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**COMMENT**

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# PAY-TO-STAY IN CALIFORNIA JAILS AND THE VALUE OF SYSTEMIC SELF-EMBARASSMENT

Robert Weisberg\* †

## INTRODUCTION

The website of the Santa Ana, California-version of Pay-to-Stay uses hotelier-type verbiage in describing features of its alternative jail program. It tells us that the jail “is pleased to host a full range of alternatives to traditional incarceration”; it reassures prospective “clients” seeking flexible work/jail schedules (“Work on Saturday or Sunday? No problem, your weekend days are our weekend days.”); it guarantees “24-hour on-site medical staff”; it accommodates inmates near and far (“We have helped clients with sentences from other counties as well as other states.”); and it generally brags that the jail “is the most modern and comfortable facility in the region,” where, à la *Cheers*, “Each of our clients has a name . . . .”

Surely this manifestation of pay-to-stay is embarrassing. But, as so honestly represented, pay-to-stay could prove salutary for the criminal justice system if recognized as part of our somewhat ritualized cycle of *constructive self-embarrassment* over the role of wealth in criminal justice. More specifically, pay-to-stay could become one of those occasional eruptions of transparency about the forms of currency exchanged in the market for punishment.

## I. THE MARKET FOR PUNISHMENT

Let me explore one slightly off-kilter example to highlight the mercantile nature of criminal justice. In the briefly notorious case of *United States v. Singleton* (1998), a Tenth Circuit panel threatened to undo the universal practice of prosecutors offering leniency to defendants in exchange for testimony against other defendants. With bold literalness, the panel declared that, in making a fairly standard deal with an informant, the prosecutor had violated a portion of the federal bribery and gratuities statute. Under this law, “whoever” gives “anything of value” for testimony has committed a felony. (Indeed, having gone this far, the court could have even upped the ante to a still more serious felony by accusing the prosecutor of accepting a bribe from the putative witness.)

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The eruption in *Singleton* was quickly snuffed out a year later by an en banc reversal, and the grounds for reversal were telling. The en banc court mumbled some rationalizations about how the “whoever” term in the gratuity statute suggested an individual human being independent of the sovereign government, whereas the prosecutor here was the government itself. This semantic wriggle dissatisfied even some judges on the pro-government side of the case; a concurrence asserted that this was sophistry: “whoever” really could refer to anyone and even to an intangible entity. The honest concurrence explained that the panel had been wrong because, well, we have always allowed this particular kind of currency exchange as a necessary tool of law enforcement—and Congress must think it is all right because it has never said otherwise. *Singleton* briefly exposed the commercial side of criminal justice by recognizing that testimony was a form of currency in the criminal system.

In that sense, *Singleton* was just a step beyond an earlier generation of cases, which recognized the role of market-style transactions in criminal justice. In *Brady v. United States* (1970), the Supreme Court brought plea bargaining out of the closet and acknowledged the existence of rough-and-tumble plea dealing, holding that a defendant might rationally waive a trial rather than gamble on a very plausible constitutional attack on a death penalty law. In *Santobello v. New York* (1971), the Court acknowledged that plea bargains are subject to mundane state contract law doctrines of breach, repudiation, and rescission.

Such cases find further confirmation in Judge Easterbrook’s important 1983 article *Criminal Procedure as a Market System*, which explains the wonderful efficiency of plea bargaining. He explores the following hypothetical: a factually guilty defendant makes a Fourth Amendment suppression motion with a fifty percent chance of success and which, if granted, would turn a sure conviction to a sure acquittal. The plea bargaining system enables prosecutor and defendant to settle on a deal for half the possible sentence (and of course to find a suitable offense somewhere in the penal code that would match that sentence). Thus, justice can be “monetized” into an efficient currency.

Returning to sentencing, pay-to-stay should remind us of the major earlier episode in which the Supreme Court condemned the notion that wealth might determine whether, and for how long, someone could be incarcerated—at least where that determination was too transparent. In *Bearden v. Georgia* (1983), a man named Bearden received probation rather than jail on the condition that he pay off a fine in installments. Laid off and unable to find work, Bearden was sent to jail after all. The Supreme Court viewed this incarceration as resulting from unavoidable poverty. The Court noted that it had “long been sensitive to the treatment of indigents in our criminal justice system,” while adding that it had “also recognized limits on th[is] principle.” Drawing on earlier, similar cases such as *Williams v. Illinois* (1970) and *Tate v. Short* (1971), the *Bearden* Court held that once the state had initially determined that the fine was appropriate punishment, it could not convert the sentence to jail time—at least not where Bearden was demonstrably unable

to pay and the state had not even considered reasonable alternatives such as an extended installment plan or some sort of work-pay plan.

Justice White, however, used his concurrence in *Bearden* to clarify the ambivalence—if not hypocrisy—the decision exposed about criminal justice in America. He noted that if the trial judge initially had been confident that the defendant could not pay the fine, she surely could have constitutionally ordered the defendant's incarceration. In Justice White's view, the Court had been spasmodically anxious and ambivalent about creating the impression that wealth classifications cannot influence punishment.

Indeed, Justice White's comments remind us that one's economic condition is often a major determinant of one's punishment, including its likelihood and the length of any incarceration. Putting aside the meta-concern that poverty might itself be criminogenic, poverty can sometimes deny a defendant the pretrial release that might help to build a defense; it can force him to rely on a poorly resourced lawyer; and it might leave him without the circle of social resources that would be helpful in winning or sustaining release on parole.

Notably, the *Bearden* Court waffled between equal protection and due process in resolving the case, ultimately relying on the quaintly vague language of "fundamental fairness." This waffling itself reflects an ongoing struggle in the Court. When the Court in *Douglas v. California* (1963) guaranteed the right of counsel on first appeal, that decision led some to believe that wealth classifications might become unconstitutional in criminal justice and elsewhere under Equal Protection. But soon the more general doctrine of wealth-based equal protection faded, and the Court worried that other doctrines—such as the *Gideon* Sixth Amendment right—might nevertheless impose strict resource-related equity constraints on the states.

On the question of representation, of course, the Court laid down the vague standard of reasonably competent performance, and hence we have the occasional eruptions of national embarrassment over absurd fixed-cap fees for appointed lawyers or absurdly high caseloads for public defenders in major felony cases in many states. By the time the Court decided in *Ross v. Moffit* (1974) that no right of counsel existed after the first appeal, analysis of wealth had shifted mostly from equal protection to due process. Under due process, ostensibly rational (if arguably arbitrary) lines could be drawn to distinguish when during criminal prosecution the defendant is constitutionally entitled to some resource that might determine the outcome.

Thus, only some of the *inputs* into criminal sentences—most obviously *some* minimal representation at trial and first appeal—are subject to a wealth-equity test. Others—including representation at later appeals and lawyerly and investigative resources beyond a minimum baseline—are not.

If this is true, then perhaps only some of the *outputs* of criminal sentences are important enough for such a test. If the poor prisoner is sentenced to an otherwise legitimate length of incarceration, and if the "economy class" conditions of incarceration do not independently violate the Eighth Amendment, then the disparity in the conditions of incarceration is unlikely to encounter any constitutional obstacles.

## II. THE POTENTIAL UTILITY OF PAY-TO-STAY

Putting aside the constitutional questions, consider whether a jurisdiction could choose a wealth-based scheme of incarceration when the restraints are budgetary, bureaucratic, or political. Whether pay-to-stay proves viable on a larger scale may depend on how its colorful imagery gets framed in public discourse. That framing may be done initially by the local or state executive branch officials who announce such a scheme, but it will still remain subject to considerable reframing by others—including additional political figures and the press—with a stake in the way we incarcerate.

Under one framing, we should view the costs of necessary punishment as part of the harm that a person's crime has imposed on society, and so, to relieve the taxpayers, inmates in general should be forced to pay the costs of their incarceration; no further details are relevant. Under another construction, so long as pay-to-stay only involves misdemeanants, and so long as the public notices it mainly in celebrity cases, then it can be tossed off as Hollywood frivolity, not a serious aspect of our jurisprudence.

