

Chapter Title: The Permanent Punishment

Book Title: A Pound of Flesh

Book Subtitle: Monetary Sanctions as Punishment for the Poor

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Published by: Russell Sage Foundation. (2016)

Stable URL: <https://www.jstor.org/stable/10.7758/9781610448550.13>

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== Chapter 7 ==

The Permanent Punishment

The futility of severe punishment and cruel treatment may be proven a thousand times, but so long as society is unable to solve its social problems, repression, the easy way out, will always be accepted. It provides the illusion of security by covering the systems of social disease with a system of legal and moral value judgments.

—Georg Rusche and Otto Kirchheimer, *Punishment and Social Structure* (1939)¹

The system of monetary sanctions is a system of “legal and moral value judgments” that disproportionately affects poor people who enter the courtrooms, jails, prisons, and supervision of the criminal justice system. Court officials rely on financial sentences as an economic resource to pay their bills and as a symbolic tool to measure defendants’ remorse and rehabilitation. In a system where payments toward legal debt equal accountability and rehabilitation, poor defendants or people without the capacity to pay can never succeed in being accountable or being rehabilitated. Thus, the system of monetary sanctions disproportionately punishes the poor in contrast to those with financial means. Indeed, LFOs enable the state to permanently punish the poor as their legal debt grows over time with the addition of penalties and accrual of interest. The result is unending frustration, social and financial strain, and emotional burdens for people with legal debts that they cannot pay.

What We Now Know About Monetary Sanctions

Despite twenty years of declines in crime rates, forty years of criminal justice expansion and budget shortfalls have led to increasingly tight criminal justice budgets. Jurisdictions across the nation now regularly

impose criminal processing user fees on defendants to balance “the budget on the backs of the poorest people in society.”² Because the disadvantaged and poor, people of color, and those with low levels of formal education and limited employment prospects are disproportionately involved in criminal justice systems, LFOs constitute a unique sanction that affects defendants’ lives above and beyond the other consequences of criminal conviction and incarceration. Further studies must be done across the country to determine the local policies, procedures, and practices used to govern monetary sanctions. Although much of my evidence comes from a single state, there are good reasons to believe that LFOs are imposed in similar ways, with similar consequences, around the country. In California, people are charged a \$300 fine if they are unable to pay their LFOs in full. Alabama imposes a 30 percent collection fee on people who are unable to pay their LFOs in full. Florida allows private collection agencies to charge an additional 40 percent surcharge on the principal LFO.³ Under the “pay or appear” practice in Illinois, a mentally ill man was ordered to pay \$100 a month from his disability benefits of \$690 a month and to appear monthly in court hearings for a three-year period.⁴ In Rhode Island in 2007, on average eighteen people were incarcerated each day for nonpayment of court debt. The average amount owed was \$876.⁵ A study of defendants in fifteen states found that monetary sanctions result in long-term cycles of debt, that nonpayment regularly results in reincarceration, and that legal debt negatively affects debtors’ chances for successfully reintegrating into society.⁶

As sentencing courts across the United States continue to loosely interpret what it means to be a “willful” nonpayer, LFOs are now being challenged in the courts as inadequate grounds for incarcerating people with arrears. In *Illinois v. Davis* (1991), for example, the appellate court found that the state’s presentation of the defendant’s unemployment status was not sufficient evidence of willfulness and that the resulting court decision to incarcerate the defendant was inappropriate.⁷

Monetary sanctions have been identified as a critical factor in the recent unrest in Ferguson, Missouri. During the writing of this book, an unarmed black teenager named Michael Brown was killed by police. Protests ensued, and people from across the United States descended on the city to express outrage at the killing and raise issues of racial injustice more broadly. Research conducted by a local public defender organization found evidence of racially disproportionate policing and criminal justice processing. In just the city of Ferguson, over \$2.2 million had been raised in municipal “fines and public safety” in 2012. That equals a payment of \$272 per household in one year. Further, the city

had issued over 24,500 warrants in one year, averaging 1.6 warrants per adult resident.⁸ A subsequent report by the U.S. Department of Justice drew attention to disproportionality in the imposition of monetary sanctions, specifically in Ferguson. After the investigation, U.S. Attorney General Eric Holder summarized the Justice Department's findings: "Our investigation has found overwhelming evidence of minor municipal code violations resulting in multiple arrests, jail time, and payments that exceed the cost of the original ticket many times over."⁹ Similar investigations of police practices were recently launched in Baltimore, Maryland, after the civil unrest that resulted from the 2015 death in police custody of Freddie Gray. Investigations of monetary sanctions across the United States have revealed a nationwide practice of imposing financial penalties on people who are involved with our systems of justice and many jurisdictions relying on the fines and fees to generate needed resources to fund local governments.

