

**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**

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## ***INTRODUCTION***

Between 2000 and 2007, the rate of imprisonment in the United States increased more rapidly than the general population.<sup>1</sup> Amidst this rapid increase in the rate of incarceration, states have been experiencing budget deficits, which “are expected to continue, and possibly increase in the coming years.”<sup>2</sup> States will have to find measures that control corrections costs as budget deficits continue to increase.<sup>3</sup> While seeking a solution to the faltering economy and the increasing rate of incarceration, “some elected officials are embracing a new idea: making inmates pay their debt to society not only in hard time, but also in cold, hard cash.”<sup>4</sup> Pay-to-stay programs charge inmates for the cost of their incarceration and have been implemented in various forms to combat decreasing corrections budgets and high incarceration rates. New York’s proposed “Madoff Bill” and New Jersey’s similar bill, if used in conjunction with other measures that seek to decrease the rate of incarceration, may provide a financial solution for their respective states, because the bills would defray the high costs of incarceration, while promoting personal responsibility where an individual has sufficient means. Several other states have implemented similar programs over the past two decades that charge inmates for the cost of their incarceration through different methods.

<sup>1</sup> HEATHER C. WEST & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, PRISONERS IN 2007 1 (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p07.pdf>.

<sup>2</sup> CHRISTINE S. SCOTT-HAYWARD, VERA INSTITUTE OF JUSTICE, THE FISCAL CRISIS IN CORRECTIONS: RETHINKING POLICIES AND PRACTICES 2 (2009), available at [http://www.vera.org/files/The-fiscal-crisis-in-corrections\\_July-2009.pdf](http://www.vera.org/files/The-fiscal-crisis-in-corrections_July-2009.pdf).

<sup>3</sup> *Id.*

<sup>4</sup> *N.Y. Lawmaker Introduces ‘Madoff Bill,’ Aims to Charge Wealthy Prisoners*, FOXNEWS.COM (Aug. 5, 2009), <http://www.foxnews.com/politics/2009/08/05/ny-lawmaker-introduces-madoff-aims-charge-wealthy-prisoners/>.

This Note examines the potential efficacy of the proposed pay-to-stay legislation in New York and New Jersey and concludes that while the legislation would not serve as a panacea for current problems, it has the potential to provide a significant amount of funds to both states. Part I describes the problem of high rates of incarceration and the associated costs. Part II surveys the current legislation of several states and details popular provisions of pay-to-stay legislation. Part III addresses the effectiveness and criticisms of pay-to-stay programs. Part IV then explains the pertinent provisions of the proposed legislation in New York and New Jersey. Part V identifies alternative measures available to states for addressing both high incarceration rates and decreasing budgets. Part VI analyzes the proposed legislation and looks at the potential efficacy of both bills. Finally, this Note concludes that New York's Madoff Bill and New Jersey's S. 579 should be adopted, as they have the potential to provide a significant source of funding to both states.

## ***I. BACKGROUND***

### *A. Incarceration Rates*

The incarceration rate in the United States is staggering in comparison to other industrialized nations; incarceration per capita in the United States is “three times more than Israel, five times more than England, six times more than Australia and Canada, eight times more than France, and over twelve times more than Japan.”<sup>5</sup> In 2008, for the first time in history, 2.3 million people, or one in every 100 adults in the United States, were incarcerated.<sup>6</sup> Excluding those incarcerated in jails, the number of United States residents serving sentences in federal or state prison accounted for one in every 198 residents as of December 31, 2007.<sup>7</sup> Between 2000 and 2007, the rate of imprisonment in the United States increased more rapidly than the general population; the number of prisoners increased by 15%, with the general population

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<sup>5</sup> Adam M. Gershowitz, *An Informational Approach to the Mass Imprisonment Problem*, 40 ARIZ. ST. L.J. 47, 52 (2008).

<sup>6</sup> John Gramlich, *Study Finds Disparity in Corrections Spending*, STATELINE.ORG (Mar. 2, 2009), <http://www.stateline.org/live/details/story?contentId=380542>.

<sup>7</sup> WEST & SABOL, *supra* note 1, at 3. “As of December 31, 2007, there were 506 sentenced prisoners per 100,000 U.S. residents (1 in every 198 U.S. residents) up from 501 per 100,000 at yearend 2006.” *Id.*

increasing only 6.4% during the same time period.<sup>8</sup> Despite the overall trend between 2000 and 2007, New York experienced a decrease of sixty-two prisoners per 100,000 residents, and New Jersey experienced a similar decrease of fifty-four prisoners per 100,000 residents.<sup>9</sup>

The increase in the number of incarcerated individuals has led to overcrowding in many prisons and jails. The 2000 Census of State and Correctional Facilities conducted by the Bureau of Justice Statistics concluded that while federal prisons were rated to hold approximately 83,000 individuals, they were holding nearly 111,000 prisoners.<sup>10</sup> On average, state prison facilities were also found to be operating in excess of capacity.<sup>11</sup> Citing these statistics, one author noted that “[t]his is to say nothing of the over-crowding in hundreds of the nation’s jails that are not analyzed in the Bureau of Justice Statistics.”<sup>12</sup> As prisoners challenge overcrowding through the legal system, the state experiences increased costs in defending itself against these suits.<sup>13</sup> Prison overcrowding is also linked to other problems with confinement, such as “unsanitary facilities, inadequate staffing, poor medical care, heightened levels of tension and violence, and a higher incidence of sexual assault.”<sup>14</sup>

### *B. Costs of Incarceration*

In the 2008 fiscal year, total corrections expenditures of states reached nearly \$52 billion.<sup>15</sup> States spent approximately \$47 billion of general funds, \$4 billion of special funds and bonds, and \$900 million of federal funds on corrections.<sup>16</sup> Since 1998, the \$47 billion expenditure of general funds represents a massive 303% increase in spending.<sup>17</sup> Total

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<sup>8</sup> *Id.* at 1.

<sup>9</sup> *Id.* at 5. “[I]ndividuals under the jurisdiction of state and federal correctional authorities.” HEATHER C. WEST & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2008 – STATISTICAL TABLES 21 (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim08st.pdf>.

<sup>10</sup> Gershowitz, *supra* note 5, at 9-10.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 10.

<sup>13</sup> *Id.* at 20.

<sup>14</sup> *Id.*

<sup>15</sup> SCOTT-HAYWARD, *supra* note 2, at 3.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

corrections expenditures rank as the fifth largest area of state spending behind “Medicaid, secondary education, higher education and transportation.”<sup>18</sup> The past few years alone have seen a large increase in corrections expenditures by states; in 2005, state governments made direct expenditures of more than \$31 billion on institutions.<sup>19</sup>

The cost of housing an individual inmate varies greatly among states and regions of the country. In fiscal year 2005, Rhode Island’s average per inmate cost of incarceration of \$44,860 was the highest in the country, while Louisiana had the lowest average per inmate cost of incarceration of \$13,009.<sup>20</sup> Northeastern states had an average per inmate cost of incarceration of \$35,584, while southern states had an average of only \$17,991 in 2005.<sup>21</sup> Currently, the cost of incarceration per inmate in New Jersey is over \$38,700 per year.<sup>22</sup> New York’s current average per inmate cost of incarceration is in excess of \$40,000 per year.<sup>23</sup>

At least twenty-six states have responded to the national recession by cutting their prison budgets, which was one of the fastest-growing areas of government spending, for fiscal year 2010.<sup>24</sup> These states have made budget cuts despite the fact that the “state corrections budgets have ballooned in the past two decades amid a surging U.S. prison population.”<sup>25</sup> While many states made smaller cuts in the corrections budgets, seven states cut corrections funding by more than ten percent.<sup>26</sup> Kansas made the largest reported budget cut with a 22%

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<sup>18</sup> John Gramlich, *At Least 26 States Spend Less on Prisons*, STATELINE.ORG (Aug. 11, 2009), <http://www.stateline.org/live/details/story?contentId=418338>.

<sup>19</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, *available at* <http://www.albany.edu/sourcebook/pdf/t192005.pdf>.

<sup>20</sup> John Gramlich, *Strapped States Eye Prison Savings*, STATELINE.ORG (Jan. 26, 2009), <http://www.stateline.org/live/printable/story?contentId=365279>.

<sup>21</sup> *Id.*

<sup>22</sup> S. 579, 2010 Sess., 214th Leg.(N.J. 2010), *available at* [http://www.njleg.state.nj.us/2010/Bills/S1000/579\\_I1.PDF](http://www.njleg.state.nj.us/2010/Bills/S1000/579_I1.PDF).

<sup>23</sup> Gramlich, *supra* note 20.

<sup>24</sup> Thirty-seven states responded to this survey. Gramlich, *supra* note 18. “The survey did not take into account federal stimulus money, which allowed some states to blunt the impact of their budget cuts.” *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> “Georgia, Idaho, Illinois, Kansas, Montana, Nebraska, and Washington – cut funding for corrections by more than 10 percent from last year’s levels according to the study.” *Id.*

decrease in state funding to corrections.<sup>27</sup> The Vera Institute of Justice stated that “[w]ith one in every 15 state general fund dollars now spent on corrections, officials have little choice but to look there for savings. In doing so, however, they must be careful to find cuts that will not compromise public safety.”<sup>28</sup>

### *C. Charging Inmates for the Cost of their Incarceration*

The practice of charging inmates for the cost of their incarceration began when Michigan adopted its State Correctional Facility Reimbursement Act.<sup>29</sup> Statutes requiring reimbursement to the state or county paying the cost of imprisonment are often referred to as pay-to-stay programs. In 1983, interviews with prison officials in forty-four states revealed that the vast majority of states had exceeded their housing capacities and many others had difficulty remaining below their inmate capacity.<sup>30</sup> At this time, Michigan was facing serious overcrowding issues.<sup>31</sup> The Michigan Corrections Commissioner asked Governor James J. Blanchard to declare an emergency, in accordance with the State’s Prison Overcrowding Emergency Powers Act.<sup>32</sup> That act mandates the declaration of an emergency whenever the prison population is in excess of a predetermined number for longer than thirty consecutive days.<sup>33</sup> It was in this context that Michigan adopted the State Correctional Facility Reimbursement Act. Since 1984, at least twenty-four states have adopted similar programs as a means of recouping a portion of the funds expended on incarcerating those convicted of crimes. These programs are popular amongst taxpayers, as they reflect the belief that “[i]nmates should be made to pay for their crimes – literally.”<sup>34</sup> These statutes are seen as “symbolic” and address both the accountability and fiscal issues of incarceration.<sup>35</sup>

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<sup>27</sup> *Id.*

<sup>28</sup> SCOTT-HAYWARD, *supra* note 2, at 3.

<sup>29</sup> MICH. COMP. LAWS SERV. § 800.401 (LexisNexis 2009).