But if pay-to-stay is instead framed as a reminder that we have not wholly rejected a cash- or commodity-exchange market in criminal justice, the outcome might be more productive for our civic discourse. And the special features of pay-to-stay may be especially productive on this score. For one thing, there is a very non-frivolous, non-symbolic side to pay-to-stay: beyond aesthetic and sumptuary perks, pay-to-stay participants can buy immunity from exposure to more unsavory inmates. Incarceration, of course, does not wholly incapacitate criminals from committing crime; it often just redistributes much of it towards fellow inmates, a class that society perhaps views as less worthy of protection. Pay-to-stay allows some inmates to purchase protection from this class of crimes.

Second, if pay-to-stay helps keep jails solvent, it might usefully bring to the public consciousness the fact that criminal punishment in the United States really is subject to rational cost-benefit analysis. Consider California. Great parts of its prison system are now certifiably unconstitutional. Federal court orders seeking to address overcrowding require prison officials to weigh the costs and benefits of continuing to incarcerate individual prisoners. County jails suffer burdens created by the overflow from the overcrowded state prisons, so jail administrators constantly make triage decisions about who to incarcerate. Confronted with the necessity of housing felons for the state, the jailers find themselves often unable to carry out legitimate misdemeanor sentences.

Pay-to-stay programs remind us that someone has to pay the bill. Ignoring this reality, politicians tend to declare the punishment of all wrongdoers as an irreducible deontological necessity; pay-to-stay reveals the economic choices their declarations delegate to sheriffs and jailers. If media coverage of pay-to-stay helps even some of the public to recognize the staggering cost of incarceration in California, this public awareness might lead politicians to become more willing to treat criminal punishment as a regulatory system

worthy of utilitarian assessment rather than treat punishment as a deontological necessity. The public and politicians might conclude that taxpayers are paying too much for some to stay in prison, far more than the prisoners themselves could ever pay. They might also start asking whether we are incarcerating too many people—or the wrong people. If they do, then that type of question should at least become a question discussable without leading to political suicide for the discussers.

#### CONCLUSION

As the California legislature dodges the question of what to do about the nation's largest and most dysfunctional jail and prison system, federal judges are threatening to expand injunctions in Eighth Amendment lawsuits. As noted above, pay-to-stay will not be held to cross constitutional lines—at least by itself. But imagine a section 1983 lawsuit about conditions or overcrowding in regular jails or prisons. And imagine that the state (California perhaps?) argues that its obligation to incapacitate criminals in the name of public safety is a categorical imperative, such that it is illegitimate for the government to engage in cost-benefit analysis when reviewing prison conditions. In such a case, a lawyer representing a plaintiff in a section 1983 claim might well want to introduce the Santa Ana website in a pleading somewhere. This may enable the federal judge to remind the defendants in the civil lawsuit that they have already, in some sense, acquiesced in cost-benefit justice, and that the question has become simply how to work out a better business plan.

# IT COULD HAPPEN TO “YOU”: PAY-TO-STAY JAIL UPGRADES

*Kim Shayo Buchanan*\* †

## INTRODUCTION

In the jails of Los Angeles County, about 21,000 detainees are held in filthy cells so overcrowded—four men in a cell built for two, six to a four-man cell—that, as federal judge Dean D. Pregerson observed in 2006, inmates must stay in their bunks at all times because there is not enough room for them to stand. These men—ninety percent of whom are pretrial detainees—are held in these conditions twenty-four hours per day, seven days per week, and are typically allowed only a single three-hour exercise period weekly. Other inmates are held for days in a county “reception center” where twenty, thirty-five, or even (according to inmates) up to fifty men are crammed into each 15½ x 12-foot holding cell.

With young men packed so densely that they can barely move, it is unsurprising that fights break out. County jail inmates are routinely assaulted and even raped. Los Angeles County Sheriff Leroy Baca reported in 2006 that recent funding cutbacks have reduced the guard-to-inmate ratio to about one guard per 100 inmates (compared to the national average of one guard per ten inmates). In such circumstances, overburdened jail administrators and staff may feel there is little they can do to prevent the violence.

Thus, Human Rights Watch and others have observed, guards routinely tell male prisoners who have been sexually assaulted, “Be a man. Stand up and fight.” As Deputy Sheriff Todd Zerbel observes, “If a new inmate comes up to me in tears and says, ‘I’m scared to death,’ my first piece of advice is dry your eyes. Don’t let them see you scared.”

Conditions in the Los Angeles County jails are exactly those identified by the Commission on Safety and Abuse in America’s Prisons as likely to result in violence: overcrowding, idleness, inadequate security classification, lack of direct supervision by staff, and a near-complete absence of recreational activities and rehabilitative programs. As a result, even though most county jail inmates are being held on nonviolent property or drug charges, they are trapped in an environment where—to forestall beating or rape—they must fight, or at least appear ready to fight.

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Any detainee would want to be protected against such danger—and some of them are. Approximately fifteen municipalities in Los Angeles and Orange counties offer pay-to-stay accommodation in police lockups or municipal jails, where inmates can pay \$75 to \$175 per night to serve their time in a safer environment, away from the chaotic county jails.

Thus, when people are arrested in southern California, they face a two-tiered jail system in which the overwhelming majority of detainees and offenders are crammed together in crowded, dirty, violent, unsafe conditions that Judge Pregerson recently observed violate “basic human values.” Governments offer certain inmates an escape hatch: in exchange for payment, their jailers will keep them safe. The perceived legitimacy of this arrangement, I will explain, depends in part on the implicit acceptance of two racial stereotypes: that most criminals are violent black men, and that white people, including white lawbreakers, are vulnerable victims.

### I. THE PAY-TO-STAY PRIVILEGE

For more than a hundred years, the Supreme Court has acknowledged that when government takes people into custody, depriving them of the ability to protect themselves, it owes an affirmative duty to protect them against injury. But when mismanaged, overburdened prison systems fail to fulfill this duty, our courts have too often attempted to justify such institutional failure by linking prison violence to the stereotype of the brutal black rapist or murderer. They attribute violence not to institutional mismanagement or overcrowding, but to what the Supreme Court in *Dothard v. Rawlinson* called a “jungle atmosphere” created by prisoners’ inherent brutality. Justice Thomas argued, in his concurrence in *Farmer v. Brennan* (quoting Judge Easterbrook in *McGill v. Duckworth*), that prisons should not be held responsible for allowing inmate violence:

Prisons are necessarily dangerous places; they house society’s most antisocial and violent people in close proximity with one another. Regrettably, “[s]ome level of brutality and sexual aggression among [prisoners] is inevitable no matter what the guards do . . . unless all the prisoners are locked in their cells 24 hours a day and sedated.”

In the county jails, violence is too often tolerated as the inevitable cause and consequence of prisoners’ brutal nature. By contrast, pay-to-stay jail officials affirm the humanity of pay-to-stay inmates, and undertake to keep them safe. For example, Lieutenant Jim Strona of the La Verne pay-to-stay facility observed, “Our job is not to punish people. It’s to incarcerate people.” A Pasadena pay-to-stay jailer said, “Despite where these folks are, they deserve to be treated with some dignity.”

In municipal jails and lockups, paying inmates enjoy privileges denied to inmates in the general population of the county jails. Paying inmates get cells to themselves. They are “allowed to watch television or select movies from the video library. They can ride the exercise bike, sip coffee and use

the bathroom in privacy. Most important, they are kept away from others in the facility who could be murderers and rapists.”

