

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

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## 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.