

Who Pays for the Welfare State? Austerity Politics and the Origin of Pay-to-Stay Fees as  
Revenue Generation

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## INTRODUCTION

Monetary sanctions, or the myriad of fines, fees, costs, and other legal financial obligations (LFOs) imposed by the legal system, have become a ubiquitous part of courts and corrections across the country (Harris, Evans, and Beckett 2010; Harris 2016; Martin et al. 2018; Shannon et al. 2020). Monetary sanctions used as both punishment and revenue generation have a long history both in the United States and abroad (Peebles 2013; Ware 2014; Harris 2016; Martin 2020). Contemporary understandings of monetary sanctions as revenue generators cite the fiscal crisis of legal systems due to mass incarceration and a growing neoliberal penology as the primary drivers of the expanded imposition and changing rationales for the use of financial penalties (Friedman and Pattillo 2019; Gordon and Glaser 1991; Hillsman 1990; Martin 2018; Appleman 2016; Sances and You 2017). However, many forms of revenue-generating monetary sanctions have a longer history in the United States, predating both mass incarceration and what would be considered the neoliberal turn in the criminal justice system. Pay-to-stay fees are one such example, defined as financial commitments imposed by counties and states on incarcerated individuals for the cost of their jail detention or incarceration, typically a per diem rate. The longer history of these fees raises questions regarding the passage and endurance of pay-to-stay laws and the origins of the rationales undergirding them. Through a comparative historical analysis of pay-to-stay fee legislation in Michigan and Illinois, our paper reveals fiscal crisis was the condition through which these states expanded holding criminalized persons financially responsible for their offender status,

nesting their policy making within austerity politics and questions over who should pay for the welfare state.

While it is more widely known that county-level pay-to-stay fees for jail detention date back to colonial America with British antecedents (Peebles 2013), several public commentaries consistently report that state-level pay-to-stay fees in the form of per diem rates for imprisonment originated in the early 1990s (see Evans 2009 and Shacknai 1994). However, our analysis of state-level pay-to-stay practices reveals a much earlier history in the United States, with their existence “on-the-books” as early as 1935 in Michigan. Illinois lawmakers explicitly cited Michigan as a role model when passing their own similar statute in 1981. While pay-to-stay can describe different recoupment strategies, this paper focuses on the practice of state agencies suing current and former prisoners for the cost of incarceration, allowing the state to be more selective in who it targets (Eisen 2014). By 2019, laws imposing pay-to-stay fees were quite common, used in all fifty states and at the federal level (Brennan Center for Justice 2019; Conboy 1995; Eisen 2015; Levingston 2007).

Using a compilation of legislative documents, judicial appeals, and primary and secondary historical scholarship, we find these laws received surprising bipartisan support over time, largely due to the specific historical moments in which they were passed and amended, one being the Depression Era and the second the 1980s Recession. Both time periods were historic moments of austerity politics and crises in government funding, when lawmakers debated the costs, funding, and utility of the welfare state. We identify how lawmakers re-conceptualized public institutions as part of the welfare state,

drawing comparisons in particular between the prison and other forms of state custodial confinement, such as asylums and public hospitals. Both states concluded that the cost of maintaining these institutions should be paid in part by the offenders housed in such spaces, given the states' purported effort to provide rehabilitative treatment. We suggest the contemporary use of pay-to-stay fees to fund general public expenditures confirms existing research positioning the criminal justice system within the larger welfare state. We argue holding criminalized persons financially responsible for their offender status as a type of welfare provision reifies the legitimacy of criminal justice as a rehabilitative institution rather than a punitive one, ensuring its longevity as integral to a welfare state predicated on coercion and the myth of individual responsibility. The origination and expansion of these fees occurs under the rationale of austerity because the individualization of rehabilitation and the correctional provision of welfare goods and services are preexisting legal templates tied to the rehabilitative ideal (Rubin 2019).

The historical and comparative nature of this analysis contributes to literature on the evolution of monetary sanctions as revenue (Beckett and Harris 2011; Harris 2016; Martin 2018), on pay-to-stay fees (Eisen 2014, 2015, 2017; Gipson and Pierce 1996; Levingston 2007; Plunkett 2013), and on reimbursement lawsuits against prisoners to recoup these fees (see (*author suppressed*) submitted; (*author suppressed*) submitted). Offering comparisons between states' legislation brings this work in conversation with a number of studies that have examined differences in penal legislation across states using comparative historical methods (Barker 2009; Campbell and Schoenfeld 2013; Lynch 2009; Goodman, Page, and Phelps 2017). This paper supports Barker's (2009) and

Bright's (1996) findings that policies surrounding punishment are rooted in state politics, histories, and political structures, rather than driven by crime rates or demographics alone. This study is the first to explore the socio-legal history and political and economic rationales that motivate pay-to-stay practices and how the proliferation of this practice speaks to broader forces guiding changes in the welfare state landscape.

#### MONETARY SANCTIONS IN THE CRIMINAL JUSTICE SYSTEM

Monetary sanctions can be traced to the colonial era with multiple rationales, such as punishment for a crime, repayment of a debt, a tool to hold criminalized persons responsible as users of court resources (Harris 2016; Ware 2014), and a strategy to restrict movement by coercing the poor and working classes, and Black and Indigenous communities into a cycle of enslaved and indentured labor (Friedman 2020). Pay-to-stay fees are one such example of this multi-purposed long history (Peebles 2013). The contemporary distinction made by most courts is that fines and restitution serve as the portion considered "punishment," whereas court fees, costs, and assessments are intended to recoup costs and financially support courts, probation offices, and other agencies (Friedman and Pattillo 2019; Martin et al. 2018). However, in practice this distinction does not hold, as both sets of monies can be utilized to generate revenue and both are experienced as punishment (Bannon, Diller, and Nagrecha 2010; Colgan 2014; Harris 2016; Pattillo and Kirk 2020). Regardless of their purpose, scholars have documented the disproportionate consequences for the poor and working classes and communities of color (Eisen 2014; Fernandes, Cadigan, Edwards, and Harris 2019; Harris, et al. 2010; Harris 2016; Henricks 2019).

