

CASE STUDY

PAY-TO-STAY AS STATEGRAFT

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Stategraft refers to the practice by which “state agents transfer property from persons to the state in violation of the state’s own laws or basic human rights.”¹ Public officials engaging in stategraft utilize these financial resources to replenish public coffers and often target segments of the population poorly positioned to fight back.² Arguably, there are few populations more vulnerable to financial extraction than incarcerated individuals. Thus, a prime example of stategraft at work is that of “pay-to-stay” fees or the practice of states and localities charging incarcerated individuals for the cost of their incarceration. Legal scholars have challenged the constitutionality of these practices as violating the Due Process Clause of the Fourteenth Amendment, and the Excessive Fines Clause of the Eighth Amendment.³ Our research has focused primarily on states that utilize civil lawsuits to collect these fees, such as Illinois and Michigan, as particularly egregious examples of stategraft.

In this Case Study, we lay out how this practice extends beyond predation to reflect stategraft. While many practices of stategraft are tied to the rise of neoliberalism, pay-to-stay practices have a longer history in the United States, dating back to the 1930s and the rise of the modern prison.⁴ We draw on empirical research that we have conducted on prison pay-to-stay practices in Illinois and Michigan, as well as a survey of state

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1. Bernadette Atuahene, *A Theory of Stategraft*, 98 N.Y.U. L. Rev. 1, 3 (2023).

2. *Id.*

3. Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees behind Bars May Violate the Excessive Fines Clause*, 15 LOY. J. PUB. INT. L. 319 (2014); Katherine G. Porter, Article, *A “Debt” to Society?: Reassessing the Constitutionality of Pay-to-Stay Programs in Ohio Jails and Prisons*, 44 OHIO N.U. L. REV. 415, 419–24, 429–35 (2018); S.P. Conboy, Note, *Prison Reimbursement Statutes: The Trend Toward Requiring Inmates to Pay Their Own Way*, 44 DRAKE L. REV. 325, 344–46 (1996).

4. Gabriela Kirk, April Fernandes & Brittany Friedman, *Who Pays for the Welfare State? Austerity Politics and the Origin of Pay-to-Stay Fees as Revenue Generation*, 63 SOCIO. PERSPECTIVES 921, 921—22, 927 (2020); See Atuahene, *supra* note 1, at 35.

statutes across all 50 states.⁵ While a small number of states including Illinois are repealing or reforming these practices, we have found at least 43 states have active statutes that allow for the collection of fees related to the costs of incarceration, referred to as “room and board.”⁶ The amount states charge is often calculated by determining the annual operating cost divided by the days that individual was incarcerated.⁷ For incarcerated individuals subject to these fees, the amounts can reach into the hundreds of thousands of dollars and their collection can represent the totality of their financial assets.⁸ In Michigan, the state is entitled to 90% of one’s assets and can seize assets normally protected from collection such as pensions and social security benefits.⁹

States argue the legality of these practices by framing fees as reasonable reimbursement for “expenses incurred by their incarceration.”¹⁰ However, we found that historically in Illinois the money collected did not necessarily go directly back to the Department of Corrections.¹¹ The funds collected went into a general state fund that was then distributed to a number of agencies to serve the state’s needs in agriculture, health and family services, and juvenile justice in addition to corrections.¹² These fees, collected from incarcerated individuals, went to satisfy other budget shortfalls rather than reimbursing the state. Additionally, state budgets already include large amounts of funding for the operation of prisons.¹³ Beyond extracting disproportionately from this vulnerable population, the state is collecting funds for expenses it has likely already funded through state tax dollars and other revenue.

Pay-to-stay fees represent a form of stategraft because states utilize collection practices that violate due process and draw on information and

5. *50 State Historical Survey of Pay-to-Stay Fees*, CAPTIVE MONEY LAB (forthcoming 2024) <https://captive.moneylab.org> [<https://perma.cc/357M-5CUS>] (on file with authors) [hereinafter *50 State Survey*].

6. *Id.*; see also Eisen, *supra* note 3, at 322, 325.

7. See Brittany Friedman, April D. Fernandes & Gabriela Kirk, “*Like If You Get a Hotel Bill*”: *Consumer Logic, Pay-to-Stay, and the Production of Incarceration as a Public Commodity*, 36 SOCIO. F. 735, 750–52 (2021); Kirk, Fernandes & Friedman, *supra* note 4, at 923.

