statutory language of this exclusion, often referred to as the "inmate exclusion," contains an exception for when the inmate is a patient in a medical institution, such as when an inmate must be hospitalized.[21] The "inmate exclusion" exception will be discussed further in Part IV of this article. Second, the inmate exclusion only excludes federal *payments* for medical care and services; the exclusion does not expressly terminate Medicaid eligibility and enrollment of inmates, but rather the inmates' ability to use federal Medicaid funds for payment of medical care and services.[22]

Historically, many states have read the inmate exclusion rule as terminating Medicaid eligibility, rather than the payment status, upon incarceration. Thus, most states terminate inmates' Medicaid coverage upon incarceration because they think it is necessary to adequately comply with the statutory provisions of 42 U.S.C. § 1396d (a)(29)(A). As a result, hundreds of thousands of inmates are released from prisons and jails each year with no medical coverage.[23] Not only are these individuals attempting to secure adequate housing and employment post-release, but they must also go through the tedious process of applying for a new eligibility determination for Medicaid coverage,[24] which can take a minimum of 45 to 90 days.[25]

The Centers for Medicare & Medicaid Services attempted to address this problem in a 2004 letter sent to all State Medicaid Directors and CMS Associate Regional Administrators for Medicaid.[26]

> CMS is encouraging states with this letter to "suspend" and not "terminate" Medicaid benefits while a person is in a public institution or Institute for Mental Disease (IMD). Persons released from institutions are at risk of homelessness; thus, access to mainstream services upon release is important in establishing a continuum of care and ongoing support that may reduce the demand for costly and inappropriate services later.
>
> As a reminder, the payment exclusion under Medicaid that relates to individuals residing in a public institution or an IMD does not affect the *eligibility* of an individual for the Medicaid program. Individuals who meet the requirements for eligibility for Medicaid may be enrolled in the program before, during, and after the time in which they are held involuntarily in secure custody of a public institution or as a resident of an IMD. The statutory federal financial

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21. *See* 42 U.S.C. § 1396d(a)(29)(A) (2006).

22. FED. INTERAGENCY REENTRY COUNCIL, REENTRY MYTHBUSTER! ON MEDICAID SUSPENSION VS. TERMINATION 1 (2011) https://csgjusticecenter.org/documents/0000/1181/Reentry_Council_Mythbuster_Medicaid_Suspension.pdf.

23. COUNCIL OF STATE GOVERNMENTS JUSTICE CTR., *supra* note 6, at 1.

24. *See* HEATHER BARR, CORRECTIONAL ASSOCIATION OF NEW YORK & URBAN JUSTICE CENTER, PRISONS AND JAILS: HOSPITALS OF LAST RESORT 14 (1999), *reproduced in* Prison Legal News (Nov. 26, 2003), https://www.prisonlegalnews.org/media/publications/prisons_and_jails_hospitals_of_last_resort_heather_barr_2003.pdf.

25. *See* COUNCIL OF STATE GOVERNMENTS JUSTICE CTR., *supra* note 6, at 4.

26. FED. INTERAGENCY REENTRY COUNCIL, *supra* note 22, at 2.

> participation (FFP) exclusion applying to inmates of public institutions and residents of IMDs affects only the availability of federal funds under Medicaid for health services provided to that individual while he or she is an inmate of a public institution or a resident of an IMD.

This letter introduced[27] and encouraged the idea of Medicaid suspension for inmates as an alternative to termination.[28] It also spoke directly to the ambiguity present in both the *Estelle* rule and the FFP with regards to inmates' health insurance or other medical coverage.[29] Although the court in *Estelle* determined that states must provide adequate medical care prisoners, it did not address whether states could allow inmates to use their own health insurance to cover medical costs.[30] The statutory federal financial participation exclusion spoke to this ambiguity by stating that Medicaid can be used to pay for a wide variety of medical care or services, unless the individual covered under Medicaid is an inmate of a public institution.[31] However, neither the federal financial participation exclusion nor the *Estelle* decision discuss whether individuals may still be enrolled in Medicaid while they are inmates of a public institution. The above CNS letter gave a clear answer to the ambiguity. To date, twelve states[32] have adopted a policy of suspending rather than terminating Medicaid eligibility for inmates.[33] Thus, thirty-eight states and the District of Columbia still terminate[34] Medicaid for inmates upon incarceration.[35]

B. Medicaid expansion under the PPACA means more prisoners will be eligible for Medicaid coverage.

"Each year more than 700,000 individuals are released from state and federal prisons."[36] Additionally, approximately 9 million individuals cycle through local jails[37] each year.[38] Of these 10 million, an estimated 70 to 90

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27. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-752R, MEDICAID: INFORMATION ON INMATE ELIGIBILITY AND FEDERAL COSTS FOR ALLOWABLE SERVICES 3 (2014), http://gao.gov/assets/670/665552.pdf (stating that CMS first issued guidance addressing continued Medicaid eligibility for inmates in 1997).

28. *See* FED. INTERAGENCY REENTRY COUNCIL, *supra* note 22, at 2.

29. DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 199–200 (1989).

30. *See* Estelle v. Gamble, 429 U.S. 97 (1976).

31. *See* 42 U.S.C. § 1396d(a)(29)(A) (2006).

32. NATIONAL ASS'N OF COUNTIES, *supra* note 13, at 2 (listing California, Colorado, Florida, Iowa, Maryland, Massachusetts, Minnesota, New York, North Carolina, Ohio, Oregon and Texas as the states that currently suspend Medicaid coverage for inmates).

33. *Id.*

34. *Id.* ("Some states have passed laws to expand that timeframe to avoid terminating coverage for those being detained or serving short sentences.").

35. *See id.*

36. FED. INTERAGENCY REENTRY COUNCIL, *supra* note 22, at 2.

37. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 27, at 1 ("For purposes of this report, we define inmates as individuals incarcerated in state prisons, local jails, or facilities under contract with states or local authorities, such as counties. Inmates in state prisons are typically individuals sentenced for more than one year. Inmates in local jails are typically individuals with