Existing studies have explored pay-to-stay fees that allow certain prisoners additional privileges or debated their rehabilitative or deterrent effects (Buchanan 2007; Levenson and Gordon 2007; Michtom 2003; Aviram 2015), leaving out explorations of broader per-diem fees. This omission may be due to the fact that pay-to-stay fees are imposed and collected outside of criminal law, occupying Beckett and Murakawa's (2012) "shadow carceral state," defined as aspects of the state that extend penal power through legal hybridity and civil law (*author suppressed*), submitted). These laws avoid associations with "punishment" and sentencing and evade constitutional protections, such as the right to counsel. Building on the work of scholars who have pointed to distinctions lawmakers and court actors make between "punishment" and "not-punishment" (Beckett and Murakawa 2012; Colgan 2014; Martin et al. 2018), this paper details how this distinction becomes embedded in the language of these laws and allows for this conceptualization of incarceration as welfare, a state provision that comes at a cost for those determined to have the ability to pay. The use and proliferation of pay-to-stay as a revenue generation strategy across states underscores the shifting tides of fiscal responsibility for state institutions and their "free" services from taxpayers to the incarcerated.<sup>1</sup>

#### WELFARE STATE AND THE CARCERAL STATE INTERTWINED

While some scholars speculate that fiscal pressures of the current mass incarceration system offer an important moment for reform (Lichtenstein 2015), others warn that cost-cutting measures will only make prisons more punitive and shift penal systems to further differentiated community-based control (Gottschalk 2011, 2016;

Martin 2016; Small 2014). Aviram's (2015) examination of the impact of the 2008 financial crisis on punishment policy suggests the emergence of a cost-centered logic, not related to humanitarian concern or belief in the rehabilitative ideal (58). Our analysis confirms Aviram's findings that fiscal crises lead to changes in correctional policy, however, we find past fiscal crises led to a reaffirmation of rehabilitative ideals in linking the carceral system to welfare provision.

While some scholarship has argued for understandings of the welfare and carceral state as competing or replacing one another (Beckett and Western 2001; Wacquant 2009), recent historians have looked to trajectories of policy making to examine how states construct policy in these realms in parallel, where funding decisions in one impact the other (Hinton 2017; Parsons 2018; Kohler-Hausmann 2015; Metzl 2011). Additionally, a number of scholars have begun to examine how carceral contact becomes conceptualized as welfare or as a rehabilitative service (Comfort 2007; Miller 2014; Stuart 2016). Lara-Millán and Gonzalez Van Cleve (2017) find both court actors and jail correctional officers see their institutional role as gatekeepers of institutional services, constructing their own moral evaluations regarding who is worthy of these resources. Similarly, we find in the legislative observations constructions of worthiness and a blurring of conceptualizations of incarceration and welfare. Lynch (2009) describes how Arizona legislators' perceptions of "country club-style living" within state prisons, and an entrenched disdain for government spending on corrections, fostered support for mandating medical co-pays and payments for electricity from incarcerated individuals (160). The incarcerated individual is pitted against the deservingness of the "law-abiding

citizen” when it comes to the fiscal responsibility for welfare state services. For lawmakers, those who have violated the terms of the social contract have ceded their claim to the free use of these services, and are subject to pay-to-stay provisions. This paper details an under-explored consequence of this connection between deservingness and fiscal responsibility, which becomes part of the state’s rationale for revenue extraction.

#### STATE VARIATION IN PUNISHMENT POLICY

The comparative historical nature of this study follows recent scholarship that has called attention to the state-level variation in punishment policy, despite the coherent national narrative of mass incarceration (Barker 2009; Campbell and Schoenfeld 2013; Lynch 2009; Goodman, et al. 2017). While federal policy, funding, and directives were important in determining the resources and problems states faced, state lawmakers ultimately shaped correctional policy (Campbell and Schoenfeld 2013). Examining the nuances in state legislation and particular states’ legislative temperaments, histories, and structures is integral to understanding the development of mass incarceration (Goodman, et al. 2017). While pay-to-stay fees do not necessarily reflect legislators’ desire to increase punishments or who they punish, their examination does provide insights into how legislators conceptualize who deserves to disproportionately bear that cost, in light of a continuously growing carceral system. Building on Barker’s (2009) theory of state governance, which highlights the role of political structures and practices, we explore how the passing of legislation creating pay-to-stay fees was both historically contingent and born out of the structural and political realities of their time and place. In line with



Rubin (2019), the change in laws on the books informs how pay-to-stay provisions fold into our broader understanding of punishment and the fiscal and moral culpability of incarcerated persons. Rubin's work on legal templates provides a window into the historical and contemporary undercurrents of penal law and policy, with the spread and adoption of pay-to-stay statutes constituting an institutionalized template that shapes our conception of what punishment should be and how extensively it should be meted out. The analysis of the legislative debates allows for an investigation of the ways change in penal statutes across time and space signals a shift in how society views the role of punishment and the responsibility of the punished.