Unlike their counterparts in the county jail, pay-to-stay inmates are expected to act rationally, despite their crimes. Some pay-to-stay lockups, including La Verne, according to the *Los Angeles Times*, allow inmates to freely roam grounds from which “they could make a jail break without even jumping a fence.” Jail officials trust that a paying inmate won’t try this because “that would earn . . . a transfer to the type of lockup he is trying to avoid.” Lieutenant Strona commented, “You’d go from 100 days in the La Verne Jail to three years in the state pen. Have at it.” If other inmates were believed to be rational, they would be expected to respond the same way to the behavioral incentive of a safer, more comfortable lockup. But county jail inmates are not offered the opportunity to demonstrate their rationality. They are confined by force.

Sheriffs and other proponents of pay-to-stay jails are remarkably sanguine about the violence that is institutionalized in the county jails. As Orange County Lieutenant John Petropoulos observed, “If you’re going to be in jail, it’s the best \$75 per day you’ll ever spend in your life. You don’t have to worry about getting beat up by a guy with a shaved head and tattoos.” Flyers in police stations tout municipal pay-to-stay accommodations: “Serve your time in our clean, safe, secure facility!”—a pitch that would be ineffective if county jails were clean, safe, and secure.

At the same time, though, “Sheriff’s officials say there are no more assaults per capita in the [Men’s Central Jail] than at most municipal facilities and . . . that graphic scenes in such movies as ‘American Me’ have overstated the personal dangers.” But municipal officials have little incentive to dispel this belief when they perceive that they can make money from it.

The pay-to-stay upgrade is pitched to the public as a privilege for basically decent people who have run afoul of the law. It is, the *Los Angeles Times* observed, “for those who have no business being in places such as the Los Angeles men’s county jail.” When the Pasadena jail started its pay-to-stay program in the early 1990s, “Our sales pitch . . . was, ‘Bad things happen to good people.’” The pay-to-stay upgrade is said to serve the goals of incarceration by locking up first-time offenders “without unduly exposing otherwise law-abiding citizens to the criminal element.”

The difficulty, of course, is finding a legitimate basis for distinguishing the criminals who are “good people” from the “criminal element.” Sheriffs, jailers, and news reporters discussing pay-to-stay lockups portray them as reserved for nonviolent, first-time or petty offenders. But actor Christian Slater, who had at least two previous convictions, served a ninety-day sentence at the La Verne pay-to-stay lockup after being convicted of drug crimes and battery of his then-girlfriend. Former Orange County assistant sheriff George Jaramillo is currently paying to serve a twelve-month sentence at Montebello City Jail for felony perjury and misappropriation of public funds for his personal use. News stories quote repeat offenders who compare their pay-to-stay treatment favorably to their prior stints in the county jail.

Eligibility for a jail upgrade, then, is not necessarily based on the nature of the offender's crimes. In some cases, eligibility may not even depend on ability to pay: the deluxe La Verne lockup reportedly requires only that inmates "work off their rent by washing cars, serving food or raking the grounds." What these offenders do have in common is their ability to pass the screening interview.

Pay-to-stay facilities are not open to everyone who can pay the daily fee. Admission is invariably subject to screening interviews, for which there are no acknowledged criteria. The *New York Times* reports that pay-to-stay jail administrators "can operate like bouncers, rejecting anyone they wish."

Pay-to-stay eligibility is thus in some inchoate way contingent on who the inmate is, not on what he (or, less often, she) has done. A spokesperson for three private pay-to-stay jails in Orange County described the benefits this way: "You can avoid gang issues. You are restricted in terms of the number of people you are encountering and they are a similar persuasion such as you."

In most cases, convicted offenders must be referred to the jail by the sentencing judge. Municipal Judge Gregory O'Brien, an early defender of pay-to-stay upgrades, "stressed that a sentence in a municipal jail is not appropriate punishment for most offenders," but can be fitting for the few inmates who are "otherwise respectable citizens who find themselves on the wrong side of the law." These inmates, he suggested, were visually distinguishable from the inmates of the County Jail: "I think if you go down and look at the . . . inmates down at County Jail, you'll see very few who fit that profile." Unlike county jail inmates, he explained, pay-to-stay offenders "need the shock of being behind bars and having their freedom taken away. They don't need to have their safety threatened."

## II. IT COULD HAPPEN TO "YOU"

The *Los Angeles Times* describes the county jail as a "dingy" environment that would "intimidate the uninitiated," where "[i]nmates with shaved heads and tattoos stare and flash gang signs." In news articles, the fear that "the uninitiated" would feel upon entering this environment is explained in a racially loaded, second-person narrative. One such passage in *The Australian* reads, "You've just been arrested for drunk driving in Pasadena . . . Thoughts of heavily tattooed gang members with shaved heads and a penchant for beating and raping wimps who haven't thrown a punch since that haymaker in primary school, flood your mind and suddenly you're very alert for a drunk."

Similarly, a *Los Angeles Times* article begins, "You're busted, heading to jail for a one-time mistake, say, petty fraud or drunk driving. You're small, frail, haven't used your fists since the fifth grade and are about to meet some seriously hard-core dudes at county jail. Could you defend yourself? Or would you be victimized and face years of therapy? . . . Those not eager to learn the answers firsthand might be relieved to discover . . . [y]ou can rent a cell in a much quieter, presumably safer municipal lockup."

The person addressed in these narratives—the imagined newspaper reader—is depicted as a physically weak, psychologically vulnerable drunk driver who will be vulnerable, like you, to the real criminals, who are identifiable on sight as gang members. The racial ascription (or “persuasion”) of the person like “you” is not made explicit in these articles, but the pay-to-stay inmate’s vulnerability is constructed by the difference between his race and that of the criminal “gang members.” For example, one article quoted a drunk driver as saying, “I heard that county jail is dirty and dangerous, especially for Asian guys like me. . . . There’s so many gang members, they beat us up.”

The racial ascription of the “gang members” is also coyly left unsaid, but gang members are so strongly stereotyped as Latino and black that, as the Justice Policy Institute points out, white gang members are “virtually absent from most law enforcement and media accounts of the gang problem,” despite their involvement in comparable levels of criminal activity. As a recent Northern California ACLU report observed, in places like San Jose and Orange County, 97% of police-identified gang members are nonwhite. The gang members portrayed in pay-to-stay narratives are impliedly black or Latino tough guys who, unlike “you,” know how to fight.

Statistics on the racial breakdown of the county and pay-to-stay jails are not publicly available. But although surveys consistently show that most Americans’ image of the criminal is a violent black man, most California prisoners are not black; according to the California Department of Corrections and Rehabilitation, about 38% of California prisoners are Latino/a, 29% are African-American, and about 27% are white. And not all pay-to-stay “clients” are white: the inmates described in the news articles include a Korean-American, two Latinos, and African-American rapper Dr. Dre. Nonetheless, imagery of “gang” violence and white vulnerability pervades media coverage of pay-to-stay jails.

In the news stories, the fear of rape and violence is almost always illustrated from the perspective of the economically comfortable, impliedly white man addressed in these second-person narratives. From this perspective, it is difficult to imagine that some of these intimidating brown and black men may be locked up for the first time, too. It is invisible or irrelevant to “you” that most of the men in this environment feel intimidated by the others, and that they may look tough because they feel they have to.

In these narratives, the immediacy of the pay-to-stay inmate’s terror owes much to gendered expectations and racialized fears. The gendered racial stereotype of black men is that they are supermasculine—huge, oversexed, criminal, strong, angry, violent men with a penchant for raping white women—a stereotype that, in prison, is transposed into a threat to white men. Through the lens of these images, it is almost impossible to view black men as anything but tough. It becomes hard to see that a black criminal (or Latino “gang member”) with a shaved head and tattoos may be just as terrified of rape and beating as the imagined reader of the *Los Angeles Times*.