<sup>30</sup> Monica Davey & Abby Goodnough, *State Prisons Around Nation Scramble for Relief as Overcrowding Mounts*, N.Y. TIMES, Sept. 29, 1983, at A18.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *State Prisons Go After New Source of Financing: Their Inmates*, N.Y. TIMES, July 7, 1996, at 14.

<sup>35</sup> *Id.*

## II. LEGISLATION

### A. State Statutes

At least twenty-four states have a statute allowing for the recovery of the costs of incarceration from inmates.<sup>36</sup> While some statutes provide for detailed procedures as to the assessment and collection of the costs of incarceration,<sup>37</sup> others merely authorize the practice.<sup>38</sup> Further, some statutes permit state recovery,<sup>39</sup> while others provide for recovery by counties.<sup>40</sup> Still others provide for recovery by both states and counties. Despite these differences, there are several provisions that are common to many.

The pay-to-stay statutes can be grouped into two categories: those that provide the state with a cause of action against the inmate,<sup>41</sup> and those that permit a fee to be assessed against an inmate without a

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<sup>36</sup> See ARIZ. REV. STAT. § 31-238 (LexisNexis 2008); ARK. CODE ANN. § 12-29-506 (2009); CONN. GEN. STAT. § 18-85a (2008); FLA. STAT. ANN. § 944.485 (LexisNexis 2009); IDAHO CODE ANN. § 20-607 (2009); 730 ILL. COMP. STAT. ANN. 125/20 (LexisNexis 2009); IOWA CODE § 356.7 (2008); KY. REV. STAT. ANN. § 441.265 (LexisNexis 2009); LA. REV. STAT. ANN. § 15:705 (2009); ME. REV. STAT. ANN. tit. 17-A, § 1341 (2009); MICH. COMP. LAWS SERV. § 800.401 (LexisNexis 2009); MO. REV. STAT. § 217.831 (2009); MONT. CODE ANN. § 53-1-107 (2009); NEV. REV. STAT. ANN. § 211.2415 (LexisNexis 2009); N.H. REV. STAT. ANN. § 30-B:19 (LexisNexis 2009); OHIO REV. CODE ANN. § 5120.56 (LexisNexis 2009); OKLA. STAT. tit. 22, § 979a (2009); OR. REV. STAT. § 169.151 (2007); TENN. CODE ANN. § 41-21-905 (2009); TEX. GOV'T CODE ANN. § 501.019 (West 2009); UTAH CODE ANN. § 76-3-201 (LexisNexis 2009); W. VA. CODE § 25-1-3a (2009); WIS. STAT. § 301.325 (2009); WYO. STAT. ANN. § 7-13-109 (2009).

<sup>37</sup> See ARK. CODE ANN. § 12-29-506; CONN. GEN. STAT. § 18-85a; 730 ILL. COMP. STAT. ANN. 125/20; MICH. COMP. LAWS SERV. § 800.403(2); MO. REV. STAT. § 217.831.

<sup>38</sup> Kentucky allows the amount to be deducted from the inmate's canteen account. KY. REV. STAT. ANN. § 441.265. Louisiana requires approval by the sentencing judge. LA. REV. STAT. ANN. § 15:705.

<sup>39</sup> Those states providing for state recovery include: Arizona, Connecticut, Michigan, Missouri, Texas, Tennessee, and Wisconsin. ARIZ. REV. STAT. § 31-238; CONN. GEN. STAT. § 18-85a; MICH. COMP. LAWS SERV. § 800.401; MO. REV. STAT. § 217.831; TENN. CODE ANN. § 41-21-905; TEX. GOV'T CODE ANN. § 501.019; WIS. STAT. § 301.325.

<sup>40</sup> Those states providing for county recovery include: Idaho, Maine, Michigan, Nevada, and Wyoming. IDAHO CODE ANN. § 20-607; ME. REV. STAT. ANN. tit. 17-A, § 1341; MICH. COMP. LAWS SERV. § 801.88; NEV. REV. STAT. ANN. § 211.2415; WYO. STAT. ANN. § 7-13-109.

<sup>41</sup> Those statutes providing a cause of action against the inmate include: ARK. CODE ANN. § 12-29-506 (2009); CONN. GEN. STAT. § 18-85a (2008); 730 ILL. COMP. STAT. ANN. 125/20 (LexisNexis 2009); MICH. COMP. LAWS SERV. § 800.403(2) (LexisNexis 2009); MO. REV. STAT. § 217.831 (2009).

judicial proceeding.<sup>42</sup> In states where the statute provides a cause of action, the Attorney General is authorized to initiate civil proceedings, if certain requirements are met, to recover the costs of incarceration from the inmate or former inmate.<sup>43</sup> Other statutes do not require a judicial proceeding, however, the statutes may authorize the fee to be deducted from the inmate's canteen account,<sup>44</sup> or may require approval by the sentencing judge in order to seek reimbursement from the inmate.<sup>45</sup> A few states provide for both practices by authorizing the deduction of costs from the assets in the possession of the correction official or government authority, and by then permitting the institution of a civil action if the funds available are insufficient to cover the entire cost of incarceration.<sup>46</sup> Some statutes specify what will be done with the funds received as reimbursement for incarceration costs, with most dictating that the funds go to the corrections department or facility budget.<sup>47</sup>

Where a recovery is not automatically permitted, many statutes impose a time limit within which the Attorney General or the county may bring the action to recover.<sup>48</sup> For example, Connecticut's statute permits the Attorney General to bring a claim within two years of the inmate's release.<sup>49</sup> Idaho imposes a one-year limitation for the county to

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<sup>42</sup> Those statutes permitting a fee to be assessed without a judicial proceeding include: KY. REV. STAT. ANN. § 441.265 (LexisNexis 2009); LA. REV. STAT. ANN. §15:705 (2009).

<sup>43</sup> ARK. CODE ANN. § 12-29-506; CONN. GEN. STAT. § 18-85a; 730 ILL. COMP. STAT. ANN. 125/20; MICH. COMP. LAWS SERV. § 800.403(2); MO. REV. STAT. § 217.831.

<sup>44</sup> *E.g.*, KY. REV. STAT. ANN. § 441.265.

<sup>45</sup> *E.g.*, LA. REV. STAT. ANN. §15:705.

<sup>46</sup> OHIO REV. CODE ANN. § 5120.56 (LexisNexis 2009); OKLA. STAT. tit. 22 § 979a (2009).

<sup>47</sup> Seventy percent of money recovered goes to the state general fund and 30% goes to the Attorney General's costs. ARIZ. REV. STAT. § 31-238 (LexisNexis 2008). Reimbursements are credited to the justice fund or current expense fund of the county, to be available for jail maintenance and operation purposes. IDAHO CODE ANN. § 20-607 (2009). Money recovered goes to the jail's budget. KY. REV. STAT. ANN. § 441.265. Twenty percent is paid to a recovered inmate incarceration reimbursement act revolving fund, and the remaining money goes to the department for the construction and operation of the correctional facility. MO. REV. STAT. § 217.841. "[C]redit the moneys to the appropriate fund established by law from which appropriations to the department are made for inmate care and custody at the department." ARK. CODE ANN. § 12-29-507.

<sup>48</sup> Those statutes explicitly implementing a time limit for recovery include: CONN. GEN. STAT. § 18-85a; IDAHO CODE ANN. § 20-607; KY. REV. STAT. ANN. § 441.265.

<sup>49</sup> CONN. GEN. STAT. § 18-85a (2008).

file a claim against the former inmate for reimbursement.<sup>50</sup>

Many of the statutes provide for an assessment of the inmate or former inmate's ability to pay the cost of their incarceration.<sup>51</sup> Florida assesses the inmate's ability to pay all or a portion of the cost of his or her incarceration, and looks to the obligations of the individual to the victim and the needs of the inmate's dependents.<sup>52</sup> Under the Idaho statute, the county investigates the financial status of the inmate by looking at the "age, marital status, number and ages of children and other dependents, type and value of real estate, personal property, investments, cash, bank accounts, pensions, annuities, salary, wages, other personal property."<sup>53</sup> Many statutes exclude jointly owned property or assets.<sup>54</sup> Other statutes mandate that "the fee must bear a reasonable relationship to the offender's ability to pay."<sup>55</sup> The determination that an inmate has the ability to pay a certain portion is a prerequisite to seeking recovery under certain statutes.<sup>56</sup> At least three states require that the Attorney General have "good cause to believe that a prisoner has sufficient assets to recover not less than 10% of the estimated cost of care of the prisoner or 10% of the estimated cost of care for two years, whichever is less."<sup>57</sup>

Some statutes specify a maximum permitted recovery, while others specify a method or formula for determining the amount to be assessed against the inmate.<sup>58</sup> Several statutes provide for the amount for each day that may be charged as the lesser of the amount specified in the statute and the actual cost of incarceration.<sup>59</sup> In Maine, the fee assessed

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<sup>50</sup> IDAHO CODE ANN. § 20-607.

<sup>51</sup> See FLA. STAT. ANN. § 944.485 (LexisNexis 2009); IDAHO CODE ANN. § 20-607; KY. REV. STAT. ANN. § 441.265 (LexisNexis 2009); ME. REV. STAT. ANN. tit. 17-A, § 1341 (2009); MICH. COMP. LAWS SERV. § 800.403(2) (LexisNexis 2009); MO. REV. STAT. § 217.831 (2009); TENN. CODE ANN. § 41-21-905 (2009); WYO. STAT. ANN. § 7-13-109 (2009).

<sup>52</sup> FLA. STAT. ANN. § 944.485.

<sup>53</sup> IDAHO CODE ANN. § 20-607 (2009).

<sup>54</sup> See, e.g., KY. REV. STAT. ANN. § 534.045.

<sup>55</sup> ME. REV. STAT. ANN. tit. 17-A, § 1341. See also KY. REV. STAT. ANN. § 534.045.

<sup>56</sup> See MICH. COMP. LAWS SERV. § 800.403(2). See also MO. REV. STAT. § 217.831; TENN. CODE ANN. § 41-21-905.

<sup>57</sup> MICH. COMP. LAWS SERV. § 800.403(2) (LexisNexis 2009). See also MO. REV. STAT. § 217.831 (2009); TENN. CODE ANN. § 41-21-905 (2009).

<sup>58</sup> See IDAHO CODE ANN. § 20-607; KY. REV. STAT. ANN. § 441.265 (LexisNexis 2009); ME. REV. STAT. ANN. tit. 17-A, § 1341 (2009); OR. REV. STAT. § 169.151 (2007).