#### DATA AND METHODS

This paper utilizes a process tracing approach to analyze the legislative history of the laws requiring reimbursement for the costs of state incarceration in Michigan and Illinois. Process tracing and comparative case studies are well-suited to both understanding context and mechanisms that make a specific outcome possible (Blatter and Haverland 2014; Brady and Collier 2010) and for examining policy change (Kay and Baker 2015). This paper draws on legislative documents, floor debates, bill analyses, and judicial appeals decisions in each state. We first identified the portion of the current penal code that grants the state authority to impose and collect pay-to-stay fees. The current law cites the most recent date the law was updated and we traced the original law in each state backwards in time, identifying each bill and public act that made amendments to that portion of the law. This yielded 13 bills in Illinois and 4 bills in Michigan. Searches in the current penal code for relevant terms such as "reimbursement" and "Department of

Corrections” yielded additional laws related to the powers of the Department of Corrections (DOC) and the reimbursement of expenses in prisons and jails. Tracing these laws backwards, we identified 7 related bills in Illinois and 8 in Michigan. These bills provided historical context to the powers of the DOC and reimbursement expectations over that time period.

Using the index features of the legislative records, we did a close reading of the transcripts in the House and the Senate of every mention of the 32 relevant bills. Legislators across both the House and Senate discussed each bill we examined on at least ten legislative dates and up to seventeen dates. We downloaded the transcripts that offered substantive description, discussion, or votes of the relevant bills. Additionally, we collected all appeals to the pay-to-stay reimbursement law and major legislative speeches subsequent to the passage of the original laws, resulting in 93 documents, totaling over 2,500 pages. The lead author inductively coded these documents in NVivo to identify common language and themes. Following an iterative process, the authors exchanged memos and discussed the codes. As themes related to budgetary concerns and welfare institutions emerged, we then turned to secondary historical documents on Michigan and Illinois during the relevant time period, as well as revisiting the legislative record for bills related to the state’s budget and its handling of other welfare institutions.

One limitation of this analysis is the lack of historic transcripts of committee meetings or other types of analyses done by these committees in drafting, disputing, and amending the law. The fiscal analyses and committee documents available for Illinois’s 2019 repeal of its law and Michigan’s 1996 expansion suggest that many decisions about

the utility of these laws happen within committee. However, the floor debates included in this analysis highlight moments of tension and consensus among legislators in developing and passing these laws. This strategy also allows for a careful tracing of small changes in wording and language as the bills moved in and out of committee between readings on the legislative floor.

## FINDINGS

Michigan was on the leading edge of economic, social, and political development at the turn of the 20th century. The state's booming automobile industry gave way to new configurations of industry, production, and labor relations, which in turn impacted the structure of politics and punishment (Bright 1996). However, the Great Depression disrupted these configurations and threw politics as usual into disarray. Shrinking budgets and revenues largely dismantled the previous system that was built on patronage and the doling out of government contracts for large state projects, including highway and prison construction (Bright 1996: 124). It is in this moment, with Michigan's politicians adjusting to new political configurations of both industry and punishment, that we see the emergence of the first pay-to-stay provisions.

### *Responding to Fiscal Crisis: The Problem with the Welfare State*

Governor's speeches to the legislature at the beginning and end of congressional terms offer one glimpse into the priorities, political tensions, and challenges of the time. At the start of Michigan's 1935 congressional term on January 3, outgoing Governor William A. Comstock addressed his inaugural message to the joint convention of the two Houses. He commented that while the state had been successful in shrinking their fiscal

deficit at the beginning of the previous term, the legislature was “facing emergency conditions requiring the strictest economy possible.” Despite the state making great strides, he felt that there were a number of remaining problems facing the state. The first was taxation: “It has always seemed to me that a fair and just system of taxation should derive about half its revenue from a tax with a broad base like a sales tax and fifty per cent of its revenue from taxes levied on the principle of the ability to pay.” The second problem facing the legislature was “the welfare problem,” with unemployment increasing and the substantial emergency relief from the federal government becoming more precarious. The third problem was the overburdened facilities of state institutions, particularly of “the mentally deficient and epileptics.” He noted that this problem in particular “has been so recently and so thoroughly discussed that it is not necessary for me to go into detail.” His speech articulated a persistent tension in government, the desire to distribute the growing state budget across its constituents while also recognizing the duty of the state in providing for large groups of individuals unable to contribute to their own care.

The incoming governor, Frank D. Fitzgerald, echoed these concerns in his own speech to the legislature on the same day. He, too, began by describing a state “in crisis,” seeing it as an opportunity to put aside special interests and improve the state for the sake of all citizens. In agreement that finance and taxation were the main concerns, he commented that the “cost of government must be reduced,” advocating that “contributions are in proportion to benefits received and the ability to contribute.” Rather

than seeking new sources of state revenue, he proclaimed his administration would seek a simplified and balanced budget, focusing only on “essentials.”