Consistent with the black-rapist trope, many anecdotal and official narratives about prison rape assert that the most common scenario involves a black perpetrator and a white victim. However, in a recent victimization survey conducted by the University of California at Irvine, researchers found that, as in the outside world, the overwhelming majority—over 82%—of prison sexual assaults are intraracial. The two demographic factors that most affected an inmate's risk of sexual assault were nonheterosexual status and African-American racial ascription. It is well-known in corrections that gay, transgendered, and bisexual inmates are at heightened risk of sexual assault in men's prisons. Contrary to stereotype, so are straight black men. Although African-American prisoners comprised only 36% of the survey sample, 50% of the non-heterosexual inmates who reported being sexually assaulted were black. Of the straight men who reported having been sexually assaulted, 83% were black.

Gendered racial stereotypes make it hard for authorities to see that black men are harmed by rape in prison, and make it even harder to get those authorities to do anything about it. For example, Roderick Johnson, the plaintiff who alleged in *Johnson v. Johnson* that he was repeatedly sexually assaulted in a Texas prison, said that prison officials told him many times that because he was gay, he probably liked being raped. But because he was black, he was supposed to be able to defend himself without protection from guards: "You need to get down there and fight or get you a man," they told him. "There's no reason why Black punks can't fight and survive in general population if they don't want to f\*\*\*." From this perspective, black men are, or should be, so violent that they do not need, or deserve, guards' protection.

Gendered racial images make it seem fair that governments confine tens of thousands of men to conditions in which they have to fight for a measure of safety, even as it seems equally fair that wealthier lawbreakers (stereotyped as white drunk drivers) should not have to. Today, the notion that black men are subhuman brutes is rarely endorsed in polite company, but black people are still stereotyped as criminals, and criminals are still stereotyped as black.

Such gendered racial images also make it easy for law enforcers, decision makers, and pay-to-stay inmates to imagine, as many do, that most prisoners are "murderers and rapists." But California Department of Corrections and Rehabilitation data on new felon admissions suggest that only a tiny proportion—less than five percent—actually are.

Even though most inmates are not black, the stereotypes that link black men to notions of violence and criminality condemn offenders of all racialized groups to an environment of government-sponsored violence where the weak are victimized and the strong are compelled to act like the violent henchmen of racist stereotype, thereby confirming the assumption that they are the brutes of our most racist nightmares. But the racial stereotypes that justify the abandonment of most prisoners' safety also make it seem harsh and excessive to subject a respectable lawbreaker like "you" to the kind of violence we tolerate for them.

## CONCLUSION

There is no principled basis on which a low-income drunk driver, drug dealer, or batterer “deserves to have [his] safety threatened” in a way his wealthier counterpart does not. The government is constitutionally required to protect both of them—and it can. The institutional design and management practices required to prevent prison violence have been identified by various correctional organizations, including the Commission on Safety and Abuse in America’s Prisons. These practices have been implemented in other parts of the state and the country, where jail systems are able to function without an escape hatch for wealthier lawbreakers. The jails of Santa Clara County, for example, are widely characterized as better managed and safer than those of Los Angeles. In Santa Clara, reports spokesperson Mark Cursi, “Jail is jail. No extras.”

# THE DIRTY LITTLE SECRETS ABOUT PAY-TO-STAY

Laurie L. Levenson & Mary Gordon\* †

## INTRODUCTION

The dirty little secret is out: people with more money get a better deal in our criminal justice system. Anyone who has spent more than a nanosecond in this system knows it to be true, yet that does not make it right. It is an abomination to divert our attention to pay-to-stay programs instead of finding the resources to improve our general jail facilities to make them tolerable for every inmate. Don't get us wrong—if we suffered the misfortune of being arrested, we would dearly love the opportunity to pay for a private jail facility. However, the pay-to-stay initiative is unlikely to do anything other than mask the problems in our correctional facilities. Pay-to-stay programs should only be endorsed if a serious commitment is first made to improving the overall conditions in correctional facilities.

## FIVE TRUTHS ABOUT PAY-TO-STAY

Implicit in the influence of money in the criminal justice system are five truths that help explain why—despite pay-to-stay's appeal on the surface—we must look deeper to rehabilitate our ailing criminal justice system.

First, the overwhelming problems with our correctional facilities disproportionately impact minorities and the poor—groups that most need safe, rehabilitative correctional services and that are staggeringly likely to be incarcerated. Black males have a 32% chance of entering a state or federal prison during their lifetime and Hispanic males have a 17% chance, according to a recent Bureau of Justice Statistics report, while white males have only a 5.9% chance.

Paying to stay is likely not an option for almost 90% of inmates in jail, including the 59% of inmates who earned less than \$1,000 per month before their arrest and the 29% who were unemployed. Unless we allow these inmates to use their ill-gotten gains to fund their incarceration costs—a troubling idea in its own right—they will be stuck in the squalid conditions that pervade our regular jail facilities. In Los Angeles County, the nation's

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largest jail system has come under criticism for its inadequate medical support for inmates, which has resulted in long treatment delays and even deaths. In addition to lacking health care and rehabilitative services, the Los Angeles County Jail also has serious problems with violence, especially race-related riots.

While increasing the use of pay-to-stay facilities might allow more resources to be used for those inmates who are stuck in public correctional institutions, diverting inmates to private facilities will not reduce the public jail population sufficiently to free up additional resources for the remaining inmates' care. Past experience suggests that the overall incarceration rate will continue to climb. According to the Bureau of Justice Statistics, incarceration rates have grown by 243% over the last two decades. This increase in incarceration is due significantly to the "war on drugs," and there is little incentive to end that war when it is the financial lifeline for contractors who build private correctional facilities and politicians who benefit from their contributions. In fact, as Sharon Dolovich observed in *Changing the Terms of the Private Prisons Debate*, "The state's use of private prisons could create a powerful interest group with a financial interest in increased incarceration."

There is also no indication that the pay-to-stay system will free up dollars to reform our public jails. Private entities will benefit, but given the relatively few persons placed in pay-to-stay facilities, there is unlikely to be a noticeable effect on the taxpayer and the government's budget for law enforcement. Moreover, since some of the pay-to-stay programs are actually operated by local governmental entities, there may be a reduction in the resources available for general jail populations if the programs draw from the same general budget or taxpayer base.

Second, pay-to-stay programs reduce incentives for public officials to address the problems in our correctional facilities. Face it: generally, the public doesn't want to know what is happening in our correctional facilities. The pay-to-stay program reduces further the urgency for politicians to address these problems because the "decent folk" participating are no longer subjected to the intolerable conditions of ordinary jails.

Not until a celebrity is incarcerated does the public even pay attention to problems in the correctional system. Paris Hilton's recent headline-making incarceration identified some of the problems with regular jails while publicizing the availability of private facilities for those with means. Public reaction was mixed. As reported by the *Los Angeles Times*, some people were sympathetic to Hilton. One claimed, "I am not a fan of Paris Hilton, and I don't think it's fair she got such a big sentence. But if they can go easy on her, why not [Valerie Jacquez] too?" Yet, others decried the "unequal justice." Hilton's fellow inmate Rhonda Thompson found it unfair that Hilton was allowed to leave early, stating, "I didn't want to be here either. It was a nightmare."

Ironically, without pay-to-stay, celebrity incarcerations could actually generate real support for programs to reform our jails. Celebrity incarcerations can focus attention on a reform movement that does not otherwise

enjoy broad public support or have the means to generate it. Even with pay-to-stay programs, many used Hilton's experience to publicize needed correctional facility reforms, especially solving the overcrowding problem in California's correctional facilities. Recent proponents of reform include Patrick McGreevey in a July 2007 article in the *Los Angeles Times* and Bob Herbert in a June 2007 *New York Times* column that used attention surrounding Hilton's incarceration to publicize the over-incarceration of school children. Imagine the calls for reform if Paris Hilton had shared in the squalor facing the general jail population.