<sup>59</sup> See IDAHO CODE ANN. § 20-607 (2009); KY. REV. STAT. ANN. § 441.265; ME. REV.

by the sentencing court “may not exceed the cost of incarcerating the offender or \$80 per day, whichever is less.”<sup>60</sup> Rather than specify a per diem rate, many statutes require the determination of the per annum cost by the department of corrections or commissioner of corrections, and then prorate this amount for those individuals who are incarcerated less than 334 days.<sup>61</sup> Some statutes also permit recovery from inmates for the cost of incarceration during the time served prior to conviction.<sup>62</sup> States may also allow for the cost of incarceration to be offset by any claim or obligation that the inmate has against the state.<sup>63</sup>

Finally, some statutes impose consequences for failing to comply with the statute’s terms.<sup>64</sup> For example, the Idaho statute does not allow for an inmate’s term to be reduced if they have “willfully [refused]” to provide information regarding their assets.<sup>65</sup> Also, Florida requires that inmates disclose their assets as a condition of parole.<sup>66</sup> Perhaps the most extreme statute is that of Maine, which provides that the offender must show by a preponderance of the evidence that his failure to pay was not the result of an “intentional or knowing refusal to obey the court’s order or . . . a failure on the offender’s part to make a good-faith effort to obtain the funds required to make payment.”<sup>67</sup> Maine permits the court to place an offender under custody, if seeking reimbursement once the individual has been released, “until all or a specified part of the jail reimbursement fee is paid,” but the length of confinement “may not exceed one day for every \$5 of unpaid jail reimbursement fee or 6 months, whichever is shorter.”<sup>68</sup>

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STAT. ANN. tit. 17, § 134; OR. REV. STAT. § 169.151.

<sup>60</sup> ME. REV. STAT. ANN. tit. 17-A, § 1341. *See also* IDAHO CODE ANN. § 20-607; KY. REV. STAT. ANN. § 441.265; OR. REV. STAT. § 169.151.

<sup>61</sup> *See, e.g.*, ARIZ. REV. STAT. § 31-238.

<sup>62</sup> *See, e.g., id.*

<sup>63</sup> *Id.*

<sup>64</sup> *See* IDAHO CODE ANN. § 20-607; ME. REV. STAT. ANN. tit. 17-A, § 1341 (2009).

<sup>65</sup> IDAHO CODE ANN. § 20-607 (2009).

<sup>66</sup> FLA. STAT. ANN. § 944.485 (LexisNexis 2009).

<sup>67</sup> ME. REV. STAT. ANN. tit. 17-A, § 1341.

<sup>68</sup> *Id.*

*B. Litigation Regarding the Statutes*

## 1. Due Process Challenge

Missouri has one of the most comprehensive pay-to-stay statutes, containing several provisions that have been included in the New York and New Jersey bills.<sup>69</sup> The Missouri Incarceration Reimbursement Act has withstood due process challenges. *Missouri v. Peterson*<sup>70</sup> demonstrates the constitutionality of a cost-effective statutory provision, and how this provision functions to prevent the state from seeking reimbursement where such actions would be futile and a waste of state resources.<sup>71</sup> Petitioner was convicted of first-degree robbery in 1995, and was sentenced to twenty-five years in prison.<sup>72</sup> He worked in the craft room and sold his projects, and received a state payroll deposit each month.<sup>73</sup>

In May 2006, the Attorney General filed a petition for reimbursement under the Missouri Incarceration Reimbursement Act, which stated that the Attorney General had good cause to believe that the state could recover at least the threshold amount, ten percent of the cost of Petitioner's care for two years.<sup>74</sup> The parties agreed that ten percent of the Petitioner's cost of care for two years was \$2800.<sup>75</sup>

Petitioner argued that the statutory definition of assets was unconstitutionally vague, and that because the court seized his assets without a hearing, the act violated his due process rights.<sup>76</sup> He also challenged the Attorney General's finding of good cause under section 217.831.3, asserting that the Attorney General did not have the authority to file the petition for reimbursement.<sup>77</sup> Examining the language of the statute,<sup>78</sup> the Supreme Court of Missouri found that the use of the words

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<sup>69</sup> MO. REV. STAT. § 217.827 (2009).

<sup>70</sup> *Missouri v. Peterson*, 253 S.W.3d 77 (Mo. 2008).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 80.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 80 n.3.

<sup>76</sup> *Missouri v. Peterson*, 253 S.W.3d 77, 80 (Mo. 2008).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 81. Section 217.827 states that for the Missouri Incarceration Reimbursement Act, the term asset shall mean:

(1) (a) "Assets", property, tangible or intangible, real or personal, belonging to

“wages” and “bonuses” implied “a regular employment relationship.”<sup>79</sup> The Court also found that the state payroll monthly deposits were the only funds that qualified as a wage or bonus, and were properly excluded from the Attorney General’s assessment of Petitioner’s assets.<sup>80</sup>

In response to Petitioner’s due process claim, the Court noted that before a pre-judgment seizure, the Attorney General must have good

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or due an offender or a former offender, including income or payments to such offender from Social Security, workers’ compensation, veterans’ compensation, pension benefits, previously earned salary or wages, bonuses, annuities, retirement benefits, or from any other source whatsoever, including any of the following:

a. Money or other tangible assets received by the offender as a result of a settlement of a claim against the state, any agency thereof, or any claim against an employee or independent contractor arising from and in the scope of said employee’s or contractor’s official duties on behalf of the state or any agency thereof;

b. A money judgment received by the offender from the state as a result of a civil action in which the state, an agency thereof or any state employee or independent contractor where such judgment arose from a claim arising from the conduct of official duties on behalf of the state by said employee or subcontractor or for any agency of the state;

c. A current stream of income from any source whatsoever, including a salary, wages, disability, retirement, pension, insurance or annuity benefits or similar payments;

(b) “Assets” shall not include:

a. The homestead of the offender up to fifty thousand dollars in value;

b. Money saved by the offender from wages and bonuses up to two thousand five hundred dollars paid the offender while he or she was confined to a state correctional center. Mo. Rev. Stat. § 217.827 (2009).

<sup>79</sup> *Peterson*, 253 S.W.3d at 81. In determining what is considered an asset some states have determined that the state may access gifts and windfalls of inmates or former inmates in seeking reimbursement for the costs of incarceration. According to the press secretary for the Attorney General in Missouri, “[g]ifts are considered assets under the statute. In many cases, inmates received thousands of dollars in deposits, which are put into their inmate accounts each year... Some inmates have large assets, such as retirement funds, trust funds, annuity payments, inheritances and lottery winnings.” Trish Mehaffey, *Attorneys Battle Law Requiring Prisoners to Pay for Their Stay*, DAILY RECORD (Kansas City, Mo.), July 9, 2007, available at 2007 WLNR 26684687. Also, in Connecticut, “[t]he state Department of Administrative Services has collected incarceration costs from current and former inmates who come into what the state considers a ‘windfall’ – money received through an inheritance, the lottery, or a legal judgment – since 2001.” Ann Marie Somma, *Windfalls Not Much Luck for Prisoners; States Will Send a Bill to Cover its Expenses*, HARTFORD COURANT, Apr. 15, 2007, at A1.

<sup>80</sup> *Peterson*, 253 S.W.3d at 81-82. Section 217.827(1)(b) excludes from assets “[m]oney saved by the offender from wages and bonuses up to two thousand five hundred dollars paid the offender while he or she was confined to a state correctional facility.” *Id.* at 80.

cause to believe that the offender has sufficient assets,<sup>81</sup> and that the court is then required to issue an order to show cause regarding why the petition should not be granted to the Attorney General.<sup>82</sup> This process provides the offender with notice and the opportunity to challenge the petition.<sup>83</sup> The Court stated that “the fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner,’”<sup>84</sup> and found that the statutory procedures provided adequate due process to offenders.<sup>85</sup> Finally, in response to the argument that the Attorney General did not have the authority to file the petition, the Court noted that the “good cause to believe” requirement is a condition precedent that must be met in order for the Attorney General to have the authority to seek reimbursement.<sup>86</sup> The Court noted that the good cause requirement is not intended as a defense to a petition for offenders, but rather is “intended as a cost-effective limitation on the attorney general’s authority.”<sup>87</sup> An offender is entitled to an evidentiary hearing to determine whether there is good cause if the offender is able to raise a factual issue regarding the presence of the requisite assets.<sup>88</sup>

### III. PAY-TO-STAY PROGRAMS

#### A. Effectiveness of Current Programs

Many states and counties have recovered large sums of money from inmates as reimbursement for the costs of their incarceration.<sup>89</sup> For example, under the Missouri Incarceration Reimbursement Act, the

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<sup>81</sup> *Id.* at 82 (citing MO. REV. STAT. § 217.837.2).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* (quoting *Jamison v. Dep’t of Soc. Servs.*, 218 S.W.3d 399, 405 (Mo. 2007) (en banc)).

<sup>85</sup> *Missouri v. Peterson*, 253 S.W.3d 77, 83 (Mo. 2008).

<sup>86</sup> *Id.* (citing *State ex rel. Nixon v. Watson*, 204 S.W.3d 716, 720 (Mo. Ct. App. 2006); *State ex rel. Nixon v. Koonce*, 173 S.W.3d 277, 283-85 (Mo. Ct. App. 2005)).

<sup>87</sup> *Peterson*, 253 S.W.3d at 83 (citing *Watson*, 204 S.W.3d at 720; *Koonce*, 173 S.W.3d at 283-85).

<sup>88</sup> *Id.* at 83-84.

<sup>89</sup> Missouri collected more than \$5.3 million between 1993 and 2007. Mehaffey, *supra* note 79. Connecticut collected \$5 million between 2001 and April 2007. Somma, *supra* note 79. Macomb County, Michigan recovered nearly \$1.5 million in 2003 alone. Fox Butterfield, *Many Local Officials Now Make Inmates Pay Their Own Way*, N.Y. TIMES, Aug. 13, 2004, at A1.