Decoupling Justice from Punishment

The system of monetary sanctions is part of a larger system of criminal justice. Despite this connection, it has little coherence within or communication with other domains of the criminal justice system. The decentralized bureaucracy made possible by an ambiguous statute offers significant discretion to "street-level bureaucrats"—judges, clerks, prosecutors, and defense attorneys—without much supervision or accountability.

In every jurisdiction I studied, judges did not know how LFOs were implemented by other judges in their own courthouse—much less by other judges in the state—or how they were monitored and enforced by clerks. When I asked them how the collection process worked, judges directed me to talk with the clerks. Judges' general lack of knowledge about LFO implementation, monitoring, and sanctioning processes highlights the decoupling of LFOs from the imposition of justice. Only rarely did a judge take full account of a defendant's situation, and court officials were rarely aware of the total amount of time and resources their clerk's offices were devoting to imposing virtually unrecoverable LFOs; consequently, they gave little consideration to what was involved in the continual monitoring and sanctioning of LFOs. Fewer still outside of the criminal justice system are aware of how much time county clerks and judges spend imposing and monitoring LFOs. And even legally savvy defendants and attorneys do not fully understand how LFOs undermine legal rights to due process and the equal application of justice.

Monetary sanctions empower clerks to enforce highly individualized policies. In enforcing sentencing orders, they devise means for overseeing and sanctioning unresponsive or insolvent defendants. As a consequence of the ambiguity in the statutes, clerks wield a great deal of power in how they judge defendants, and few safeguards are in place to protect defendants against uneven or unjust sanctioning or abuse of power. The exercise of power is a central feature of the system of monetary sanctions. Judges, clerks, and prosecutors use LFOs to control people with legal debt. After punishment has been dispensed within a courtroom, within the confines of a jail or prison, or through the imposition of labor in a community service program or work crew, debtors continue to face perpetual punishment simply because of their inability to pay.

Punishment through monetary sanctions is imposed on and experienced by a wide range of people. During a probation violation hearing, I observed a young man, Scott, waiting in line; he was called up to the clerk's station in front of me. As Scott handed over \$35, the older man who accompanied him told the clerk that he was not his father but his employer. The clerk began by saying:

Clerk: You were supposed to pay \$100. You were in for sentencing. You were released from the jail and told to pay \$100. Do you have \$65 more?

Scott: No.

Clerk: You will have to wait for the judge.

Employer: What happens if he doesn't pay the \$65?

Clerk: He could go to jail. Do you have a credit card with \$65?

Scott: No, it's all I got. [*He walks away.*]

Employer: Will the judge give me time to scrounge around for more money?

Clerk: No.

Employer: So I have to go to the ATM right now?

Clerk: Yes.

Both the employer and Scott leave and later return with a payment receipt. While the employer is paying, I hear him give the clerk a mailing address that includes "care of."

Clerk: Are you related?

Employer: No, I have a vested interest. *As of today I own him.*¹⁰ He is one of my mechanics.

Just like social control systems of the past—slavery, indentured servitude, and convict leasing—the system of monetary sanctions generates perverse, indeterminate, and punitive relationships both within and outside of the criminal justice system.

Even when debtors provided documentation that they had no means to make payments, clerks and judges scoured them for resources. They inquired about conspicuous spending habits, looked at fingernails for recent manicures, and asked about tattooing and smoking. Regular summonses to court were mailed, wages were garnished to tap into defendants' financial assets, bench warrants were issued, and sentences that had initially been stayed, deferred, and diverted were revoked. When people failed to appear in court, they were arrested and incarcerated.

Many court officials and defendants alike recognized that whatever the costs of not appearing at an LFO hearing, there were also costs associated with showing up. Defendants were fearful of being incarcerated, and many were frustrated by their inability to pay; some did not even know they had been served because they had no stable place to live where they could receive mail. In more punitive counties, defendants with legal debt were regularly incarcerated for nonpayment. But even in less punitive counties, jail time was used to punish nonpaying offenders, particularly those who owed restitution. The variation in experiences of justice and punishment led to arbitrary justice and impeded a sense of fairness.