Third, although the pay-to-stay concept presumes that private inmates are willing and able to pay for what they really need—rehabilitation—pay-to-stay programs generally fail to address that need. In terms of day-to-day operations and structure, private prisons function very similarly to public prisons. Generally, the focus of pay-to-stay programs is not on rehabilitating their paying customers. Rather, they are “gray-bar hotels” that provide safer, cleaner room and board for their clientele. Much of the problem with incarceration today is that it focuses solely on punishment and not on rehabilitation. Many states face serious problems with poor conditions in overcrowded prisons. Rehabilitation may be the answer—but pay-to-stay does not necessarily make rehabilitation more likely. It often just makes the stay more pleasant for those who can afford it.

Instead of actually rehabilitating inmates, pay-to-stay programs merely give the illusion that participants pay their debt to society and come out reformed by the experience. However, private jails do not name rehabilitation as a selling point to their prospective clients. Rather, they attract clientele with sales pitches like, “bad things happen to good people.” Then, they provide safe accommodations but little in the way of rehabilitation. In order for pay-to-stay programs to provide a better product for their customers, they should shift the largely myopic focus currently placed on the inmates' physical accommodations to concentrate on another component essential to a successful jail: effective rehabilitation programs. Currently, there are no standard rehabilitation programs required at many pay-to-stay facilities, and, given the facilities' profit motives, they have little incentive to spend resources on programs that could actually reform their charges and prevent them from becoming re-offenders.

Fourth, pay-to-stay programs create a slippery slope for inequality in the criminal justice system. Before you say this is far-fetched, consider a different scenario. Trials in Judge Jones's courtroom take forever. He is generally unpleasant and the courtroom accommodations are spartan. In the summer, the courtroom bakes like a barbecue. In the winter, the bailiff wears long underwear beneath his uniform. To defray operational costs, the court proposes allowing defendants to hire judges from a panel to try their cases in more plush surroundings. All of the same rules of evidence and law would apply, but through this pay-to-try system, defendants could avoid the unpleasantness of the run-down neighborhood courthouse.

Would we countenance quasi-private judges in the criminal justice system, the functional equivalent of what already largely exists on the civil side

in the form of arbitration? If not, how do we explain why a defendant should be able to pay for incarceration in a private facility? Both pay-to-stay and the hypothetical pay-to-try threaten to institutionalize financial inequalities in our criminal justice system; both also increase the likelihood that individuals will be judged more on the size of their pocketbooks than the merits of their cases.

At a visceral level, opposition to the pay-to-stay program is as much about decrying the inequalities in our criminal justice system as it is about the actual operation of correctional facilities. Such inequality creates an incalculable amount of cynicism. As Mike Jackson, the training manager of the National Sheriffs' Association, explained in the *New York Times*, "It seems to [me] to be a little unfair. Two people come in, have the same offense, and the guy who has money gets to pay-to-stay and the other doesn't. The system is supposed to be equitable." It is impossible to gauge how the cost imposed by this inequity—in the form of increased cynicism—measures against savings to the criminal justice system from allowing pay-to-stay programs.

Fifth, capitalism and correctional systems don't mix well. Despite the highly competitive capitalist world in which we live, we still expect our government to provide safe and effective correctional facilities. Much of the resistance to pay-to-stay programs essentially boils down to a wariness of allowing the government to shirk one of its primary obligations.

#### CONCLUSION

There are still too many issues to be resolved before a final verdict can be rendered on the pay-to-stay program. But an open discussion is critical before we abandon real solutions and simply let the private sector profit off some of the biggest problems facing government today. Too many people are in custody and too many of them need resources we are unwilling or unable to provide. We assume too readily that the private sector can solve these problems more efficiently and effectively than the government can. But there are no easy solutions to these problems. Pay-to-stay may be beneficial in a limited way by reminding us that our jail system could be better. It could even show us how the system can be improved. However, the pay-to-stay programs will not clean or heal the correctional system's festering wounds. At best, they provide a bandage that allows certain members of the public to avoid the most deplorable attributes of the correctional system.

# GOVERNMENT ENTREPRENEURSHIP: HOW COP, DIRECT SUPERVISION, AND A BUSINESS PLAN HELPED SOLVE SANTA ANA'S CRIME PROBLEMS

*Police Chief Paul M. Walters & Russell Davis\* †*

## INTRODUCTION

Much has been written about Community Oriented Policing for police agencies and about the Direct Supervision concept for jail operations. Each strategy is at the cutting edge of its respective discipline. This Commentary describes how the progressive City of Santa Ana implemented both strategies—along with a visionary business plan to operate its jail at minimal cost—to combat crime successfully. The City's business plan relies on entrepreneurship that is too often lacking in government programs. This approach has led to a number of innovations in law enforcement, corrections, and government service. Pay-to-Stay programs provide yet another example of how Santa Ana's willingness to innovate helped it build ever more effective and efficient correctional facilities.

## I. THE CRISIS PRECIPITATING ADOPTION OF CONTRACT HOUSING AND PAY-TO-STAY PROGRAMS

In 1991, the City of Santa Ana<sup>‡</sup> faced a crisis of criminal behavior that was seriously undermining the quality of life in the City. Misdemeanor and felony crime statistics continued to climb at an alarming rate. The Civic Center area had become a large homeless encampment. Signs of disorder were visible throughout the community.

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‡ The City of Santa Ana is a diverse community of over 353,000 residents and has a day-time population of over 550,000. It is the ninth largest city in California and the seat of government for Orange County, which has a population of over 3 million residents. According to the 2006 American Community Survey, Santa Ana's percentage of foreign-born residents—over fifty-one percent—is the tenth largest of any major city in the United States. The Santa Ana Police Department has been recognized since 1997 as a U.S. Department of Justice National Demonstration Site and Training Center for Community Policing and Problem Solving.

At that time, the Orange County Jail was seriously overcrowded and under a federal court order to reduce its population. As a result, the Orange County Jail did not accept any misdemeanor arrests and released minor felony arrests within a few minutes of booking. The situation became so acute that subjects arrested under misdemeanor bench warrants for failure to appear were cited and released on their promise to appear. Santa Ana police officers described the situation as misdemeanor anarchy.

The Police Chief, the City Manager, and the City Council decided the City needed to do something to ensure that incarceration would be a viable law enforcement tool. The Police Chief contacted the National Institute of Corrections' Jails Division and asked for technical assistance in the form of a Local Systems Assessment exploring the feasibility of the City entering into the jail business. The resulting report outlined all of the issues associated with a city owning and operating a jail.

After reviewing the report, the City contracted for construction of a 96-bed temporary jail. Its purpose was to provide quick relief to the incarceration crisis and to bridge the gap until a more permanent jail solution could be implemented. The City hired a Jail Administrator in April 1992 to develop and implement the jail system. He soon assumed responsibility for monitoring the construction, developing financial and operational plans, and hiring staff to operate the temporary jail.

Once the facility was completed in December 1993, Santa Ana Police booked all persons arrested into the temporary jail. They were held in custody until video arraignment. If the court remanded the inmates to await trial, they were transported to the Orange County Intake and Release Center and booked into the Orange County Sheriff's Department facilities. As such, the Sheriff had major concerns about the Santa Ana Jail. Since inmates were transferred to the county facility *post*-arraignment, the Sheriff could not release them in compliance with the federal court order. In this manner, the existence of the Santa Ana Jail actually increased the Orange County Jail's population.

## II. LONG-TERM PENOLOGICAL NEEDS AND FINANCIAL CONCERNS DROVE PLANNING FOR A PERMANENT JAIL

The fundamental philosophy of Community Oriented Policing ("COP") (also known as Problem Oriented Policing) is that law enforcement efforts should address the root causes of criminal behavior rather than solely responding to incidents. Under this approach, proactive problem solving becomes the norm rather than the exception. A comprehensive approach to problem solving that utilizes community members, police officials, and other appropriate governmental representatives supplements the traditional police response to incidents.

The existence of the Santa Ana Jail provided one of the most essential elements of a COP effort: the ability to incarcerate. The Santa Ana Jail's impact on crime was almost immediate. Many arrestees remained in jail awaiting arraignment, which alleviated the crisis in the field for a few hours

or even a few days. Arrestees also remained in custody long enough to be positively identified and to answer to a judge concerning their suitability for release prior to trial. The courts reported that finally they were processing people rather than paperwork.