State collected more than \$5.3 million between 1993 and 2007.<sup>90</sup> In 2006 alone, the Missouri Attorney General's office collected \$757,862 from state inmates as reimbursement to the state for the cost of their incarceration.<sup>91</sup>

Under Michigan's Prisoner Reimbursement to the County Act, Macomb County, Michigan, which charges inmates for room and board "on a sliding scale of \$8 to \$56 a day, depending on ability to pay," collected nearly \$1.5 million in 2003 alone.<sup>92</sup> In addition, Hillsborough County, Florida recently adopted a daily subsistence fee of \$5 per day and has added a charge of \$50 per day for those inmates who have been convicted of a crime and are serving time in jail.<sup>93</sup> Police Commissioner Kevin Beckner believes that these new measures could raise as much as \$5.6 million assuming a collection rate of 80%.<sup>94</sup> Further, Connecticut, which collects its reimbursement fees from inmates' windfalls, collected \$5 million between 2001 and April 2007, with the Connecticut Department of Administrative Services collecting \$1.9 million in 2006 alone.<sup>95</sup>

Despite administrative costs,<sup>96</sup> pay-to-stay programs collect a significant amount of money for the states and counties that implement them. Although the money that such programs bring in may be small in comparison to a jail or prison's annual operating cost, the programs are also popular with the public.<sup>97</sup> Sheriff Mark Hackel of Macomb County, Michigan said "[w]hy should we as taxpayers have to pay the whole

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<sup>90</sup> Mehaffey, *supra* note 79. Missouri Department of Corrections reported an estimated inmate cost per year of \$14,000. *Id.*

<sup>91</sup> *Nixon Gets \$757,862 From State Inmates*, SPRINGFIELD NEWS-LEADER, Dec. 20, 2006, at 1B. Under the Missouri statute, the Attorney General has a cause of action to obtain a judgment against the offender for the cost of their incarceration if they have good cause to believe the recovery will be above certain threshold levels. MO. REV. STAT. § 217.831 (2009).

<sup>92</sup> Butterfield, *supra* note 89.

<sup>93</sup> Bill Varin, *Jail Inmates May Pay More For Stay*, ST. PETERSBURG TIMES, Sept. 17, 2009, at 5B.

<sup>94</sup> *Id.* Due to the fact that the \$50 daily fee could cost some inmates approximately \$18,000, as many jail inmates are serving sentences of just under one year for misdemeanors. *Id.*

<sup>95</sup> Somma, *supra* note 79.

<sup>96</sup> Butterfield, *supra* note 89. The Macomb County, Michigan program costs \$120,000 per year to administer. *Id.*

<sup>97</sup> *Id.*

cost of incarcerating these people who break the law?”<sup>98</sup> The Jacksonville Sheriff, John Rutherford, expressed a similar sentiment, stating that although the money collected will “only put a dent” in his budget, “the general public will appreciate the fact [that] inmates will be made to pay some of their own way.”<sup>99</sup>

### *B. Criticism of Pay-to-Stay Statutes*

Many opponents of pay-to-stay statutes criticize the laws as ineffective because the inmates from whom reimbursement is sought are often poor.<sup>100</sup> The ACLU’s National Prison Project has criticized pay-to-stay statutes as ineffective.<sup>101</sup> The National Prison Project believes that since “[t]he overwhelming number of people who end up in prison are poor,” pay-to-stay programs rarely are profitable.<sup>102</sup>

Another criticism of pay-to-stay statutes is that the funds sought are difficult to collect.<sup>103</sup> In Overland Park, Kansas, officials only collect

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<sup>98</sup> *Id.*

<sup>99</sup> Tia Mitchell, *Sheriff: Make the Inmates Pay More; Rutherford Suggests a \$2 Subsistence Fee for Incarceration Costs*, FLORIDA TIMES-UNION, May 27, 2008, at A1.

<sup>100</sup> See Butterfield, *supra* note 89. Stating that:

[T]he fees raise thorny ethical and constitutional issues, say advocates for prisoners rights and some other corrections experts. The costs place an unfair burden on a population that is almost by definition impoverished, making it harder for inmates to get back on their feet after release, some groups argue. Others contend that the fees deprive inmates of due process or constitute cruel and unusual punishment. In a few cases, courts have sided with the inmates of specific issues.

*Id.* Due to rising “clearance rates (‘the fraction of crimes cleared by arrest’)” and sentencing practices during the 1980s and 1990s, “about one and a half million more people were locked up in 2000 than in 1980. Such individuals are poor by any standard. Furthermore, their income – for the most part no more than a few dollars a day—place them very far below the poverty line.” Ian Irvine & Kuan Xu, *Crime, Punishment, and the Measurement of Poverty in the United States, 1979-1997 2* (Dalhousie University Economics Working Paper, June 2003), available at <http://ssrn.com/abstract=423220>.

<sup>101</sup> *N.Y. Lawmaker Introduces ‘Madoff Bill,’ Aims to Charge Wealthy Prisoners*, FOXNEWS.COM (Aug. 5, 2009), <http://www.foxnews.com/politics/2009/08/05/ny-lawmaker-introduces-madoff-aims-charge-wealthy-prisoners/>.

<sup>102</sup> *Id.* (quoting Elizabeth Alexander, ACLU’s National Prison Project director).

<sup>103</sup> See Butterfield, *supra* note 89. Stating that:

[C]ollecting fees is also an entirely different matter from levying them. Some places profess so much difficulty that they have concluded the administrative costs outweigh the benefits. Even if the programs bring in revenue, there may be other costs. “The simple, stark truth is that most inmates are not drug kingpins with lots of assets,” said Richard Blumenthal, the Connecticut attorney

39% of the fees that they are owed.<sup>104</sup> Officials in Jackson County, Missouri, found that they were expending more money in their efforts to collect the fees than they were able to collect.<sup>105</sup> Further, where counties merely attempt to collect their fees by taking money from inmates' commissary funds, inmates are able to avoid being charged for the cost of their incarceration by not depositing any money into their accounts.<sup>106</sup>

Critics also accuse pay-to-stay programs of placing the burden on the wrong people.<sup>107</sup> Oftentimes, friends and family members of inmates are left holding the bill in addition to, or in lieu of, the inmates themselves.<sup>108</sup> These programs "[place] an additional financial burden upon families already deprived of a wage-earner, especially where these family members, as taxpayers, are already subsidizing the cost of incarceration."<sup>109</sup> This criticism likely resonates best in states or counties that collect fees from the inmate's prison or jail account because it is the families of inmates that often make deposits into these accounts.<sup>110</sup>

Still other opponents of pay-to-stay statutes argue that the programs are not rehabilitative.<sup>111</sup> Since the programs may potentially burden a recently released inmate with a significant amount of debt, such inmates may feel pressure to resort to criminal activity in order to

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general. "In some cases, seizing assets may be counterproductive because it will interfere with their rehabilitation."

*Id.*

<sup>104</sup> *N.Y. Lawmaker Introduces 'Madoff Bill,' Aims to Charge Wealthy Prisoners*, *supra* note 101.

<sup>105</sup> *Id.*

<sup>106</sup> *See Butterfield*, *supra* note 89. According to one person, who was sentenced to jail for thirty days, "I don't put any money into my account, because they will just take it. . . I think this system is unjust, because the judge has already given us our sentence, and the fees are on top of that." *Id.*

<sup>107</sup> Particularly in states where fees are periodically collected from an inmate's prison account, the burden of these statutes falls on the wrong parties, as "[i]t's the spouses, children and parents who pay the fees. They are the people who contribute to the prisoners' canteen accounts." *N.Y. Lawmaker Introduces 'Madoff Bill,' Aims to Charge Wealthy Prisoners*, *supra* note 101.

<sup>108</sup> *Id.*

<sup>109</sup> Joshua Michtom, Note, *Making Prisoners Pay for Their Stay: How a Popular Correctional Program Violates the Ex Post Facto Clause*, 13 B.U. PUB. INT. L.J. 187, 201 (2004).

<sup>110</sup> *N.Y. Lawmaker Introduces 'Madoff Bill,' Aims to Charge Wealthy Prisoners*, *supra* note 101

<sup>111</sup> *See Michtom*, *supra* note 109, at 201.

relieve themselves of the burden.<sup>112</sup> According to Richard Blumenthal, the Connecticut Attorney General, “[t]he simple, stark truth is that most inmates are not drug kingpins with lots of assets. . . . In some cases, seizing assets may be counterproductive because it will interfere with their rehabilitation.”<sup>113</sup>

#### IV. PENDING LEGISLATION IN NEW YORK AND NEW JERSEY

##### A. New York’s Madoff Bill

Sponsored by New York State Assemblyman Jim Tedesco on June 23, 2009,<sup>114</sup> New York’s Madoff Bill would require inmates with sufficient financial means to pay for the costs of their incarceration.<sup>115</sup> Proposed Section 601-e would be entitled “Reimbursement for Costs of Imprisonment,” and proposed Subdivision 1 explains that the expense of imprisonment is to be borne by the inmates.<sup>116</sup> Under the bill, each inmate is subject to reimburse the state a specified portion of the cost of his incarceration.<sup>117</sup> This schedule looks to the inmate’s total assets to determine his liability to the state’s Department of Corrections, and creates a sliding scale dictating that an inmate owes a higher percentage of the cost of his or her incarceration the higher the amount of their total assets.<sup>118</sup> Under the proposed schedule, an inmate who has total assets of \$200,000 or more would be responsible for 100% of the cost of his or her incarceration, and an inmate who has total assets of less than \$40,000 would not be responsible for any of the cost.<sup>119</sup>

The bill excludes from an inmate’s “total assets” the value of his or her home or equity therein.<sup>120</sup> Child support and mortgage payments are also protected from consideration.<sup>121</sup>

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<sup>112</sup> *Id.*

<sup>113</sup> Butterfield, *supra* note 89.

<sup>114</sup> Assemb. 09055, 232nd Leg., Reg. Sess. (N.Y. 2009), available at [http://assembly.state.ny.us/leg/?default\\_fld=&bn=+A09055%09%09&Memo=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=+A09055%09%09&Memo=Y).

<sup>115</sup> N.Y. Assemb. 09055.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> M.J. Stephey, *Making Prisoners Pay – Literally*, TIME, July 22, 2009, available at <http://www.time.com/time/nation/article/0,8599,1912065,00.html>.

The purpose of the legislation is to:

...[E]liminate situations where taxpayers are forced to pay costs associated with incarcerating well-off criminals. Taxpayers should not be stuck with the bill housing well-off criminals that are often able to return to their opulent lifestyles once they are released. Forcing wealthy criminals to pay the costs associated with their incarceration will act as a deterrent and will prevent the inappropriate use of taxpayer funds in our prisons. . . This bill will hold criminals accountable for their actions while taking the fiscal burden off our taxpayers.<sup>122</sup>

In the justification for the bill, Assemblyman Tedisco explained that the “recent incident” in Tombs prison, where the prison was “used as a social club for parties hosted by wealthy inmates and their connected friends,” demonstrates the necessity for this legislation.<sup>123</sup> The justification states that the proposed legislation would “hold criminals accountable for their actions while taking the fiscal burden off our taxpayers.”<sup>124</sup> In addition to the Tombs Prison bar mitzvah being an impetus for the bill, Assemblyman Tedisco said that he has “been considering the bill for a long time, [and] called convicted Ponzi schemer Bernard Madoff’s 150-year sentence in federal prison the ‘tipping point.’”<sup>125</sup> Wealthy drug dealers are an additional target of the

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<sup>122</sup> Assemb. 09055, 232nd Leg., Reg. Sess. (N.Y. 2009), available at [http://assembly.state.ny.us/leg/?default\\_fld=&bn=+A09055%09%09&Memo=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=+A09055%09%09&Memo=Y).