Meanwhile, Michigan had recently constructed one of the largest prisons in the world in 1926, Jackson State Prison. The building of Jackson followed a decade of overcrowded facilities and increasing crime and criminalization due to prohibition, smuggling, and a growing young male labor force in Detroit (Bright 1996; Goodman, et al. 2017). Bright’s (1996) historical analysis of the building of Jackson details that its size was somewhat accidental, a product of growing patronage construction contracts. However, the pre-Depression model of prisons envisioned an industrial model where prisoners were put to work as a means for punishment, rehabilitation, and to pay for the prison through contracted prison labor. Dreams of creating a large, centralized labor force at Jackson that could sustain the institution itself were never realized, with the Depression shrinking the number of contracts available and high unemployment outside the prison leading to the collapse of the industrial logic of the prison (Bright 1996: 296). Saddled with the costs of this enormous prison, Michigan politicians, including Governor Fitzgerald, confronted a growing reform movement away from industrial logics towards a focus on individualized treatment:

*The cost of handling each probationer is only one-tenth of that paid by the state for its prisoners. If a better system of probation can be set up, it will inspire confidence in our courts to place more first offenders on probation instead of sending them to prison, where many become hardened criminals by reason of association.*

While part of the statement is couched in terms of deterring future criminal activity, Governor Fitzgerald’s overarching tone suggests concern over the mounting costs

associated with incarceration and potential solutions to reducing this fiscal burden in precarious economic times. Discussing such alternatives set the stage for the resulting state reimbursement law, the first iteration of pay-to-stay provisions.<sup>2</sup>

In the wake of the Great Depression, Governor Fitzgerald was not opposed to the distribution of welfare, despite his call for reduced government, and he announced it must be “our paramount obligation.” However, he stressed that state benefits be paid for by those who have the ability to contribute and not universally by the state. He faced overburdened and overcrowded public institutions including hospitals and orphanages, but without public funds to build more facilities. In terms of the penal arm of the state, he was displeased with its fragmented nature, its cost, and its inability to achieve rehabilitation: “...the existing [system is] highly unsatisfactory because it lends itself to political abuse, it does not deal adequately with the broad problem of punishment and reformation; and it is scattered among several unrelated agencies.” The tensions between cost and a desire to provide services to those in need opened the possibility for new practices for reimbursement that aligned with the state’s determination of fiscal responsibility.

In the midst of two competing crises, the fiscal crisis of the Great Depression and an overburdened welfare state that was failing to achieve its goals, Michigan ushered in the initial bill for the “Prison Reimbursement Act,” House Bill 204, which described its purpose as relative to the “care and maintenance of prisoners therein” and “to provide for the reimbursement of the on account thereof in certain cases” for the three prison institutions in the state, including the Ionia Hospital for the Criminally Insane. The initial

bill focused on “certain cases,” allowing the state to investigate “all information available on the financial responsibility of said prisoner” and making suspected estates subject to payment. The finalized version of the bill grants this authority stating, “regard being had to claims of persons having a moral or legal right to maintenance out of the estate of such prisoner.” The state is then *entitled* to these funds in exchange for the provision it provides. If one has the means to pay for reformation, then it is their legal responsibility to do so.

In the legislature, House Bill 204 received little discussion or opposition, with the final version of the bill passed 25 to 4 in the Senate and 93 to 0 in the House, becoming Act 253 of 1935. The lack of opposition may have been because the language was strikingly similar to a previous act, Act 151 passed in 1923, that consolidated the laws organizing the hospitals for the insane and other institutions for mental disorders. This act stipulated that the state collect from the estates of the insane, feeble-minded, or epileptic in cases where the individual, their family members, or a legal guardian was deemed to have an estate. The act differentiated between “public” versus “private” patients based on their ability to pay, despite occupying the same institution. Both acts allowed for collection of the “future expenses” of housing and treating individuals. The portion of House Bill 204, quoted above, establishing a moral and legal right to payment and the terms for reimbursement, appeared word-for-word in this previous act. The fact that this new act was copied verbatim was discussed in several judicial appeals (see *Auditor General v. Hall* 1942 and *Auditor General v. Olezniczak* 1942), which later served to uphold the constitutionality of this new law based on precedent. As the prison was

reconceptualized as an institution for individualized treatment and rehabilitation, we see the same logics of payment and fiscal responsibility transferring across institutions.

An amendment to the bill in 1937 added clarity to legislators' intentions with its new reimbursement law: "In enacting Act 253 of the Public Acts of 1935, it was not the intent of the legislature to discourage thrift and good habits by the prisoner during the period of his incarceration, but to provide for reimbursement to the state in such cases where the prisoners were possessed of estates which warranted such reimbursement." In this articulation, the legislature makes it clear they were not envisioning these fees as a sanction nor do they anticipate any deterrent impacts or rehabilitative effects from the fees themselves. The imposition of pay-to-stay fees was about revenue collection and funding the welfare system and its correctional incarnations. In making prison wages exempt from collection in the amendment, the state sought to separate labor from pay-to-stay, and attempt to balance the state's commitment to a rehabilitative ideal with the needs of revenue generation by protecting monies received both through prison labor and recoupment of inmates' estates.

In the first major appeal of the law in 1942 [*Auditor General v. Hall*], the presiding judge rationalized the unequal application of this law, considering "that two individuals with the same criminal classification would be treated differently depending on whether they had an estate." Similar to this analysis, he drew on the striking similarities with other welfare reimbursement laws, understanding incarceration as a form of welfare, emphasizing its rehabilitative efforts rather than its punitive purpose:

*The moral difference between an insane person and a felon is manifest, but, from a sociological point of view, their similarities are more pronounced than their*