Even as we watched the early successes of the temporary jail, we proceeded with the programming, design, and construction of the permanent jail.

We, along with other Police Department and City representatives, were strongly committed to the Direct Supervision concept of jail design and operation. We seized the opportunity to design and implement a jail system that went hand in hand with COP. Just as controlling criminal behavior is the primary goal of the police officer through COP, controlling inmate behavior is the primary goal of the detention officer under the Direct Supervision approach.

Direct Supervision emphasizes personal responsibility and accountability by maintaining direct contact between the corrections officer and the inmates at all times. Correctional Officers are placed in the inmate housing unit so they are able to supervise inmates and manage their behavior. Officers are trained to use leadership, communications skills, and expectations to create an environment in which most inmates voluntarily conform to behavioral norms. The result is a jail environment in which inmates clearly understand that it is in their best interests to follow the rules and conform to the positive expectations. Since inmates are safe and secure, they can focus more attention on educational and socialization programs and taking responsibility for their actions.

As we evaluated our correctional requirements, we recognized that we would have only one chance to build a jail that would meet the needs of the City for the next fifty years. At the same time, we recognized that fulfilling federal incarceration needs could yield revenues to offset our operational costs while benefiting the City and the federal government.

Potential contract housing revenues were central to our planning for the new facility. We recognized that a 100-to-150 bed jail would be inherently inefficient. Due to economies of scale, operation of a 450-to-500 bed jail would be much more cost effective. We presented a business plan to the City Manager and City Council to build and operate a 480 bed jail. We proposed to utilize contract housing to fill all of the beds not needed by the Police Department and to generate a revenue stream that would cover most of the facility's operational costs. Prior to opening the temporary jail, the city annually paid the Orange County Sheriff's Department over \$2.5 million in booking fees. The annual cost of operating the temporary jail was slightly less than \$2.5 million. And we could use revenues from contract housing to offset any operational costs over \$2.5 million per year.

Almost immediately the demand for contract housing by the U.S. Marshals Service and other state and federal law enforcement agencies increased significantly. In 1996, we were averaging approximately \$76,000 per month in contract housing revenue. After we opened the new jail, we were averaging over \$200,000 per month. Two additional changes quickly

resulted in contract housing revenue increasing to over \$500,000 per month—in May 1997, we started housing INS inmates and in July 1997, we entered into a contract with Orange County Probation to house juveniles remanded to adult court. In July 1998, we started housing drug court inmates. In July 1999, we entered into a contract with the California Department of Corrections and Rehabilitation to house parole violators. By 2000, we were averaging over \$750,000 per month in contract housing revenue. Today we are averaging over \$1 million per month in revenue. This revenue stream covers most of the cost of operating the jail.

### III. THE ROLE OF PAY-TO-STAY IN COMMUNITY ORIENTED POLICING EFFORTS

The same innovative outlook that led Santa Ana to design and build a new correctional facility also led the City to create a pay-to-stay program. Pay-to-stay programs are a strategy to facilitate punishment for a criminal conviction while allowing the inmate to maintain employment and other positive ties to the community. The financial commitment, along with the rigid restrictions of the program, serves to ensure that participants take responsibility for their actions.

The main function of the program is to provide an alternative to traditional incarceration. Nontraditional options include weekends in jail, nonlinear sentences, and work release sentences. The major benefit of these options is the opportunity for those convicted of a relatively minor crime to continue to provide for themselves and their families by working while they serve out their sentences.

Offenders participating in the program have typically been convicted of misdemeanors and minor felonies such as DUI, auto burglary, petty theft, probation violations, and embezzlement. Offenders charged with crimes involving violence against children or law enforcement or sexual misconduct are automatically ineligible for the program due to special security and housing concerns inherent in these offenses.

The jail's Records Supervisor initially interviews applicants to ensure they meet the minimum qualifications and have adequate resources to pay for the program. The fee is based on the per diem rate in effect at the time of application multiplied by the actual number of days spent in custody (as opposed to the full sentence). Even though a court may allow a particular defendant to participate in a work furlough program, the final discretion to accept an individual into the Pay-to-Stay Program remains with our facility and is informed by our predetermined criteria. For example, those with court orders allowing their release on work furlough beyond our permitted twelve hours per day are ineligible for the program.

Approximately 200 inmates have successfully participated in the Santa Ana Jail's Pay-to-Stay Program since its inception in 1998. The ages of the pay-to-stay inmates generally range from eighteen to forty-five years. The sentences range typically from ten days to one year. As provided by section 4019 of the California Penal Code, pay-to-stay inmates can earn one day of

*good-time* credit and one day of *work-time* credit for every six days of their sentence. These are the same credits offered by the county jail; *good-time* credit accrues for compliance with prison rules, and *work-time* credit accrues for satisfactory performance of any labor assigned to the inmate by the jail administration.

Pay-to-stay inmates are not given any special treatment and are housed in general population with other inmates, including some who are not participating in the pay-to-stay program. When they check into the jail, they are not allowed to bring anything with them except identification and locker and car keys. Paperback textbooks for school are allowed with a court order. Inmates in the program may be released for work up to six days a week but must complete one full day in custody each week and must spend a minimum of twelve hours in custody each day. All accepted participants must sign a contract with the jail that outlines the expectations they must continue to satisfy in order to remain in the program. The jail may terminate this pay-to-stay contract if the inmate fails to abide by facility rules and regulations, engages in conduct that disrupts or threatens the safety or security of the jail, or is under the influence of drugs or alcohol at any time during his or her incarceration. An inmate terminated from the Pay-to-Stay Program will be booked at the county jail to serve out his or her sentence.

Initially, the Pay-to-Stay Program was limited to Santa Ana residents and averaged three to eight participants daily. After the City approved a program expansion to include nonresidents in 2001, the daily average increased to twenty to thirty-five inmates and has remained at that level. The Pay-to-Stay Program generated additional revenue in excess of \$500,000 per year that helped offset the jail's operational expenses.

In early 2007, the jail temporarily suspended the program due to staffing shortages. Inmates participating in the program who have work release sentences require an escort to and from the lobby, a strip search, and another escort into the housing module at various times during the night shift. This caused a significant hardship for the limited staff, as they also needed to process a large number of detainees from other law enforcement agencies during the same time. As vacant staff positions are filled, we anticipate accepting and admitting new applicants to the program sometime in 2008. The program, like Santa Ana's other innovations in corrections, provides an essential tool in addressing specific needs of the inmates and the community.

#### CONCLUSION

Contract housing and the Pay-to-Stay Program have enabled the City of Santa Ana to operate its own jail and to meet the incarceration needs of the Police Department without incurring exorbitant operational costs. The full flexibility to utilize incarceration as a law enforcement tool has significantly improved Santa Ana's COP efforts. The Santa Ana Jail has become essential to the Santa Ana Police Department's service to the community. Pay-to-stay programs, meanwhile, will again assist in the City's continued efforts to achieve its goal of community-oriented law enforcement.

## WHY THE COUNTY JAIL IS OFTEN A BETTER CHOICE

*Shawn Chapman Holley*\* †

I have been a criminal defense lawyer in Los Angeles for almost twenty years. I began my career in the Los Angeles County Public Defender's Office, representing defendants who were poor and often homeless. For the past twelve years, I have been in private practice, representing defendants who are wealthy and often famous. Having represented criminal defendants coming from such varied economic circumstances, I have witnessed firsthand the criminal justice system's disparate treatment of those with money and those without. Pay-to-stay jails are yet another example of that disparity. Yet I believe that those without the money to pay for jail often find themselves in a better position than those who pay to stay.