<sup>123</sup> *Id.* In December 2008, at Tombs Jail in Downtown Manhattan, Tuvia Stern, an inmate in the detention center, hosted an extravagant, 60-person Bar Mitzvah celebration for his son. Stern, who was convicted of fraud, hosted the celebration from prison, “featuring a Kosher caterer on china plates and a live band.” *New York Assemblyman Proposes ‘Madoff Bill’ to Punish Wealthy Inmates*, FOXNEWS.COM (July 21, 2009) (on file with author). Tombs houses approximately 20,000 inmates each year and “is the largest receiving area in the country,” with “[m]ore than 500 corrections officers supervise some 850 inmates.” Harriet Ryan, *History Haunts Manhattan’s Tombs Jail*, CNN.COM (Dec. 31, 2002), <http://archives.cnn.com/2002/LAW/12/31/ctv.tombs/>.

<sup>124</sup> N.Y. Assemb. 09055.

<sup>125</sup> *New York Assemblyman Proposes ‘Madoff Bill’ to Punish Wealthy Inmates*, *supra* note 123.

A Ponzi scheme is an investment fraud that involves the payment of purported returns to existing investors from funds contributed by new investors. Ponzi scheme organizers often solicit new investors by promising to invest funds in opportunities claimed to generate high returns with little or no risk. In many Ponzi schemes, the fraudsters focus on attracting new money to make promised payments to earlier-stage investors and to use for personal expenses, instead of engaging in any legitimate investment activity.

*Ponzi Schemes – Frequently Asked Questions*, SEC. & EXCHANGE COMMISSION,

proposed legislation.<sup>126</sup>

*B. New Jersey Bill*

On May 7, 2009, State Senator James Beach (Camden) introduced NJ Legislative Bill S. 2809 that requires “certain inmates to pay the cost of their incarceration.”<sup>127</sup> On May 18, 2009, Assemblywoman Dawn Marie Addiego (Burlington) and Assemblyman Scott Rudder (Burlington) introduced an identical bill, NJ Legislative Bill A3964, in the State Assembly.<sup>128</sup> Then on January 12, 2010, Assemblywoman Addiego and Assemblyman Rudder introduced the exact same bill in the State Assembly, NJ Legislative Bill A1180.<sup>129</sup> On the same day, State Senator Beach introduced an identical bill in the State Senate, NJ Legislative Bill S. 579.<sup>130</sup>

Under the proposed legislation, the Commissioner of Corrections is responsible for establishing and collecting a fee to cover the costs of confinement for every year that an inmate is in the custody of the Department of Corrections.<sup>131</sup> The amount of the fee collected is the average cost of incarcerating an inmate for one year, which is to be prorated for people incarcerated for 334 days or less.<sup>132</sup> The amount of the fee includes “time served prior to conviction” as well.<sup>133</sup> The Commissioner will also establish and collect this fee for inmates in halfway houses and “similar private nonprofit community based residential treatment centers.”<sup>134</sup>

In assessing whether to impose a fee on a particular inmate, state officials gather information from the pre-sentencing investigation report

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<http://www.sec.gov/answers/ponzi.htm> (last visited Feb. 15, 2010).

<sup>126</sup> Stephey, *supra* note 121.

<sup>127</sup> S. 2809, 2009 Sess., 213th Leg. (N.J. 2009), available at [http://www.njleg.state.nj.us/2008/Bills/S3000/2809\\_I1.PDF](http://www.njleg.state.nj.us/2008/Bills/S3000/2809_I1.PDF).

<sup>128</sup> Assemb. 3964, 2009 Sess., 213th Leg. (N.J. 2009), available at [http://www.njleg.state.nj.us/2008/Bills/A4000/3964\\_I1.PDF](http://www.njleg.state.nj.us/2008/Bills/A4000/3964_I1.PDF).

<sup>129</sup> Assemb. 1180, 2010 Sess., 214th Leg. (N.J. 2010), available at [http://www.njleg.state.nj.us/2010/Bills/A1500/1180\\_I1.PDF](http://www.njleg.state.nj.us/2010/Bills/A1500/1180_I1.PDF). The bill was reintroduced as it was a new legislative session.

<sup>130</sup> S. 579, 2010 Sess., 214th Leg. (N.J. 2010), available at [http://www.njleg.state.nj.us/2010/Bills/S1000/579\\_I1.PDF](http://www.njleg.state.nj.us/2010/Bills/S1000/579_I1.PDF).

<sup>131</sup> N.J. S. 579(1)(a).

<sup>132</sup> *Id.* at (1)(b).

<sup>133</sup> *Id.*

<sup>134</sup> N.J. S. 579.

and the findings and orders of the sentencing court.<sup>135</sup> This information is used to determine the inmate's assets, liabilities, and dependents.<sup>136</sup> If the inmate's financial situation changes from the time of the report,

[T]he commissioner shall have the discretion to waive the fee or impose a lesser fee if the inmate demonstrates to the commissioner's satisfaction: (1) that the inmate is unable to pay the fee and is unlikely to become able to pay; or (2) that the imposition of the fee would unduly burden the inmate's dependents.<sup>137</sup>

The proposed legislation provides that the fees collected can be used towards alcohol and drug abuse prevention programs.<sup>138</sup> According to State Senator James Beach, "[m]any of those behind bars are there as a direct or indirect result of drug abuse, and I believe that the money collected could be put to better use to help fund substance abuse programs that may help decrease the rate of recidivism."<sup>139</sup>

As the means of collection, the State will have a lien against the inmate's property and income for the amount of the fee.<sup>140</sup> Importantly, the proposed legislation allows for those people either directly or indirectly affected by the lien to bring an action against the State in the county in which the lien was filed in order to challenge its validity.<sup>141</sup> Once this process is complete, the entry will have "the same force and effect as a civil judgment"<sup>142</sup> and the State will have "all the remedies and may take all of the proceedings for the collection thereof which may be had or taken upon the recovery of a judgment in action, but

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<sup>135</sup> *Id.* at (1)(c).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at (1)(d).

<sup>138</sup> *Id.* at (1)(e).

<sup>139</sup> James Beach & James W. Holzapfel, *Criminals Should Cover the Cost of Their Imprisonment*, ALLBUSINESS, July 20, 2009, <http://www.allbusiness.com/government/elections-politics-politics-political-parties/12601658-1.html>.

<sup>140</sup> S. 579(2)(a), 2010 Sess., 214th Leg. (N.J. 2010), available at [http://www.njleg.state.nj.us/2010/Bills/S1000/579\\_I1.PDF](http://www.njleg.state.nj.us/2010/Bills/S1000/579_I1.PDF). In order to establish the lien, the State Treasurer or commissioner is to issue a certificate that identifies the person who is indebted to the clerk of the Superior Court, and "the clerk shall immediately enter upon the record of docketed judgments the name and date of birth of such inmate as debtor; the State as creditor; the address of such inmate if shown in the certificate; the amount of the debt so certified; a reference to the statute under which the debt is assessed; and the date of making such entries." *Id.* at (2)(b).

<sup>141</sup> *Id.* at (2)(f).

<sup>142</sup> *Id.* at (2)(b).

without prejudice to any right to appeal.”<sup>143</sup> In addition, post-judgment interest may accrue from the date of docketing the certificate, if not waived by the State Treasurer.<sup>144</sup> Further, if the debt remains unpaid, and if the State Treasurer makes further collection efforts, a fee will be imposed in the amount of the greater of 20% of the debt or \$200.<sup>145</sup> In order to discharge the lien, the State Treasurer or his agent must file a certificate with the clerk of the Superior Court stating that the lien should be discharged.<sup>146</sup> The State Treasurer is authorized to compromise for the settlement of the amount of a lien for the costs of an inmate’s confinement.<sup>147</sup>

## **V. ALTERNATIVE WAYS TO ADDRESS THE BUDGET DECREASE AND/OR HIGH INCARCERATION RATE**

### *A. Jail and Prison Closures*

Several states have considered closing prisons as a means of decreasing their expenditures in light of the national recession.<sup>148</sup> As of 2009, Colorado, Kansas, Michigan, New Jersey, New York, North Carolina and Washington had at least considered closing prisons.<sup>149</sup> In addition, at least twenty-two states have “reduced beds, halted expansions, or delayed the opening of new facilities.”<sup>150</sup> The ability to

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> The State Treasurer can refer the matter to the Attorney General. *Id.*

<sup>146</sup> S. 2809(2)(d), 2009 Sess., 213th Leg. (N.J. 2009), available at [http://www.njleg.state.nj.us/2008/Bills/S3000/2809\\_I1.PDF](http://www.njleg.state.nj.us/2008/Bills/S3000/2809_I1.PDF).

<sup>147</sup> *Id.*

<sup>148</sup> John Gramlich, *Tracking the Recession: Prison Economics*, STATELINE.ORG (June 1, 2009), <http://www.stateline.org/live/details/story?contentId=403563>.

<sup>149</sup> Gramlich, *supra* note 18. By July 2009, Michigan had closed two prisons and one prison camp and has plans to close an additional three prisons and five prison camps in fiscal year 2010. New York has plans to close three minimum security prisons and parts of seven other facilities. SCOTT-HAYWARD, *supra* note 2, at 6-7. Since the fall of 2008, Washington has closed or has plans to close five units at different facilities. Press Release, Dep’t of Corr. Wash. State, DOC Announces Additional Prison Unit Closures and Delayed Openings (June 2, 2009), available at <http://www.doc.wa.gov/news/pressreleases/2009/060209DOCAnnouncesAdditionalPrisonUnitClosuresandDelayedOpenings.asp>. In 2009, New Jersey closed a Camden prison that held more than 1000 prisoners. *N.J. To Close Camden’s Riverfront State Prison*, CBS 3, <http://cbs3.com/local/Riverfront.State.Prison.2.909382.html> (last visited Aug. 29, 2010).

<sup>150</sup> SCOTT-HAYWARD, *supra* note 2, at 6-7.

take such actions in an effort to reduce corrections expenditures is limited to those states that have been able to lower their prison populations through policy reforms.<sup>151</sup>

In New York, prison closures have been implemented in an attempt to decrease the more than \$16 million budget gap, which is partially due to “staggering revenue losses” following the collapse of Wall Street.<sup>152</sup> With the hopes of saving more than \$50 million over the next two fiscal years, New York has plans for the complete closure of three minimum-security correctional camps, and the partial closure of seven additional facilities.<sup>153</sup> The State will move the inmates expected to be displaced by these closures, a total of 670 inmates, to other facilities with open beds.<sup>154</sup> Because of the potential for job loss, unions representing prison employees and the communities in which the facilities are located have opposed these closures.<sup>155</sup>

### *B. Reducing Guard to Inmate Ratio*

Another measure taken by some corrections systems to reduce expenditures is the reduction of the guard to inmate ratio.<sup>156</sup> However, this practice is potentially dangerous to both the inmates and the

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<sup>151</sup> *Id.* Policy reforms that can work to reduce prison populations include improving community supervision, reducing recidivism, and accelerating prison releases. *Id.* at 7-10.