*dissimilarities. An insane person is mentally sick, while a felon is frequently termed socially sick, anti-social. Both require institutionalization for their own benefit as well as that of the public at large. A modern prison requires the full time services of at least one psychiatrist. A convict is sent to prison not only for punishment and determent, but also for reformation and rehabilitation (Act No. 255, chap. 4, § 7, Pub.Acts 1937 (Stat.Ann. § 28.2127)). He has made it necessary for the State to keep and maintain him at a large cost. Many provisions in the Prison Reimbursement Act seem to have been adopted verbatim from the act providing for recovery of expenses from the estate of insane persons. 2 Comp.Laws 1929, § 6894 (Stat.Ann. § 14.817). The latter act provides for recovery of so much of the expenses, both past and future, from the estate of the insane person, 'as may to the court appear to be just and equitable, regard being had to the claims of persons having a moral or legal right to maintenance out of the estate of such mentally diseased person.' The statute relative to the recovery of the expenses of maintenance from the estate of insane persons has been upheld by this court.*

This conceptualization of criminality as a social illness is consistent with the rehabilitative ideals of the time (Rothman 1971; Schneider 1993; Bright 1996). In this quote, the judge places the blame on the prisoner: “he made it necessary,” with the responsibility for the costs as separate from the original sentence that punishes, thus making the law exempt from protections under double jeopardy. This highlights the consequence of the earlier distinction between “punishment” and “not punishment,” as the courts frame sanctions as civil commitments to place them outside of the constitutional limits on excessive punishment. A second appeal, *Auditor General v. Olezniczak* (1942), reiterated these logics and legal precedent, characterizing the period before the law as a time in which the “State of Michigan to furnish its prisoners such keep and maintenance gratuitously.” In this appeal, the judge stated that to limit the types of assets subject to this law would be to “deny the State of Michigan reimbursement” for the rehabilitation provided, again reiterating that the state is entitled to compensation.

## [TIMELINE ABOUT HERE]

*New Wave of Fiscal Crises: Battle Between Austerity and the Welfare State*

In 1980 and 1981, a new set of fiscal crises hit the country with another recession due to rising interest rates and oil prices, with unemployment reaching historic highs. The speeches of legislators and Governor Thompson in Illinois in 1981 echoed many of the same sentiments of those in Michigan in the 1930s. The recession impacted state revenues due to lower corporate tax receipts, raising the unemployment rate to a shocking 12.9% by 1982, prompting legislators to discuss the deteriorating business climate. Governor Thompson echoed the sentiments of Michigan's Governor Fitzgerald in creating a leaner and more efficient state, instructing, "New programs must be postponed or cancelled. State employment must be forced down," while simultaneously calling for the state to continue its commitment to the welfare of its citizens: "Our first priority must be to make sure that no resident of our state goes without food, clothing, shelter, or essential medical services." Similarly to sentiments in 1935, Governor Thompson discussed that essential funding from the federal government would soon be ending, largely due to the beginning of President Reagan's administration, resulting in lost revenue totaling nearly \$113 million. Governor Thompson praised the lean budget he was proposing, "And if we, the elected representatives of the people, do not quickly get them to the bottom line of economic stability, fiscal prudence, a lean government that delivers 100 percent on the taxpayer dollar invested and leaves the maximum possible in the taxpayers pocket for themselves and their families, we will be let go." Again we see the

rationale of austerity, of cutting and limiting government, but at the same time maintaining necessary welfare services to support its citizenry during the recession.

In the beginning of the 1980s, states were facing a confluence of factors that heightened existing fiscal pressures, with many precipitated by the changing administration at the federal level. In particular, the Omnibus Reconciliation Act (OBRA) of 1981 set the stage for a mounting fiscal crisis in regard to social welfare programs and a broader discussion on who should be responsible for the costs of said programs. While OBRA did not discuss incarceration specifically, it was an instrumental force in driving state budgets into shortfall, causing states to reconsider their contributions to social services and institutions (Jacobi and Van Dam 2013). With shifting landscapes on the federal level and an encroaching nationwide recession, states were left grappling with budgetary shortfalls and increasing citizen demands for welfare state services. As money from the federal government became increasingly precarious, states began to contend with forces within their states and at the federal level that were aimed at shrinking the size of government and shifting the economic responsibilities of welfare services. Such austerity moves on the federal level prompted states to rethink the utility of and funding models for welfare state programs and services.

Responding to concurrent external and internal pressures, Governor Thompson suggested shrinking the size of the growing welfare state by limiting increases in spending, and as a second priority, containing the burgeoning costs of Medicaid. Escalating medical costs, particularly hospital care, were eating away at public aid funding as the federal government planned to cap reimbursement. While Illinois's

legislators moved away from in-patient care and institutionalization for the mentally ill to cut costs, legislators grappled with dangerous overcrowding in prisons. In his speech, the governor also proposed the building of an additional 1,000 prison beds. Prison expansion, rather than decriminalization, was the political economic strategy of the era. Governor Thompson described the state of the penitentiary system as:

*Bursting at the physical and financial seams of a correction system which has been extended again and again and again in the past four years at great cost to other areas of social concern. To this point we have been willing to pay the price because prison confinement, while expensive, at least protects society from those most dangerous among us.*

Here we see the governor noting that the cost of the carceral system was already impinging on other social functions of the state, resulting in a proposed budget that would eliminate 1,150 jobs from the Department of Mental Health Facilities, close community health centers, and make drastic cuts to public aid. Governor Thompson pitted the correctional system against other necessary social services, highlighting its purpose, yet decrying the compromises required of other welfare services.