Maintaining Class Inequality

Monetary sanctions reinforce existing class inequalities by sentencing a population that is often undereducated, unemployed, homeless, and physically or mentally disabled to pay relatively large amounts of money. The criminal justice system manages the poorest of our society. Surveys of county jails across the nation have highlighted the impoverished circumstances from which inmates are pulled. Nearly half (44 percent) of inmates in local jails have less than a high school diploma or GED. Overwhelmingly, felony defendants come from poverty-stricken neighborhoods with high rates of under- and unemployment and failed school systems. Monetary sanctions reinforce existing inequalities and

exacerbate poverty in these areas by overburdening already marginalized people with debt they can never pay off.¹¹ It is no exaggeration to say that imposing financial penalties on such defendants directly sustains poverty.

Perpetuating Racial and Ethnic Inequality

Existing racial and ethnic disparities in criminal justice contact and its consequences are exacerbated by the imposition of monetary sanctions. African Americans, Native Americans, and Latinos are disproportionately convicted and incarcerated, and the burden of monetary sanctions is disproportionately borne by people of color. While one in one hundred American adults eighteen years of age or older live behind bars, there are dramatic differences by race: one in eighty-seven white men, one in thirty-six Latino men, and one in twelve black men are incarcerated in the United States. Among recent generations, people who drop out of high school have much higher odds of being incarcerated than those with a GED or diploma. Of black men born between 1965 and 1969, 30 percent of those without a college education and 60 percent of those without a high school diploma had gone to prison by age thirty-five. The risk of incarceration has only increased for more recent generations: of men born between 1975 and 1979 who dropped out of high school, an estimated 28 percent of white men, just over 19 percent of Latino men, and 68 percent of black men have experienced prison. Becky Pettit and Bruce Western have concluded that “prison time has become a normal life event for African American men who have dropped out of high school.”¹² Monetary sanctions, solely because racialized communities are the disproportionate focus of the criminal justice system, are imposed in a disparate way on people of color and thus are implicated in perpetuating racial and ethnic inequality.

The Place of Monetary Sanctions in the Legacy of U.S. Social Control

Criminalization and Debt

The United States has a long history of both informal and formal practices linking the punishment of its marginalized populations to processes of debt. Debtors’ prisons were transported from Europe, where they were common, and used in the United States up until the early 1830s as a way to punish impoverished people who were unable to pay their private debts. Today monetary sanctions incarcerate people who are free but poor.

U.S. history provides several other examples of systems of social control that link criminalization and servitude. One of the earliest systems was the institution of slavery. From the seventeenth century until the mid-nineteenth century, the American economy was based on plantation farming and relied on fiscally inexpensive laborers—enslaved Africans. From the 1830s through the 1850s, as the economy began to industrialize, enslaved people were “leased out” by their “owners” to work on railroad construction and in coal mines.¹³ Termed “slave leasing,” the practice lasted until the legal abolishment of slavery in the 1860s.

“Convict leasing” is another example of a U.S. social control practice linked to debt. Similar to slave leasing, convict leasing began in Alabama in 1846 and lasted through 1928. For a fixed rate, state prison systems would lease their inmates to private individuals and companies engaged in plantation farming, railroad construction, and coal mining. Some historians suggest that the practice of convict leasing replaced the use of slave labor. In fact, previous owners of enslaved people were able to lease convicts to work the same land that enslaved people had previously worked.¹⁴ As a system, convict leasing enabled states to manage their costly prison systems, control their unemployed African American population, and generate state income. When the violent and deadly treatment of prisoners by private entrepreneurs came to light, states began to abolish their systems of convict leasing throughout the early 1900s, with North Carolina being the last state to end the practice in 1933.

During the late nineteenth century and the early twentieth century, a new form of social control emerged, particularly in the South: African Americans were disproportionately arrested, convicted, and incarcerated in comparison to their white counterparts as authorities enforced the “Black Codes” that had been developed to monitor the behavior of the formerly enslaved.¹⁵ These laws codified certain everyday behaviors of African Americans: standing in one area of town became “loitering,” and walking at night was now “breaking curfew.” Also listed under the Black Codes were “crimes” such as “free negro alone” and “insulting gestures.” African Americans in the South convicted under the Black Codes were incarcerated and made to labor. As a result of the Black Codes, the percentage of African Americans in prison grew exponentially.¹⁶