<sup>152</sup> Gramlich, *supra* note 148.

<sup>153</sup> SCOTT-HAYWARD, *supra* note 2, at 6-7, 9. The Sullivan Annex, a minimum security prison in upstate New York is one of the closures. Gramlich, *supra* note 148. New York State has closed the following minimum-security correctional facilities: Mt. McGregor (Saratoga County), Pharsalia (Chenago County), Gabriels (Franklin County). New York State has plans to close the following Annexes: Butler Minimum (Wayne County – minimum security), Eastern Annex (Ulster County – medium security), Green Haven Annex (Dutchess County – medium security), Groveland Annex (Livingston County – minimum security), Lakeview Annex (Chautauqua County – medium security), Sullivan Annex (Sullivan County – minimum security), Washington Annex (Washington County - medium security). *Fact Sheet: 2009 Prison Closures*, NEW YORK ST. DEPARTMENT OF CORRECTIONAL SERVICES, <http://www.docs.state.ny.us/FactSheets/PrisonClosure09.html> (last visited Aug. 29, 2010).

<sup>154</sup> Gramlich, *supra* note 148. A spokesman for the New York State Department of Correctional Services explained, “[w]e are like everybody else. We have to cut back. We just don’t have the money...these are different times, and this is a big crisis that we face.” *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> See Kim Shayo Buchanan, Commentary, *It Could Happen to “You”: Pay-To-Stay Jail Upgrades*, 106 MICH. L. REV. FIRST IMPRESSIONS 60, 60 (2007).

remaining guards of the facilities.<sup>157</sup> In Los Angeles County, inmates are so densely packed in their cells that they must remain in their bunks at all times, causing routine assault and rape.<sup>158</sup> In 2006, amidst these terrible conditions, funding cutbacks led to a reduction in the guard-to-inmate ratio to approximately one guard per 1000 inmates, as compared to the national average of one guard per ten inmates.<sup>159</sup> In these dire conditions, “overburdened jail administrators and staff may feel there is little they can do to prevent the violence.”<sup>160</sup> Further, the Commission on Safety and Abuse in America’s Prisons identifies several conditions that are likely to result in violence: “overcrowding, idleness, inadequate security classification, *lack of direct supervision by staff*, and a near-complete absence of recreational activities and rehabilitative programs.”<sup>161</sup> Although a possible means to reduce expenditures, the potential increase in violence may outweigh the utility of this expenditure-reduction measure.

### C. Releasing Prisoners

Several states have responded to overwhelming incarceration rates by releasing prisoners early.<sup>162</sup> These measures are controversial and some believe that early releases, as well as other cost-cutting measures, have the potential to threaten public safety.<sup>163</sup> Furthermore, when released prisoners recidivate, public outrage and reviews of corrections policy often result.<sup>164</sup>

For instance, in 2008 a paroled Pennsylvania man fatally shot a police officer within a month of his release.<sup>165</sup> As a result of this crime, Governor Ed Rendell “temporarily [halted] the parole process to

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<sup>157</sup> See generally Matthew Harwood, *Prison Overcrowding Jeopardizes Guard and Inmate Safety*, SECURITY MANAGEMENT (July 21, 2009), <http://www.securitymanagement.com/news/panel-prison-overcrowding-jeopardizes-guard-and-inmate-safety-005904> (explaining that overcrowding and reduced guard to inmate ratios increases the level of violence experienced by both groups).

<sup>158</sup> Buchanan, *supra* note 156, at 60.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* (emphasis added).

<sup>162</sup> Alabama, California, Kentucky, and North Carolina are among the states that have released prisoners early in recent years. Gramlich, *supra* note 18; Gramlich, *supra* note 20.

<sup>163</sup> Gramlich, *supra* note 18.

<sup>164</sup> Gramlich, *supra* note 20.

<sup>165</sup> *Id.*

conduct a ‘top-to-bottom review;’<sup>166</sup> however, the review found that the prisoner had been properly released.<sup>167</sup> At least eight states in the last year have considered or approved the practice of releasing prisoners early, and some states, including Alabama and North Carolina, have approved the release of elderly or terminally ill inmates, whose health care while incarcerated costs taxpayers millions of dollars.<sup>168</sup> At least thirty-four other states have approved compassionate releases of inmates who pose little threat to the public.<sup>169</sup> Early release programs are highly criticized when it is found that a large number of those released commit new crimes. For example, the prisoner release program in Kentucky was criticized when it was reported by a newspaper that “at least [fourteen] percent of those released were accused of committing new crimes within months,” despite the fact that national recidivism rates are generally much higher.<sup>170</sup>

#### *D. Sentencing Alternatives*

##### *1. Community Courts*

The Community Court system is one measure that New York has taken as an alternative to traditional incarceration.<sup>171</sup> In 1994, New York began the Midtown Community Court in the Manhattan Theater District, which focused on “quality-of-life crimes,” such as shoplifting, vandalism, and prostitution.<sup>172</sup> This innovative program was successful and over the past fifteen years, the State has started seven additional Community Courts.<sup>173</sup> Judge Judith S. Kaye identified three core

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* A compassionate release is the release of an elderly or terminally ill inmate. *Id.*

<sup>170</sup> Gramlich, *supra* note 20.

<sup>171</sup> The Honorable Judith S. Kaye, Lecture, *Frank M. Coffin Lecture on Law and Public Service: Shaping State Courts for the New Century: What Chief Judges Can Do*, 61 ME. L. REV. 355, 361-62 (2009).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 362. As of January 1, 2009, there were seven operational Community Courts: Midtown Community Justice Center (New York, NY), Harlem Community Justice Center (New York, NY), Bronx Community Solutions (Bronx, NY), Red Hook Community Justice Center (Brooklyn, NY), Babylon Community Court (Lindenhurst, NY), Hempstead Community Court (Hempstead, NY), and Syracuse Community Court (Syracuse, NY). *Community Courts*, NEW YORK ST. UNIFIED CT. SYS., [http://www.nycourts.gov/courts/problem\\_solving/cc/courts.shtml](http://www.nycourts.gov/courts/problem_solving/cc/courts.shtml) (last visited Oct. 5, 2010).

elements of the eight Community Courts in New York.<sup>174</sup> First, each court has “a dedicated judge in the leadership role of judicial decisionmaker and convener of all the collaborators necessary to assure maximum information and maximum opportunity for a meaningful resolution.”<sup>175</sup> Next, offenders plead guilty and then receive sentences that are “designed to help restore the neighborhood harmed by the offense.”<sup>176</sup> Finally, in all of the Community Courts, there is additional help for offenders, including drug treatment, mental health assistance, and interview training and employment services.<sup>177</sup> Programs like New York’s Community Courts, which sentences offenders to revitalize the neighborhoods that they harmed with their illegal behavior, are an important way to divert certain offenders from the corrections system. This program focuses on rehabilitation, by providing drug, mental health, and employment services.

## 2. Drug Programs

Drug courts and substance-abuse programs are important rehabilitative programs enabling some inmates to avoid incarceration.<sup>178</sup> Although states must respond to the national recession by decreasing their expenditures, programs that seek to rehabilitate offenders should not be cut or face reductions in funding, as these programs attempt to decrease expenditures related to incarceration.<sup>179</sup> Unfortunately, the budget crisis has necessitated cuts to substance abuse programs for former offenders in New York City.<sup>180</sup>

In addition to substance-abuse programs, all fifty states provide the opportunity for drug users “to avoid jail time if they meet rigorous

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<sup>174</sup> Kaye, *supra* note 171, at 362.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> See Gramlich, *supra* note 20 (explaining that if drug users meet certain standards, they may be able to avoid serving time in jail).

<sup>179</sup> Given the economic crisis and the states’ budget problems, C. West Huddleston III, executive director of the National Association of Drug Court Professionals, fears that drug courts will face decreased funding despite their success: “My experience in the last decade of working in policy is that, pretty much 100 percent of the time, drug dependent offenders are at the end of the line when it comes to funding priorities... It is my fear that in these lean times... legislatures [might] see drug court as just an extra expense on the books that they can cut to save money.” Gramlich, *supra* note 20.

<sup>180</sup> *Id.*

sobriety and other conditions set by a judge.”<sup>181</sup> These programs are successful in reducing the incarceration rate and corrections expenditures, as “[m]ore than 70 percent of those who participate in drug courts avoid incarceration.”<sup>182</sup> Currently, New York has 170 drug treatment courts, some of which are in the family courts, offering “parents the chance for early reunification with their children if they step up to end their drug habit, and offer drug-addicted juvenile offenders a chance to get back on course.”<sup>183</sup>

### 3. Sentencing Reform

Sentencing reform is another alternative that many states have implemented as a way to decrease the incarceration rate, and therefore, corrections expenditures. Advocates of sentencing reform “support curtailing or eliminating mandatory-minimum sentences and want to change other policies, such as ‘truth in sentencing,’ that restrict parole opportunities for many offenders” in order to prevent the nation’s incarceration rate from continuing to rise.<sup>184</sup> According to *The Sentencing Project*, which advocates for sentencing law changes as a means to reduce incarceration rates, the incarceration rate will continue to increase “unless criminal penalties are reduced, even for felons serving 20 years or more.”<sup>185</sup>

The Sentencing Reform Act of 1984 created guidelines to properly determine sentences, however, the Federal Sentencing Guidelines (“the Guidelines”) established minimum sentences for every federal crime.<sup>186</sup> Since the goal of the Guidelines is “‘objective’ sentencing, the relevant criteria were often quantitative, taking minimal account of the individuality, background or capability of the defendant.”<sup>187</sup> Under the Guidelines, sentencing ranges increased if the defendant had a “criminal history.”<sup>188</sup> The ranges for violations of drug laws resulted in sentences that were considerably higher than those prior to the implementation of

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<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> Kaye, *supra* note 171, at 363.

<sup>184</sup> Gramlich, *supra* note 20.