Only three weeks later, on March 24, 1981, Governor Thompson addressed the legislature again. This time to declare another crisis – the Regional Transit Authority (RTA), the main transit body that oversaw the administration of the Chicago Transit Authority and commuter rail and bus services, had run out of cash and was three weeks away from shutting down. Just as the state grappled with an additional \$200 million to bail out the RTA, the legislature discussed the loss of federal highway funding, which they saw as disastrous to their efforts to keep business in the state. The governor critiqued what he saw as the legislature's fixation on shrinking unemployment compensation and

workers' compensation programs to encourage job growth. In this climate of fiscal crisis and a desire to shrink the welfare state, legislators were tasked with seeking alternate forms of revenue while keeping taxes low. It is within this paradox that solutions arise geared toward shifting what was seen as the welfare burden away from the state and to its "users."

Goodman, Page and Phelps (2017) find that in the history of U.S. criminal justice policy, it is not uncommon to see recycling as different regimes and penal logics shift in different contexts. We find the same with pay-to-stay reimbursement laws. On May 18, 1981, in the midst of mounting fiscal pressures, the legislators of the Illinois House of Representatives debated the costs of the current correctional system. Representative Wolf mentioned reading an article in Reader's Digest that discussed Michigan's law "which would require wealthier inmates to help pay for their own room and board." In describing incarceration as "room and board," the legislator positioned incarceration as a welfare provision guaranteed by the state rather than as a punishment to be doled out. The Representative insisted that the law reflected "an honest attempt to recover costs from those who have large assets or who have enriched themselves because of notoriety gained during their trial." Representative Katz protested noting that Florida spends "twenty times more in administrative costs than they collect." Representative Wolf responded that Michigan in fact does not lose money; rather they collected over \$360,000 in the previous year. Introduced in a moment of fiscal crisis, House Bill 542, the law to seek reimbursement from wealthy prisoners, was in line with the austerity politics of the state and with existing discussions that worked to separate the worthy from the unworthy

among those benefiting from the welfare state. Furthermore, the adoption of the law solidified the legal template, as referenced in Rubin (2019), which cemented the symbolic connection between the incarcerated person and unworthiness, making the law a justified solution to a fiscal crisis.

*Michigan's Second Fiscal Crisis: The Expansion of the 1935 Reimbursement Act*

On January 2, 1983 the New York Times printed the headline “Michigan Governor Sworn; Says State is in ‘Depression.’” The newspaper described the state of Michigan as “slumped deep in recession and a government that is nearly insolvent” (Peterson 1983). Governor Blanchard, a Democrat, took leadership of a state again in fiscal crisis. Michigan’s automobile industry was struggling to compete with Japanese imports and its unemployment rate had risen to 16.4 percent, the highest of any state that year, which resulted in increased use of welfare and unemployment compensation. A speech by Blanchard’s chief of staff at the end of 1983 described the fiscal and economic crisis as “unprecedented” in Michigan, “no previous administration had ever inherited the dual scourges of chronically high unemployment and huge budget deficits” (Thick 2018). Similar to Illinois, legislators pointed to the withdrawal of federal funds and reduced revenues. With the state on the verge of bankruptcy, Governor Blanchard faced a nearly \$2 billion deficit, which necessitated drastically cutting spending and temporarily increasing taxes to achieve a balanced budget.

In the midst of another period of austerity and crisis, as well as a legal appeal of the 1935 law [*State Treasurer v. Wilson*], the legislature opted to amend nearly the entirety of the reimbursement act to remove the phrase “certain cases,” to expand the population

subject to pay-to-stay and broaden the definition of assets from an “estate” to “social security, worker’s compensation, veterans’ compensation, pension benefits, previously earned salary or wages, bonuses, annuities, retirement benefits, or from any other source whatsoever.” This new definition of assets decidedly suggests that Michigan lawmakers were no longer imagining the wealthy prisoner that Representative Wolf of Illinois described. Pensions in particular were protected under law from seizure, but Michigan’s new law expanded beyond other existing legal protections (Brower 2011). Only if the prisoner had assets that covered less than 10% of the estimated cost, would the Attorney General not seek reimbursement. In the expanded law, prisoners would be required to contribute up to 90% of their assets to the DOC. The law established the necessity for a standardized form to determine the financial ability of each inmate, making financial consideration now part of the incarceration experience. Failure to comply would be considered for purposes for parole, meaning inmates could be punished for non-disclosure. In the passing of these laws, Michigan has been successful in collecting additional revenue for the state, beyond what it had hoped. The Senate Fiscal Agency analysis in 1984 estimated collections of \$70,000 annually, whereas the DOC estimated up to \$150,000. While numbers for those early years are not available, in the 1993-1994 fiscal year the Attorney General collected \$479,988, with corrections expenditures totaling around \$659 million. In light of the shortfall, the legislature sought to expand the scope of collections procedures and allowances to increase potential revenue.

*Later Amendments: Increasing Collections*

With the growing demands on the state due to the expanding correctional system in the 1990s, Illinois amended its law several times to ensure that the Attorney General pursued reimbursement in all cases where collection might be possible. Illinois continued to move closer to Michigan's law to enhance the powers of the Attorney General to utilize civil procedures to recoup assets, expand the definition of assets, and adopt a per-capita daily cost determination. While a few legislators expressed concerns regarding harming innocent family members by the imposition of the enormous costs of the system, the bills continued to pass with little legislative opposition. Following a DOC audit, Illinois significantly amended the law in 2002 to more closely resemble Michigan's in order to no longer target the "wealthy" and undeserving, but as a more explicit tool for revenue generation. On April 3, 2002, Senator Roskam read Bill 2195 and put it up for a vote, commenting, "Basically, the audit folks said that the Department wasn't doing a good enough job in terms of seeking reimbursement from incarcerated persons to those -- those expenses for which incarcerated persons can be subject. So, this bill requires incarcerated people to disclose assets and so forth. Think it's a good bill, and I'd ask for your favorable consideration." The amendment passed 56 to 0 without further discussion. The bill in reality did much more; it created a standardized form, criminalized nondisclosure of assets through parole determinations, expanded those subject to the law from "convicted" to "committed" persons, and adopted verbatim Michigan's new definition of assets to include "social security, worker's compensation, veteran's compensation, pension benefits, or from any other source whatsoever and any."