8. Friedman, Fernandes & Kirk, *supra* note 7, at 752.

9. MICH. COMP. LAWS § 800.401a (2024); see generally Meghan L. Brower, *Prisoners with Pension Pay Their Own Way: An Examination of the Michigan State Correctional Facility Reimbursement Act*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 139 (2011).

10. 730 ILL. COMP. STAT. 5/3-7-6 (2019), *repealed* by S.B. 1158, 101st Gen. Assemb., Reg. Sess. (Ill. 2019).

11. Feba George, *Illinois Fiscal Analysis* (2022) (unpublished) (on file with authors).

12. *Id.*

13. See GOV. JB PRITZKER, ILLINOIS STATE BUDGET: FISCAL YEAR 2024 303 (2024).

power asymmetries. In the case of Illinois and Michigan, we argue that states weaponize the particularities of civil law and procedure, what we call *civil lawfare*, to strategically prey upon vulnerable, disenfranchised populations facing institutional barriers accessing legal resources.¹⁴ In analyzing lawsuits brought against incarcerated individuals in Illinois, we found that incarcerated individuals who were charged pay-to-stay fees struggled to find legal information, assistance, and to participate meaningfully in hearings related to the civil lawsuits used to recoup pay-to-stay fees. Those named in these lawsuits explicitly stated they lacked access to information including the time and location of their hearings, lacked access to law libraries within the prison to prepare for their defense, and often expressed confusion as to the nature of these laws and their collection procedures.¹⁵ Incarcerated individuals often argued that assets being seized were protected from collection or shared with other family members who did not bear the responsibility for their incarceration.¹⁶ Access to information and due process is critical given the broad reach of collection of these fees. Differing from the cases of Illinois and Michigan, at least 22 states collect a portion of wages earned while incarcerated for reimbursement.¹⁷ By recouping pay-to-stay fees through civil and administrative proceedings, the state violates the due process rights of incarcerated individuals, who are often left confused and surprised by this sudden, often substantial, debt.¹⁸

Finally, states selectively impose and collect funds for pay-to-stay reimbursement. In a survey of all 50 states, our research team has found that states rarely have clear guidelines as to when and from whom funds can be requested.¹⁹ This inconsistency can lead to further predation.²⁰ Stategraft often targets already vulnerable populations.²¹ In Illinois, we found that the state attempted to collect from several individuals with physical and cognitive disabilities due to the fact that many had financial assets received through medical malpractice or personal injury lawsuits, in some cases as a result of injuries at the hands of correctional officers.²² This group of incarcerated individuals are among the most vulnerable to stategraft. The collection of pay-to-stay fees from individuals with disabilities is not uncommon. Several other states, such as Connecticut and Florida, engage in pay-to-stay collection through the use of countersuits,

14. April D. Fernandes, Brittany Friedman & Gabriela Kirk-Werner, *Civil Lawfare* (2024) (unpublished manuscript under review) (on file with authors).

15. *Id.*

16. *Id.*

17. *50 State Survey, supra* note 5.

18. *See* Porter, *supra* note 3.

19. *50 State Survey, supra* note 5.

20. Friedman, Fernandes & Kirk, *supra* note 7, at 752.

21. *See, e.g.,* Atuahene, *supra* note 1, at 3–8.

22. Fernandes, Friedman & Kirk-Werner, *supra* note 14.

for example, suing individuals who are bringing suits against the state often related to state mistreatment or medical malpractice.²³

In conclusion, pay-to-stay stands to serve as a clear case of stategraft because states are filling their coffers by illicitly extracting resources from some of the most vulnerable and financially disadvantaged segments of the population. By selectively collecting funds for the “reimbursement” of incarceration (a state function already funded by other sources), violating incarcerated individuals right to due process, and preying on the most vulnerable and poorly positioned to fight back, states engage in a practice that goes beyond predation—to stategraft.

23. April D. Fernandes, Brittany Friedman & Gabriela Kirk, *Forcing People to Pay For Being Locked Up Remains Common*, WASH. POST (May 2, 2022, 6:00 AM EDT), <https://www.washingtonpost.com/outlook/2022/05/02/forcing-people-pay-being-locked-up-remains-common/> [<https://perma.cc/BUN7-MVCJ>]; see CONN. GEN. STAT. § 18-85a to 18-85b (2023); FLA. STAT. § 960.297 (2023).