<sup>185</sup> *Id.*

<sup>186</sup> Judge Louis F. Oberdorfer, Lecture, *Mandatory Sentencing: One Judge’s Perspective – 2002*, 40 AM. CRIM. L. REV. 11, 15 (2003).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

the Guidelines.<sup>189</sup> The Sentencing Reform Act of 1984, and its “truth-in-sentencing slogan,” limited “the power of the sentencing judge to consider many factors personal to the individual, such as family responsibilities, military service, education or the lack of it, job opportunities, demonstrable remorse or none, mental deficiencies short of insanity, and the individual’s capacity for rehabilitation.”<sup>190</sup>

In *United States v. Booker*,<sup>191</sup> the Supreme Court held that mandatory adherence to the Federal Sentencing Guidelines violated the Sixth Amendment, and the Court stated that a defendant has the right to have every fact that is relevant to his punishment found by a jury.<sup>192</sup> A plurality of the *Booker* Court held the Guidelines to be advisory, and as such, opined that reasonableness was the appropriate standard for the appellate review of sentences.<sup>193</sup> The reduction of the Federal Sentencing Guidelines from mandatory to optional or advisory is an important step in decreasing incarceration rates. This allows judges to assess each individual offender to determine whether he is a threat to society, and as such, must be incarcerated, or whether more intermediate types of punishment would be appropriate in the given situation.<sup>194</sup>

#### *E. California’s Pay-to-Stay Jails*

Approximately fifteen municipalities in Los Angeles and Orange Counties in California have implemented pay-to-stay jails, which provide inmates with the option of paying between \$75 and \$175 per night to serve their sentences “in a safer environment, away from the chaotic county jails.”<sup>195</sup> These jails are run by the municipalities and exist in addition to the jails where inmates typically serve their sentences.<sup>196</sup> This creates a “two-tiered jail system.”<sup>197</sup> As a result,

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<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 16.

<sup>191</sup> *United States v. Booker*, 543 U.S. 220 (2005).

<sup>192</sup> Michelle Reiss Drab, Comment, *Constitutional Law: Fact or Factor: The Supreme Court Eliminates Sentencing Factors and the Federal Sentencing Guidelines*, 57 FLA. L. REV. 987, 993 (2005); Kathleen H. Morkes, Note, *Where Are We Going, Where Did We Come From: Why the Federal Sentencing Guidelines Were Invalidated and the Consequences for State Sentencing Schemes*, 4 AVE MARIA L. REV. 249, 250-51, 272 (2006).

<sup>193</sup> Morkes, *supra* note 188, at 250-51.

<sup>194</sup> *See generally* Oberdorfer, Lecture, *supra* note 182, at 16.

<sup>195</sup> Buchanan, *supra* note 154, at 60-61.

<sup>196</sup> Buchanan, *supra* note 156, at 61.

inmates must pay in order to be housed in a safer environment.<sup>198</sup> These programs are virtually marketed to the public.<sup>199</sup> Advertisements in police stations inform individuals that they can “[s]erve [their] time in our clean, safe, secure facility!”<sup>200</sup> In addition, “[t]he pay-to stay upgrade is pitched to the public as a privilege for basically decent people who have run afoul of the law.”<sup>201</sup> Although purportedly based on the nature of the crime or ability to pay, offenders who are permitted to serve their time in pay-to-stay jails have to pass a screening interview.<sup>202</sup>

This type of program raises serious concerns about fairness and equality, and such concerns may outweigh the program’s utility. Under such a scheme, two identical defendants could experience disparately different treatment in the criminal justice system based on their ability to pay. “Paying to stay is likely not an option for almost 90% of inmates in jail, including the 59% of inmates who earned less than \$1,000 per month before their arrest and the 29% who were unemployed.”<sup>203</sup> Serious fairness and equality concerns are raised, as “there is no principled basis on which a low-income drunk driver, drug dealer, or batterer ‘deserves to have [his] safety threatened’ in a way his wealthier counterpart does not.”<sup>204</sup>

## VI. ANALYSIS OF PAY-TO-STAY LEGISLATION IN NEW YORK AND NEW JERSEY

### A. New York’s Madoff Bill

#### 1. Assessment of Madoff Bill

The Madoff Bill’s provision of a payment schedule creates a strong response to the typical criticisms of many pay-to-stay statutes. First, as

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<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> Santa Ana explains on its website that the pay-to-stay jail “is pleased to host a full range of alternatives to traditional incarceration.” Robert Weisberg, Commentary, *Pay-To-Stay in California Jails and the Value of Systemic Self-Embarrassment*, 106 MICH. L. REV. FIRST IMPRESSIONS 55, 55 (2007).

<sup>200</sup> *Id.* at 62.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 63.

<sup>203</sup> Laurie L. Levenson & Mary Gordon, Commentary, *The Dirty Little Secrets About Pay-To-Stay*, 106 MICH. L. REV. FIRST IMPRESSIONS 67, 67 (2007).

<sup>204</sup> Buchanan, *supra* note 156, at 66.

drafted, this bill meets the concerns of many opponents who argue that pay-to-stay programs are not rehabilitative, and that poor inmates will not have the funds to pay for the costs of their incarceration. The bill's justification clearly states that the statute is intended to target those with the means to pay for the costs of their incarceration, and not every inmate of the New York Correctional System.<sup>205</sup> It is intended to target "well-off criminals" who are able to return to their "opulent lifestyles" after their release.<sup>206</sup> Although the schedule provides for inmates with total assets of \$40,000 or greater to be charged for a percentage of the cost of their incarceration, and not only those who are extremely wealthy, the varied percentages of the fee owed recognize that imposing the same fee on all inmates would disproportionately burden those with lower incomes. The schedule instead attempts to impose a fair and appropriate fee for each inmate by considering the amount of his or her total assets in calculating the amount due.

Second, the Madoff Bill withstands the criticism that pay-to-stay programs burden the wrong people. The Madoff Bill authorizes the Commissioner to promulgate rules and regulations in order to implement the bill; it does not strictly authorize a deduction from inmate accounts.<sup>207</sup> If such deductions were to be authorized by the rules and regulations, the inmate's assets would first be assessed in order to determine whether they were subject to any deduction at all. Therefore, this bill does not burden anyone without a determination that they have the ability to pay, as defined by the statute.<sup>208</sup> In addition, the fact that mortgage payments, homes, home equity, and child support are all protected highlight the fact that this bill does not look to burden the families of the inmates.<sup>209</sup>

Third, in response to the criticism that pay-to-stay fees are difficult to collect, the Madoff Bill's schedule creates a system where fees are only imposed when they are likely to be collected.<sup>210</sup> This is an

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<sup>205</sup> Assemb. 09055, 232nd Leg., Reg. Sess. (N.Y. 2009), available at [http://assembly.state.ny.us/leg/?default\\_fld=&bn=+A09055%09%09&Memo=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=+A09055%09%09&Memo=Y).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*; Stephey, *supra* note 121.

<sup>210</sup> This schedule would look to the inmate's total assets to determine their liability to the state Department of Corrections: "[a]n inmate with total assets of two hundred thousand dollars or more, one hundred percent of such expense," "[a]n inmate with total assets of one

extremely important aspect of the bill, as it looks at the obligations and financial situation of each individual inmate, rather than imposing the same fee on all inmates.<sup>211</sup> This would likely prevent the waste of administrative costs incurred by seeking to collect from inmates who are unable to pay at all, or seeking too high of a fee from inmates who could afford to pay only a part of the cost of their incarceration.

Fourth, the Madoff Bill is pleasing to proponents and taxpayers, as it seeks to “hold criminals accountable while taking the fiscal burden off. . . taxpayers.”<sup>212</sup> This represents an imposition of personal financial responsibility on those who can afford to repay the government and taxpayers for the cost of their incarceration. Allowing the government and the taxpayers to shoulder the burden where the inmate is financially able to do so creates an inequitable result. Moreover, the Madoff Bill requires payment and is not an optional or alternative program like the California pay-to-stay programs. As the Madoff Bill does not reward the ability to pay with access to a better correctional facility, this avoids any potential equal protection concerns as there may be with the California pay-to-stay program, where individuals are able to pay in order to serve their time in a safer, cleaner, and less crowded facility.

The Madoff Bill has the potential to be very successful in New York State. The total cost per inmate in New York is over \$40,000, the third highest in the country.<sup>213</sup> Although the total inmate population of the New York State Department of Correctional Services declined from 63,303 on January 1, 2007,<sup>214</sup> to 62,598 on January 1, 2008,<sup>215</sup> the State

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hundred sixty thousand dollars or more but less than two hundred thousand dollars, eighty percent of such expense,” “[a]n inmate with total assets of one hundred twenty thousand dollars or more but less than one hundred sixty thousand dollars, sixty percent of such expense,” “[a]n inmate with total assets of eighty thousand dollars or more but less than eighty thousand dollars, twenty percent of such expense,” “[a]n inmate with total assets of forty thousand dollars or more but less than one hundred twenty thousand dollars, forty percent of such expense,” and finally, “[a]n inmate with total assets of less than forty thousand dollars, zero percent of such expense.” N.Y. Assemb. 09055.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> Gramlich, *supra* note 20.

<sup>214</sup> DEP’T OF CORR. SERVS., STATE OF N.Y., HUB SYSTEM: PROFILE OF INMATE POPULATION UNDER CUSTODY ON JANUARY 1, 2007 (2007) 10, available at [http://www.docs.state.ny.us/Research/Reports/2007/Hub\\_Report\\_2007.pdf](http://www.docs.state.ny.us/Research/Reports/2007/Hub_Report_2007.pdf).

<sup>215</sup> DEP’T OF CORR. SERV., STATE OF N.Y., HUB SYSTEM: PROFILE OF INMATE POPULATION UNDER CUSTODY ON JANUARY 1, 2008 (2008) 10, available at [http://www.docs.state.ny.us/Research/Reports/2008/Hub\\_Report\\_2008.pdf](http://www.docs.state.ny.us/Research/Reports/2008/Hub_Report_2008.pdf).

still expends a large sum of money on corrections each year. The Madoff Bill offers the State the opportunity to collect a significant amount from its inmates. Since the number incarcerated is approximately 62,000 people, and the annual cost of incarceration per person is over \$40,000,<sup>216</sup> even a relatively modest collection rate would yield a significant source of funding that could help to defray the corrections expenditures of the State.

Although New York has already implemented drug courts and community courts, it is important to note that the Madoff Bill would work best in conjunction with these alternative sentencing programs. These programs work to decrease the amount of money that the State expends on incarceration by diverting certain inmates from serving time in the corrections facilities. For those who are incarcerated, the Madoff Bill would provide the State with a means to reduce the budget gap by seeking reimbursement from certain inmates.<sup>217</sup> Although the Madoff Bill would not serve as a prophylactic measure for the budget problem in New York, charging inmates for the cost of their incarceration would serve as a source of income for the State to offset the budget deficit.

Further, funds raised under the bill could prevent the State from resorting to additional measures in an effort to decrease the budget gap, such as reducing the guard-to-inmate ratio.<sup>218</sup> Many states are forced to cut helpful and rehabilitative programs that are important to preventing recidivism. For example, New York City had to end its substance-abuse program for former offenders.<sup>219</sup> The adoption of the Madoff Bill could provide the funding necessary to maintain such rehabilitative programs, which help to decrease the incarceration rate.