A further Michigan amendment in 1996 expanded the law to require prisoners to pay for any college course taken while incarcerated. The fiscal analysis presented for this new amendment discussed the rising costs of housing prisoners and of the corrections budget in the past decade, decreasing budgets for other state agencies, including education. While committed to a large and expanding correctional system, the state needed to balance its expenditures with the costs of other state functions. Michigan also faced another mounting concern -- the state was now under court order, through a federal consent decree, to provide college-level classes and programming, but did not have the funds to provide the classes. The legislators saw no other option than passing these costs onto the inmates themselves: "After all, free, law-abiding, tax-paying citizens have to pay for their college education. Why should prisoners get a state-paid college education when other citizens don't?" While education is framed as a service, inmates are not seen as deserving of free services from the state. The expansion of this law presented the state with an opportunity for revenue generation. Given that the cost of college programming was nearly \$1.8 million in fiscal year 1994-1995, one Senate analyst estimated that this inclusion could realize significant additional collections. Here again we see the legislators in Michigan responding to rising costs in providing services to the state, with a reluctance to seek additional revenue from taxes or other sources.

While Illinois and Michigan lawmakers consistently referenced the ability to pay as an enforcement criterion throughout the statutes' development, prisoners' accounts were surveilled constantly for any influx of funds, regardless of the amount. Michigan takes it further by prohibiting prisoners from possessing accounts at financial institutions,

mandating all assets be kept in institutional accounts, which are visible to and controlled by the state (Brower 2011). Since prisoners can have their mail opened as a security precaution, the state uses this policy as a mechanism to seize incoming funds, with *State v. Turner* upholding the right to seize monies arriving via mail (Conboy 1995). These invasive detection and collection procedures align with the broader expansion of costs attributed to incarcerated individuals, serving to reinforce the fiscal and moral responsibility of those with even a modicum of assets to reimburse the state for costs incurred (Lynch 2009). Such practices in the pay-to-stay universe reveal a perpetual struggle between the forces of austerity and the welfare state within institutions of control -- the mandate to provide services of care, treatment and rehabilitation and the stated purpose to punish while contending with soaring expenditures and the demand for cost-cutting measures (Aviram 2015). In the midst of this struggle, states have elected, through the creation, implementation and expansion of pay-to-stay provisions, to shift a collective burden to incarcerated individuals to maintain the welfare state. The historical analysis of pay-to-stay across states and time provide context for the changes on the horizon, as the confluence of austerity politics, the expansion and contraction of the welfare state and the dynamics of penal policy and practice alter the legal, fiscal and moral landscape of carceral systems.

#### *Prosperity & Change in Illinois: Rolling Back Reimbursement Law*

In 2019, the Illinois legislature and Governor Pritzker repealed the state's pay-to-stay law for state prisons, citing moral and ethical reasons and concerns over recidivism and rehabilitation (Illinois Senate Democrats 2019). Earlier in the year, the state also

enacted HB4594, known as the Criminal and Traffic Assessment Act, which created a graduated waiver to lessen the burden of court costs on indigent defendants. When observing this current trend away from certain types of user fees in the criminal legal system, it is important to note that this period was not one of fiscal crisis. Governor Pritzker in his first budget address to the joint convention of the two Houses on February 20, 2019 spoke of optimism. Despite a large budget deficit which he attributed to “an ideological battle,” he described “a time of unprecedented economic growth across the country.” He stated, “We must stop slashing programs that build prosperity” and “let’s not hollow out vital government services anymore.” Rather than a rhetoric of austerity, his was one of expansion and investment in education, healthcare, and social services. Rather than cutting spending, he proposed two new sources of revenue that would bring in an estimated \$1.1 billion to the state: the legalization and taxation of cannabis and sports betting. These new sources of revenue would both contribute to paying down the state’s debt and support an expanded welfare state, with tax revenue from cannabis sales earmarked for mental health services, public education, and community investment. When not under a period of austerity and fiscal crisis, pay-to-stay laws and the particular type of user fees imposed on those with the least ability to pay appear to fall out of a favor as a means to fund these essential government functions.

## DISCUSSION

In two different state contexts, at two separate time points, we see related patterns of austerity measures used to limit the scope and reach of government while passing on the cost of essential welfare state services to users of institutions, such as jails, prisons,

and asylums, through pay-to-stay provisions. This paper views criminal justice policy within its broader legislative contexts to understand what motivates states to adopt legal mechanisms that recoup the costs of incarceration. We find that both Michigan and Illinois implemented and amended their laws during moments of fiscal crisis, motivated by both conservative desires to limit taxes and shrink the size of government at the same time that broader recessions threatened budgetary solvency. Thus while these laws reflect the neoliberal tendency of shifting costs to those who “use” the system, they also reflect how historically, states conceptualize correctional systems in moments of crisis within broader contexts of the welfare state. While monetary sanctions implemented as punishments can tell us about how society evaluates certain crimes, monetary sanctions also provide insight into the struggles of the state to determine who bears the burden of paying for essential state services. This historical context is increasingly pertinent as we begin to understand the impacts of the 2008 financial crisis (Aviram 2015) and the impending fiscal crisis caused by the COVID-19 epidemic on the use of incarceration and on the correctional system more broadly.