Around the same time, an extensive prison system was developed in the South in the interest of maintaining the racial and economic relationship of slavery; this revised system of social control imposed forced prison labor.¹⁷ It is commonly believed that the Thirteenth Amendment to the U.S. Constitution, ratified in December 1865, outlawed the use of

slavery for everyone. Yet the actual language allows for the involuntary servitude of people convicted of crimes.¹⁸ Slavery is legal for convicted offenders, and hard labor can be viewed as an expression of offenders' debt to society for their crimes. As the historian Douglass Blackmon explains: "Every southern state except Arkansas and Tennessee had passed laws by the end of 1865 outlawing vagrancy and so vaguely defining it that virtually any freed slave not under the protection of a white man could be arrested for the crime."¹⁹

At the very same time in U.S. history when African Americans were freed from slavery—with no wealth, income, or formal education and while living in impoverished states—a system of conviction and punishment was developed by local leaders that allowed for their legal reenslavement.²⁰ Moreover, the system permitted the imposition of forced labor as punishment.

Even today, state administrators still view the use of convicts for labor as a profitable and productive enterprise. One example of the type of plantation farm where prisoners are forced to work is Louisiana's Angola Prison. In 1880 the former Confederate major Samuel James purchased the 8,000-acre plantation that is known today as Angola—originally named for the region in Africa where the plantation's workers were from—with the goal of using convict labor as field hands. The James family ran the plantation using convict labor until it was purchased by the state of Louisiana in 1901 and converted into a prison. Slave quarters were transformed into prison cell units.²¹ Louisiana continues to rely on prison and jail inmates as inexpensive farm and textile laborers. In 2015 convicts in Louisiana put to work as farm laborers generated \$2 million in agricultural profits for the Department of Corrections. Prisoners also work in other industries, such as the manufacture of office furniture, clothing, custom trash receptacles, and horse pens. In total, prison labor generated just over \$11 million for the state of Louisiana in 2011.²²

Throughout American history, state officials have forced some people to labor as slaves or as those deemed to be criminals or moral affronts in order to generate fiscal resources for both private and public industry. Systems such as debtors' prisons, slavery, slave leasing, convict leasing, and forced labor camps have been used by state and local governments as well as by private business owners to extract labor, to punish the impoverished, and to remove citizenship rights from those labeled as criminal offenders.

Social Control and Power

Monetary sanctions are used both to punish inappropriate behavior and to invade the lives of those deemed criminal. The criminal justice

system has extended its reach beyond the walls of jails and prisons to control the actions and statements of felons in the name of “accountability.” Within the past twenty years, the criminal justice system has developed specialized drug, alcohol, family, and community courts and day reporting centers where people are forced to regularly act remorseful, urinate in cups, notify probation officers of all their activities, and report their behavior and thoughts to judges. All of their actions are subject to court officials’ interpretations of the degree to which they are remorseful or contrite about their original offenses. Further, social control mechanisms criminalize public spaces for certain people, and probation serves as a way to scrutinize their every movement. In an accountability-centered era of social control, the imposition of monetary sanctions serves as an important tool that keeps people under the legal supervision of the criminal justice system. Defendants cannot be deemed to have been held fully accountable for their crimes until they pay their financial penalties.

The use of monetary sanctions as a form of punishment of criminal offenders serves in much the same way as prior mechanisms to control and further marginalize citizens deemed unworthy of redemption. The national use of monetary sanctions across state courts is consistent with past and current legal methods of controlling the bodies of people by incarcerating them, labeling them as distinctly different, and allowing legal discrimination against them and the extraction of their labor or other financial resources. The current mechanisms control marginalized populations in the same way that has prevailed throughout U.S. history: by imposing physical incarceration and economic sanctions on them. The story of monetary sanctions is about the management of poverty, the maintenance of inequality, and the punishment of the poor in the United States.

Why We Should Care

The imposition of LFOs further marginalizes offenders—politically, socially, and economically. Because of the lack of court data, we do not know the extent of total debt owed by legal debtors in the United States, nor is there much information about the total amounts collected by state and local jurisdictions. There is also no consistency in how courts and jails keep track of defendants incarcerated purely for nonpayment. We do not know how many people are being jailed or how much money is being spent to incarcerate people for nonpayment. Future research should examine the total criminal justice resources consumed in managing legal debtors, collecting outstanding debt, and sanctioning those who have not made payments. An economic analysis would shed light on the financial efficiency of the system of monetary sanctions. We also

lack data that would help us analyze the relationships between the imposition of debt, the amount of LFOs, and subsequent arrest, probation violation, conviction, and incarceration. Another question remains unaddressed: how might the practice of monetary sanctions, and the related consequences for those who are unable to pay, enforce or undermine public safety?