In Los Angeles, pay-to-stay jails have been around for as long as I can remember, but I am not aware of any pay-to-stay prisons. Jails, of course, are different than prisons. County jails in Los Angeles are run and supervised by the Sheriff's Department and are designed to house inmates with sentences of less than one year, most of whom have been convicted of misdemeanors. Private jails are either small city jails or jails owned and operated by private entities that meet certain criteria and get approval from the state. State prisons, on the other hand, are run and supervised by the California Department of Corrections and Rehabilitation and are designed to house felons who have been sentenced to one or more years in the penitentiary. Inmates sentenced to state prison are generally considered dangerous and, as such, are not eligible for the relative "freedoms" of pay-to-stay confinement. Inmates sentenced to jail, however, are often there because they have been convicted of first-time or nonviolent offenses—or both.

In my experience, most inmates who opt for pay-to-stay jails—or, as they are more commonly known, private jails—have been convicted of a first- or second-time DUI offense and have been sentenced to less than five days in jail. People of all socioeconomic classes, races, and genders seem to commit this offense, and, accordingly, a number of DUI defendants can afford private jail.

Those defendants who can afford to pay for private jail often do, primarily because they are afraid of who and what they might encounter in the county jail. In Los Angeles, county jails are often the subject of local news

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stories involving violence and overcrowding. These stories tend to strike fear in defendants unaccustomed to the criminal justice system, and such defendants are willing to pay almost any amount to avoid the county jail.

However, many of these defendants are making an unwise choice. Because of overcrowding, nonviolent inmates with short sentences are routinely booked, processed, and released from the county jail within a number of hours. For instance, my client Nicole Richie was given a sentence of ninety-six hours in custody for a second-time DUI conviction but served only eighty-two minutes of her sentence. The judge in Miss Richie's case gave her the option of serving her time in the county jail or in a private jail. Miss Richie opted for the county jail and was prepared to serve the full ninety-six hour sentence if the Sheriff's Department so prescribed. Though people accused the Sheriff's Department of giving "special treatment" to a celebrity, the fact is that Miss Richie was treated like any other inmate serving a similar sentence for a similar offense in the county jail. That is all she expected and hoped for.

Miss Richie obviously had the means to afford a private jail, but, in my opinion, she was wise to choose the county jail. Had she chosen private jail, she would have served the entire ninety-six hour sentence. Because private jails are not overcrowded, the jailers who run them do not need to release inmates early. Inmates in private jails thus typically serve their entire sentences. Additionally, private jailers have a financial incentive to maintain their facilities at maximum occupancy.

Electronic monitoring is another option available only to those who opt to serve their time in the county jail. The Los Angeles County Sheriff's Department considers electronic monitoring tantamount to a jail sentence. Electronic monitoring allows the defendant to move about freely so long as he or she wears an ankle bracelet that must remain within a certain distance of his or her home phone. The electronic monitoring company is made aware of the defendant's work schedule and allows the defendant to go beyond the monitored distance only during approved working hours. The defendant must simply return to the monitored area immediately following the approved working hours.

Nonviolent offenders with sentences greater than a few days but fewer than ninety days often opt for electronic monitoring. Though there is a cost associated, it is based on a defendant's ability to pay and can be as little as \$10 per day. This is often significantly less than private jail stays, which can cost as much as \$127 per day. Moreover, because electronic monitoring allows defendants to go to work, those who choose this option will not risk their jobs. Private jails generally do not allow inmates to leave for work or for any other reason. As a result, private jail inmates with sentences greater than a few days are often in danger of losing their jobs.

Like the early-release program in which county jail defendants with short sentences are booked and released, electronic monitoring is a tool used by the Sheriff's Department to ease overcrowding. The federal government has mandated that the county jail population remain below a certain number. To comply with this mandate, the Sheriff's Department has no choice but to

release the inmates least likely to re-offend. Those inmates are often the very inmates in a financial position to opt for private jail.

While one unfamiliar with the criminal justice system understandably may fear the county jail and consequently may, if given a choice, opt for the relative comforts and safety of a private jail, there are obviously good reasons to choose otherwise. As a friend of mine once said, “the worst day off is still better than the best day at work.” Similarly, serving a few hours in the county jail is often better than serving a few days in the best private jail that money can buy. Ironically, in this limited but important way, it seems that those without the financial freedom to choose where to serve their time may end up faring better than those with that freedom. This may be the only area in the criminal justice system where the disparity between rich and poor inures to the benefit of the poor.

# A VIRTUOUS STATE WOULD NOT ASSIGN CORRECTIONAL HOUSING BASED ON ABILITY TO PAY

*Bradley W. Moore*\* †

## INTRODUCTION

Pay-to-stay jails expose the moral tension between the dominant theories of punishment: retributivism and deterrence. A turn to a third major moral theory—virtue ethics—resolves this tension. According to virtue ethics, the moral worth of an action follows from both the character of the action and the disposition of the actor. Virtuous acts promote human flourishing—the central goal of life—when they are the right actions performed for the right reasons. The virtue ethics theory of punishment suggests that pay-to-stay jails conflict with the promotion of human flourishing. A virtuous state’s criminal justice system would not include fee-based incarceration because it undermines the role of punishment in fostering practical judgment, an essential prerequisite to encouraging human flourishing. Neither the retributivist desire to punish offenders equally in identical (and shoddy) prison conditions nor the deterrence effect of requiring inmates to cover the costs of their confinement is motivated by virtuous reasons. Furthermore, the resolution of the pay-to-stay jails dilemma using virtue ethics highlights why retributivism and deterrence should be rejected as theories of punishment in favor of a virtue ethics-based approach.

## I. RETRIBUTION AND DETERRENCE: CONFLICTING ANSWERS TO THE PAY-TO-STAY QUESTION

Retributivism, which imposes punishment in proportion to the criminal offender’s moral desert, suggests that pay-to-stay jails are unjustified. This deontological moral theory, based substantially on the writings of Immanuel Kant, holds that punishment is a categorical imperative: the state has the right and the duty to punish all morally blameworthy acts. This duty exists irrespective of the positive or negative consequences that follow from the act of punishment. Proportionate punishment brings human relations back into the proper alignment that the morally blameworthy crime disrupted. From a retributivist point of view—assuming that the original level of punishment is

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just—prisoners paying fees for more comfortable jail-time experiences receive less than their deserved punishment for a reason unrelated to their blameworthiness: their ability to pay. Thus, retributivism would not permit pay-to-stay programs.

Applying the other main theory of punishment—deterrence—to pay-to-stay jails yields a contrary result. Deterrence actually favors pay-to-stay programs. Like other utilitarian justifications of punishment such as rehabilitation and incapacitation, deterrence is a consequentialist moral theory: punishment is justified if its positive consequences outweigh its harms. The state should punish criminals only to the extent that such punishment sufficiently deters them and other prospective criminals from committing future criminal acts. From a deterrence perspective, the decisions of California city jails to implement pay-to-stay programs reflect a novel way to address acute overcrowding and underfunding, both of which are social harms in their own right. Pay-to-stay programs increase the overall welfare of jails and municipalities by lowering net correctional costs while simultaneously decreasing deterrence only marginally. Offender participants in pay-to-stay programs—perhaps due to a comfortable position in society correlated with their ability to pay the fees—still wish to avoid returning to jail, indicating that specific deterrence remains effective for the individual offender. For example, in “For \$82 a Day, Book a Cell in a 5-Star Jail,” the *New York Times* described the attitude of one inmate who served her jail term in a pay-to-stay facility: “Ms. Brockett, who normally works as a bartender in Los Angeles, said the experience was one she never cared to repeat. ‘It does look decent,’ she said, ‘but you still feel exactly where you are.’” In fact, as the conditions in pay-to-stay facilities are better than in regular jails, these programs cause less harm to the offender for the same (or nearly the same) amount of deterrence. Only a subset of criminals (those who can afford to pay) receive the easier jail experience, preserving the general deterrent effect of jail on society as a whole. Meanwhile, jails—like their prisoners—also benefit from reduced overcrowding. In short, deterrence levels do not change significantly for pay-to-stay programs, and the programs alleviate overcrowding and underfunding. Therefore, deterrence justifies pay-to-stay programs.