## 2. Suggested Amendments for Madoff Bill

The Madoff Bill could be amended to provide that in order to file a claim, the Attorney General must have good cause to believe that the inmate or former inmate has total assets of at least \$40,000.. The amendment could provide that in the alternative, the Attorney General must have good cause to believe that the inmate or former inmate has

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<sup>216</sup> Gramlich, *supra* note 20.

<sup>217</sup> New York currently has a \$16 million budget gap and has formed plans to either fully or partially close several corrections facilities. Gramlich, *supra* note 148.

<sup>218</sup> Buchanan, *supra* note 156, at 60 (emphasis added).

<sup>219</sup> Gramlich, *supra* note 20.

the means to reimburse the state at least a certain percentage of the amount that they will be assessed to owe.<sup>220</sup> *Missouri v. Peterson*<sup>221</sup> demonstrates the constitutionality of such a provision, as Missouri has a provision under the Missouri Inmate Reimbursement Act providing for a similar condition precedent to filing an action against the inmate.<sup>222</sup> The addition of this type of provision to the Madoff Bill would prevent frivolous filings by the Attorney General where recovery is unlikely.

Further, like other states, this bill could provide that the state first seek to recover from the inmate's accounts, and then authorize a judicial proceeding in order to recover the remaining balance if there is one.<sup>223</sup> This would reduce administrative costs by preventing the State from having to file a claim in instances where the inmate's account has sufficient funds to fulfill their obligation to the State, or where the difference between the obligation and the amount of money in the account would not justify further administrative costs through judicial action.

Finally, the Madoff Bill could be amended to provide for a time limit within which the State can seek recovery from former inmates.<sup>224</sup> This would ensure fairness to the inmates by preventing the State from having a claim against earnings which are too far removed from the time of their incarceration, and do not relate to the former inmate's ability to pay at the time of his incarceration.

### *B. New Jersey S. 579*

#### 1. Assessment of S. 579

The provisions of S. 579 provide a response to many of the typical pay-to-stay criticisms. First, the proposed legislation neither burdens the wrong people nor harms the rehabilitation of former inmates. In addition, it does not attempt to collect fees from inmates who cannot afford to reimburse the State. Section (1)(c) provides for an inquiry into the individual inmate or former inmate, by looking at his assets,

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<sup>220</sup> See MICH. COMP. LAWS SERV. § 800.403(2) (LexisNexis 2009). See also MO. REV. STAT. § 217.831 (2009); TENN. CODE ANN. § 41-21-905 (2009).

<sup>221</sup> *Missouri v. Peterson*, 253 S.W.3d 77, 77 (Mo. 2008).

<sup>222</sup> MO. REV. STAT. § 217.831; *Peterson*, 253 S.W.3d at 80.

<sup>223</sup> See OHIO REV. CODE ANN. § 5120.56 (LexisNexis 2009); OKLA. STAT. tit. 22 § 979a (2009).

<sup>224</sup> See CONN. GEN. STAT. § 18-85a (2008); IDAHO CODE ANN. § 20-607 (2009).

liabilities, and dependents, as described in the pre-sentencing report.<sup>225</sup> Further, section (1)(d) permits the Commissioner to waive or decrease the fee if the inmate can demonstrate that his financial position has changed and he is either unable to pay or the fee would “*unduly burden the inmate’s dependents.*”<sup>226</sup> The proposed statute reflects the concern that individuals who are unable to pay, or for whom the obligation might interfere with their rehabilitation, are not burdened.

Importantly, the statute also looks to ensure that the fines imposed on inmates do not affect their dependents too harshly. These elements of the statute are significant, as burdening individuals with obligations to the State that they cannot reasonably fulfill may function to “force” former inmates into criminal activity in order to fulfill their obligations. The statute permits “[a]ny person affected in any manner, whether directly or indirectly by any lien” to bring an action against the State challenging the validity of the lien.<sup>227</sup> This allows for either an inmate or his dependents to challenge the lien if it is too significant of a burden. These provisions work to ensure that only inmates who are able to pay either the full cost of their incarceration, or a portion of it, are charged.

Second, this proposed legislation provides for a thorough, multi-step collection method, silencing opponents’ criticisms that the fees are too difficult to collect. The proposed legislation provides for a lien to be entered upon the determination by the Commissioner that a fee should be collected.<sup>228</sup> Next, if the debt remains unpaid, then the Attorney General may take further action, imposing a fee that, “in lieu of the actual cost of collection may be [twenty percent] of the debt or \$200, whichever is greater.”<sup>229</sup> This provision will bolster collection efforts because it incentivizes payment before the Attorney General becomes involved, thereby potentially decreasing the costs of administration.<sup>230</sup> Also, the fact that interest may be charged provides a further incentive for former inmates to pay as quickly as possible once the lien has been entered against them, and serves to defray the costs of administration.<sup>231</sup>

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<sup>225</sup> S. 579(1)(c), 2010 Sess., 214th Leg. (N.J. 2010), available at [http://www.njleg.state.nj.us/2010/Bills/S1000/579\\_I1.PDF](http://www.njleg.state.nj.us/2010/Bills/S1000/579_I1.PDF).

<sup>226</sup> *Id.* at (2)(d) (emphasis added).

<sup>227</sup> *Id.* at (2)(f).

<sup>228</sup> *Id.* at (2)(a).

<sup>229</sup> *Id.* at (2)(b).

<sup>230</sup> *Id.*

<sup>231</sup> S. 579(2)(b), 2010 Sess., 214th Leg. (N.J. 2010), available at

Additionally, S. 579 provides that the funds recovered can be used to fund substance abuse programs, due to the relationship between substance abuse and crime.<sup>232</sup> State Senator Beach has stated that since “[m]any of those behind bars are there as a direct or indirect result of drug abuse, and I believe that the money collected could be put to better use to help fund substance abuse programs that may help decrease the rate of recidivism.”<sup>233</sup> This is an important provision of the bill, as it could potentially prevent the State from being forced to cut rehabilitative programs in light of increasing corrections expenditures, or from taking other cost-reducing measures discussed above.<sup>234</sup> Further, costs of incarceration would be indirectly reduced through the substance abuse programs, as they target reducing recidivism.

S. 579 has the potential to raise a significant amount of revenue in New Jersey.<sup>235</sup> The cost of incarceration per inmate per year in New Jersey is over \$38,700 per year.<sup>236</sup> The total number of residents in New Jersey state correctional institutions and satellites totaled 25,436 as of January 1, 2009.<sup>237</sup> This figure includes 4235 individuals who are in youth facilities and 2579 who are in halfway houses.<sup>238</sup> S. 579 would require those who are in halfway houses to pay for the cost of their incarceration, if it is determined that they are financially able.<sup>239</sup>

As with New York’s Madoff Bill, due to the high cost of incarceration and the large number of people incarcerated within the State, even a low or moderate rate of collection would produce a significant sum of money that could be used for drug and alcohol

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[http://www.njleg.state.nj.us/2010/Bills/S1000/579\\_I1.PDF](http://www.njleg.state.nj.us/2010/Bills/S1000/579_I1.PDF).

<sup>232</sup> *Id.* at (1)(e).

<sup>233</sup> Beach & Holzapfel, *supra* note 139.

<sup>234</sup> *See supra* Part V.

<sup>235</sup> Based on the average stay per inmate, the Department of Corrections found that “[i]f this legislation were enacted, approximately \$1,090,488,000 could potentially be generated in revenue.” N.J. DEP’T OF CORR., FISCAL REPORT, S. 2809, 213th Leg., Reg. Sess., *available at* [http://www.njleg.state.nj.us/2008/Bills/S3000/2809\\_F1.PDF](http://www.njleg.state.nj.us/2008/Bills/S3000/2809_F1.PDF). The report opines that “only a negligible amount” would be collected. *Id.* Pay-to-stay programs have achieved great success in many states in which they are implemented. *See supra* Part III.A.

<sup>236</sup> N.J. S. 579.

<sup>237</sup> N.J. DEP’T OF CORR., OFFENDER CHARACTERISTICS REPORT ON JAN. 1, 2009 (2009) 5, *available at* [http://www.state.nj.us/corrections/pdf/offender\\_statistics/2009/WholeDoc\\_Off\\_Char2009.pdf](http://www.state.nj.us/corrections/pdf/offender_statistics/2009/WholeDoc_Off_Char2009.pdf).

<sup>238</sup> *Id.*

<sup>239</sup> S. 2809, 2009 Sess., 213th Leg. (N.J. 2009), *available at* [http://www.njleg.state.nj.us/2008/Bills/S3000/2809\\_I1.PDF](http://www.njleg.state.nj.us/2008/Bills/S3000/2809_I1.PDF).

programs, or possibly to offset high corrections expenditures.

## 2. Suggested Amendments for S. 579

One suggestion for S. 579 is an amendment to provide a payment schedule similar to that in the Madoff Bill. This would provide for an effective and efficient method for determining the amount of the lien to be entered against each individual. A payment schedule that provides for different percentages owed depending on the inmate or former inmate's financial status may actually increase recovery and decrease administrative costs, as the amounts owed by individuals would be a reflection of what could reasonably be obtained from those persons, rather than seeking recovery in full or not seeking recovery at all.

Further, a condition precedent to filing a claim requiring good cause to believe that the individual has a certain amount of assets or the ability to pay a certain percentage of the cost of his incarceration could be included. This would reduce administrative costs by only allowing the State to seek reimbursement where it is likely to recover at least a significant portion of the inmate's costs.<sup>240</sup> Finally, a provision limiting the time within which the Attorney General may file a lien could be added to ensure that the amount sought is reasonable in relation to the former inmate's financial position at the time of their incarceration, and does not allow the State to have a claim against assets that were obtained too far into the future after the inmate's incarceration.

## VII. CONCLUSION

Both the Madoff Bill in New York, and S. 579 in New Jersey, should be adopted. The practice of charging inmates for their incarceration, provided that there is an inquiry into their individual ability to pay, is an answer to the problem of high rates of incarceration paired with declining corrections budgets that faces many states currently. Both New York and New Jersey are faced with high costs of incarceration; the proposed legislation could defray some of these costs while also promoting personal responsibility where an individual has sufficient means such that the state should not be faced with shouldering the burden of the cost of their incarceration. These programs have the

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<sup>240</sup> See MICH. COMP. LAWS SERV. § 800.403(2) (LexisNexis 2009). See also MO. REV. STAT. § 217.831 (2009); TENN. CODE ANN. § 41-21-905 (2009).

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potential to provide a significant source of funds to states, but also must be used in conjunction with other alternative methods that seek to decrease the rate of incarceration.