In sum, monetary sanctions prevent many defendants from successfully reentering their communities after their conviction, developing positive social and emotional identities that would promote their desistance, becoming financially independent, and living stable lives. Policies should be developed to ensure that only defendants with the ability to pay at the time of their conviction are sentenced to nonrestitution sanctions. Clear criteria should be incorporated into state monetary sanction statutes that define “indigent” and “current ability to pay.” Judges should be required to apply each criterion to arrive at individualized assessments of defendants’ current financial status. Only those with financial resources and incomes—from sources other than state or federal benefits—should be deemed eligible for monetary sanctions. Furthermore, collection costs and interest should not be applied to outstanding debt; by imposing additional punishment on those unable to make payments in full, these charges amount to a penalty for living in poverty or precarious financial circumstances.

Reformed practices such as these would ensure that victims are truly the priority in the punishment process and that indigent defendants would avoid being saddled with legal debt that they will owe forever and instead receive a realistic punishment that they have the means of fulfilling.

Conclusion

In Greek mythology, Sisyphus was sentenced to the punishment of pushing a giant boulder up a hill over and over again. Once he reached the top, it would roll back down the hill, where it waited for him to push it back up. The key difference between today’s legal debtors and Sisyphus is that at least Sisyphus had a brief break as he walked down the hill before restarting his endless task. For legal debtors shouldering the burden of increasing legal debt, the hill just keeps getting higher and higher. When, if ever, will legal debtors be deemed as having demonstrated their remorse and accountability for their offenses? How can they remove the stain of their criminal records legally and socially? How can policymakers and practitioners expect poor people to pay when they have nothing to give?

The present-day system of monetary sanctions is neither as physi-

cally egregious nor as publicly known as the systems of convict leasing and forced labor camps, but it has eerily similar practices, and the consequences are the same for those with criminal convictions—political, social, and economic marginalization for life. Thus, the linkage between criminal justice and social control institutions that overselect for the poor and for people of color remains embedded in U.S. criminal justice practices. One exceptional and prominent iteration of the U.S. system of social control of the poor and socially marginalized is the monetary sanction system.

Consistent throughout the history of the United States has been an inextricable and insidious link between social control, class, race, and economic burden, be it labor or debt. By interrogating this particular punishment tool of today's criminal justice system, *A Pound of Flesh* has presented evidence about the durable bond between mechanisms of social control and inequality in the United States. The system of monetary sanctions is eerily reflected in literature's classic stories of systems of control and justice, from the surreal and hopeless situations in which debtors find themselves as they face bureaucratic absurdity and experience alienation and persecution in the writings of Franz Kafka to similar depictions of debtors' prisons in the works of Charles Dickens.²³ In the reality of so many individuals' lives, monetary sanctions generate and perpetuate poverty. The criminal justice system has become a stratifying institution that labels its subjects and further decreases their status in society. The imposition of legal debt compounds the stratifying power and consequences of the justice system. Because people of color and the poor disproportionately make contact with the criminal justice system and are more likely to be convicted and incarcerated, legal debt is particularly oppressive for members of these already disadvantaged groups. People are sentenced to marginalized status, condemned to poor credit ratings, kept under the continual surveillance of the criminal justice system, and regularly incarcerated.

The U.S. legal system promises evenhanded imposition of justice and due process, but that promise is not kept by the system of monetary sanctions, which permanently punishes the poor. This system is at odds with a social and economic system premised on equality of opportunity, if not outcome. Monetary sanctions harken back to the times of debtors' prisons, slavery, and the Black Codes, social control institutions that prized one's property, ability to labor, and skin color above all else. People who make contact with the criminal justice system experience hyperpoliced neighborhoods, underfunded and poor-quality schools, a lack of decent housing, and a shortage of living-wage jobs. They are then saddled with felony convictions and related collateral consequences. There is no question that after the sentencing of LFOs the

only collateral that defendants have left is a pound of their flesh. In naming and uncovering this social control practice, describing the system and related outcomes, and analyzing the rhetoric used to justify its existence, we can clearly see that the system of monetary sanctions is a “natural” extension of prior systems of social control in the United States.