The legislative transcripts provide a window into the formation and framing of fiscal responsibility for public state services. In the midst of budgetary shortfalls and increasing fiscal demands on state and local budgets, the states of Michigan and Illinois, at separate time points, opted for practices that would limit the scope of government and implement fees as a veritable tax for the use of prisons and mental health institutions. Our findings demonstrate that the logic of federal and state-level austerity measures to curtail welfare state spending prompted legislative bodies to search for new sources of revenue

separate from over-stretched state coffers and inconsistent federal funding streams. The similar language in both states at two distinct times in history highlight a pattern of logic about fiscal responsibility and the welfare state that predates our contemporary debates on the neoliberal forces of the criminal justice system.

These logics dovetail with the logic that those who use state resources and take part in welfare state services should be fiscally responsible for the costs incurred. This responsibility, both for the individual and their families, is rooted in conceptions of “good” custodial citizenship, separating those contributing to the common good and those viewed as a burden to the current system (Harris 2016). Those in need of welfare state services, such as mental institutions or prisons, are often cast in the latter position, seen as both a burden but also responsible for having to avail themselves of state resources. Such sentiments are clear in the statement from the judge tasked with deciding the constitutionality of the Michigan prisoner reimbursement act, stating that, “...there is nothing in the Constitution inhibiting laws extending charity to people in need of it, but it is not necessary to extend charity to those who are able to support themselves.” The deservingness of welfare state services, described here as “charity” as opposed to a state-rendered social service, therefore hinges not on the individual’s need of treatment and rehabilitation, but rather on their means to pay. With the ability to pay extending to the families of the institutionalized and their estates, the state effectively whittles down the population eligible to receive welfare state services “free of charge,” thereby shrinking the potential recipients of state services and the fiscal responsibility of state governments.

The historical antecedents of the implementation of pay-to-stay in both Michigan and Illinois provide essential context for the broader nationwide shifts of fiscal responsibility from state and federal government sources to the assets and estates of those utilizing welfare state services. In many ways, the cases of Michigan and Illinois's pay-to-stay provisions highlight the constitutive power, as referenced in Rubin (2019), of legal templates that become institutionalized across time and space, and where the practice of suing prisoners for the cost of their incarceration becomes a normative practice, enshrined not only in law but in a moral imperative of fiscal responsibility. Casting incarceration no longer as a state function but as "user" responsibility patterns onto broader moves to formulate and conceptualize certain essential services as distinct and subject to rules, policies, and statutes that differ from the wider universe of welfare state provisions. With the rise in the use of monetary sanctions, scholars, advocates, and activists, and debtors, have pointed to the role sanctions play in exemplifying this change in the last few decades. The creation and adaptation of pay-to-stay policies and practices in Michigan and Illinois provide insight into the foundations of these shifts, showing how the collision of economic austerity forces and the political and social landscapes can alter the fundamental rights of citizenships, including the use of public services. Pay-to-stay statutes exist within a constellation of methods to separate government from its fiscal and budgetary responsibilities while also punishing those individuals who are often perceived as burdens to the welfare state. The implications of measures that shift this fiscal liability pose financial burdens for the incarcerated and institutionalized populations, while eroding their future economic security, increasing the potential for continual dependence

on the government for welfare state services. Thereby, with pay-to-stay provisions, the state creates a feedback loop that keeps individuals dependent yet stigmatized and paying for the “privilege” of carceral or institutional incapacitation.

## CONCLUSION

Determining who pays for the welfare state constitutes a fiscal and political crisis, with criminal justice reform historically occurring in moments of fiscal crisis that push states and local jurisdictions in new directions, often leading to more punitive regimes and unintended consequences (Aviram 2015; Gottschalk 2015; Lynch 2009; Rubin 2019).

The two time points analyzed in Michigan and Illinois represent a confluence of dynamics that converged to create a shift towards austerity politics during great fiscal crises, coinciding with the increased use of state-run institutions, prompting a discussion of fiscal responsibility to fall squarely on the shoulders of users – or their estates – rather than on the state. The origin of pay-to-stay statutes suggests correctional confinement is explicitly a component of the welfare state when fiscal challenges arise, but falls back into the realm of punishment when crises are averted. This tension between politics, welfare, and punishment speaks to the discretionary nature of determining who benefits from “free” provisions, particularly in moments of austerity. With a capitalist economic system hostile to maintaining a welfare state yet still committed to the scientific correction of criminality and the hyper-criminalization of behavior, criminal justice reform policies, such as pay-to-stay, will continue to position welfare as a burden to the state. Self-sufficiency is the desired end of corrections rather than the redistribution of resources or the correcting of inequalities, allowing the state to further distance itself

from its welfare obligations. Such patterns are continually replicated in our contemporary systems, suggesting the vital need for exploring such laws from a historical context to comprehend the complex dynamics surrounding the implementation and continued transmission of pay-to-stay statutes and their effect on the relationship between states, citizens and the welfare state.

#### ENDNOTES

<sup>1</sup>While state Supreme Court decisions have noted that if pay-to-stay was intended to alleviate tax burdens then it would violate the ex post facto clause of the U.S.



Constitution (Michtom 2003), these and other challenges to pay-to-stay laws have been largely unsuccessful.

<sup>2</sup> Pay-to-stay fees were already in place in local jails, where individuals were required to pay a fee to the county.

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