom are indigent, to help foot the bill.

Despite growing awareness of the problem, jurisdictions facing budget constraints continue to implement policies to charge inmates fees while behind bars. While the excessive fines clause of the Eighth Amendment provides only one narrow opening for litigation, it provides a legal challenge to these practices. Further, advocates can build off of these legal challenges to craft new arguments to challenge these measures in statehouses across the country. A combined advocacy strategy of litigation and policy reform can be a powerful tool to impact change in the area of criminal justice debt behind bars.

ENDNOTES

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- ²⁶ See Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 892 (2009) ("The state's carceral burden is the price society pays for the decision to incarcerate convicted offenders...If society prefers, it can choose not to incarcerate. But if it wants the benefits of incarceration, society must bear the burden, even if this choice should oblige the state to provide for the needs of people in prison in ways it routinely fails to do for needy people in the free world").
- ²⁷ Dale Parent, NAT'L INST. JUSTICE, *Recovering Correctional Costs through Offender Fees* 1 (1990), available at <https://www.ncjrs.gov/pdffiles1/Digitization/125084NCJRS.pdf>.
- ²⁸ DONALD J. FAROLE, JR., & LYNN LANGTON, BUREAU OF JUSTICE STATISTICS, COUNTY-BASED AND LOCAL PUBLIC DEFENDER OFFICES, 2007 (2010), available at <http://www.bjs.gov/content/pub/pdf/clpdo07.pdf>.
- ²⁹ See Pat Nolan, *Inmate User Fees: Fiscal Fix or Mirage?*, Am. Corr. Assoc. (2003) (citing to Mark Lopez & Kara Chayriques, *Billing Prisoners for Medical Care Blocks Access*, 9 NAT'L PRISON PROJECT J. 1, 2 (1994), available at <https://www.prisonlegalnews.org/media/publications/journal%209-2.pdf>).

³⁰ See MARCUS BERZOFSKY & LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, MEDICAL PROBLEMS OF STATE AND FEDERAL PRISONERS AND JAIL INMATES, 2011-12 (2015), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5219>.

³¹ AM. CIVIL LIB. UNION, ADDING IT UP: THE FINANCIAL REALITIES OF OHIO'S PAY-TO-STAY JAIL POLICIES, available at http://www.acluohio.org/wp-content/uploads/2013/06/AddingItUp2013_06.pdf.

³² NAT'L INST. OF CORR., FEES PAID BY JAIL INMATES: FINDINGS FROM THE NATION'S LARGEST JAILS (1997), available at <http://static.nicic.gov/Library/013599.pdf>.

³³ NAT'L INST. OF CORR., FEES PAID BY JAIL INMATES: FINDINGS FROM THE NATION'S LARGEST JAILS (1997), available at <http://static.nicic.gov/Library/013599.pdf>.

³⁴ BARBARA KRAUTH, ET AL., NAT'L INST. OF CORR., FEES PAID BY JAIL INMATES: FEE CATEGORIES, REVENUES, AND MANAGEMENT PERSPECTIVES IN A SAMPLE OF U.S. JAILS 2 (2005), available at <https://s3.amazonaws.com/static.nicic.gov/Library/021153.pdf> (“Of the 224 survey responses, 202 jurisdictions charge fees to inmates for at least some programs, functions, or services”).

³⁵ Annie Cutler, *Utah Judge Orders a Stop to Jail's 'Pay For Stay' Collection Methods*, FOX 13 SALT LAKE CITY, Apr. 10, 2014, available at <http://fox13now.com/2014/04/10/utah-judge-orders-a-stop-to-jails-pay-for-stay-collection-methods>.

³⁶ Dylan Woolf, *County To Charge Inmates For Food, Doctor*, ELKO DAILY FREE PRESS, Feb. 6, 2014, available at http://elkodaily.com/news/county-to-charge-inmates-for-food-doctor/article_b69992e8-8ee8-11e3-82ee-001a4bcf887a.html.

³⁷ U.S. Const. amend. VIII.

³⁸ *United States v. Bajakajian*, 524 U.S. 321, 322 (1998).

³⁹ *Tillman v. Lebanon Cnty. Corr. Facility*, 221 F.3d 410, 416 (3d Cir. 2000).

⁴⁰ *Trop v. Dulles*, 356 U.S. 86 (1958).

⁴¹ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

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