## II. A VIRTUOUS ALTERNATIVE

As deterrence and retributivism provide conflicting answers to questions of the proper form and level of punishment for pay-to-stay participants and other inmates, criminal justice requires a third moral theory for the justification of punishment. Virtue ethics, also referred to as Aretaic theory, offers a viable alternative to deterrence and retributivism that better accounts for both the practical and aspirational purposes of punishment. The essence of virtue ethics is that the moral value of an action depends neither on its conformity to categorical moral rules, as in deontological theory, nor on the overall happiness that the action causes, as in consequentialist theory. Rather, the morality of an action depends on both the action’s character and

on the moral agent's disposition while performing the action. The central purpose of virtue ethics is to answer the question, "How should I live?" instead of the question, "What is the right action?" Virtue ethics' answer is that a person should live in a way that cultivates the virtues necessary for human flourishing. A moral agent exercises virtue through practical reasoning; knowing the proper action depends on wisdom, deliberation, and moral judgment. In other words, a virtuous agent acts not just rightly, but for the right reasons.

In *On Aristotelian Criminal Law: A Reply to Duff*, Professor Kyrón Huigens, the strongest advocate of a virtue ethics theory of criminal law, describes the justification of punishment as follows:

Aristotelian punishment theory attempts to describe the criminal law in terms of virtue. Virtue, for Aristotle, was not adherence to moral duties against one's inclinations, but a quality of exemplary practical judgment by which the agent does right because the right is what he wants to do—not in the sense that he wishes to comply with a rule, but in the sense that his judgment is so well attuned to the good in ordinary affairs that the right course of action and its objectives are desirable to him. I have argued that the justification of punishment turns on an assessment of whether the defendant exhibited a lack of Aristotelian virtue in the conduct that violated the criminal law, because the inculcation of this kind of virtue is a justifying end of the criminal law.

If criminal law's function in society is to promote virtue, then punishment is justified only if it facilitates the development of practical reason: the tendency and motivation to do the right act because one values the proper reasons for acting rightly. When a criminal makes an unvirtuous choice, punishment plays an educative role. Punishment does not act, however, as a deterrent—a person should choose the right action out of a desire to do so, not out of fear of sanction. A criminal offense constitutes a failure of practical reason: the perpetrator acted through the wrong means or for the wrong ends. However, virtuous punishment habituates the offender to form a desire to act rightly for the right reasons.

Therefore, practical reason should guide the state in deciding what punishment to impose. Imposing either excessive or overly merciful punishment would not be virtuous if it inhibits rather than promotes the development of practical reason in the offender. The state should also impose punishment only for the right reasons—the cultivation of virtue and the promotion of human flourishing. The correctness of the punishment depends on the practical wisdom present in the justice system as a whole. Individual judges exercise practical wisdom when they determine fault and punishment. Likewise, the policies of the state should be evaluated based on the extent to which they reflect practical wisdom and instill virtue.

### III. THE VIRTUE ETHICS ANSWER TO THE PAY-TO-STAY QUESTION

Pay-to-stay jail policies inhibit, rather than foster, the instillation of virtue and the promotion of practical reasoning. Consider first the prisoner

relegated to standard jail facilities. Those prisoners who cannot afford pay-to-stay jail upgrades will likely feel resentment at their disparate treatment. Jail already alienates many criminals and destroys a desire to act rightly for the right reasons. Resentment of pay-to-stay jails can only exacerbate the risk that prisoners will not experience punishment in a way that promotes practical judgment. Second, prisoners who serve time in pay-to-stay facilities will be less likely to perceive punishment in a virtue-developing way. Although they may feel less resentment, the sense of entitlement that they may feel could blunt the educative effect of punishment. Finally, pay-to-stay jail policies threaten the fostering of the state's own practical judgment. With these programs, the government has chosen to solve a broader crisis of overcrowding and underfunding by taking advantage of the different wealth levels of its prisoners, irrespective of the effect on these prisoners' development of practical judgment. While citizens might believe that a program to provide more funding for jails and reduce crowding is good for promoting virtue, a state needs to create the right kind of program, for the right reasons. A state undermines the virtue-promoting function of the criminal law when it creates a program that does not consider its citizens to be equal before the law.

Exploring the public reaction to the punishment of Paris Hilton, a recent California jail guest, can further explain how virtue ethics best resolves the problem with pay-to-stay jails. While resentment at the idea that Ms. Hilton might pay for a more pleasant jail stay might sound like a retributivist concern, the amount of punishment is not the issue; forty-five days in jail for driving with a suspended license is, if anything, on the harsher end of possible penalties. Rather, the nature and the function of the punishment are what matter to most people. If Ms. Hilton receives a harsh punishment but does not change her attitude towards the law, then people will still not be satisfied. The key role of Ms. Hilton's punishment is to teach her to align her character and her disposition with the virtues for a flourishing life, so that she can make the choices that a virtuous moral agent would make. Virtue ethics best explains the resentment people felt from speculation that Ms. Hilton might opt for the more tolerable pay-to-stay jail facilities.

However, critics might raise two major objections to the use of virtue ethics to resolve the pay-to-stay jails dilemma. First, virtue ethics begs the question: there needs to be some agreement on what the virtues are before society can say differential jail facilities are not virtuous. Second, society already conditions the delivery of services on the consumer's ability to pay in many contexts—why should jail be different?

The virtue ethicist has a reply to these criticisms. First, virtue ethics is impressive not because of how little agreement exists about what a flourishing life looks like but how much agreement exists. For example, in *Non-relative virtues: An Aristotelian Approach*, the philosopher Martha Nussbaum observes that while local understandings of the virtues may vary, there is wide cross-cultural consensus about what the virtues are. Furthermore, even if some disagreement exists as to the constitution of a virtuous life, virtue ethics is less likely to lead to absurd results than rule-based theories

like retributivism and deterrence, which have more trouble managing equitable exceptions and moral complexity. Even if retributivism and deterrence can codify the rules that should govern in a given situation, practical wisdom is necessary to apply those rules. Ultimately, it is the application of practical wisdom, not the content of a moral code, that determines the outcome of a moral dilemma. Virtue ethics avoids the senseless application of moral rules by allowing for a full appreciation of the equities in an ethical conflict. Second, even if society as a whole is improperly structured on the basis of ability to pay, it would not follow that virtue ethics is an invalid moral theory; rather, society itself may need some restructuring in order to further promote human flourishing. A society that better provides its citizens the opportunity to live a flourishing life might start by eliminating pay-to-stay jails, but it would not stop there.

#### CONCLUSION

Retributivism and deterrence should be rejected as the dominant theories of punishment because the scope of a virtue ethics critique of the criminal justice system would not end with pay-to-stay jails. Virtue ethics explains society's discomfort with municipalities' pay-to-stay responses to overcrowding and underfunding. The virtuous state, through the application of practical reason, would have chosen another solution, one that would promote practical reason in prisoners and citizens more generally. To the extent that the current correctional system fails to develop practical reason in prisoners in other ways, many other reforms are necessary.

Shifting to a virtue ethics approach would best capture the true purpose of punishment. Commonly cited problems with the prison system as a whole—inordinate costs, inability to prepare prisoners for reentry into society, excessive mandatory minimum sentences—would likely find better resolution if the state were to take a virtue ethics approach to crime and punishment. The dominant theories of punishment, deterrence and retributivism, rely on moral rules that cannot account for the nuance and complexity of competing moral claims. Therefore, as pay-to-stay jails show, the state cannot successfully balance the competing concerns of deterrence and retributivism. Virtue ethics avoids this trap by focusing on character and disposition, not on specific acts. As such, the state should reject retributivist and deterrent justifications for punishment, and all criminal justice reforms should instead be evaluated by the standard of whether or not the virtuous state would choose such reforms.