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# REFLECTIONS FROM THIS ISSUE FOR ADVANCING STRUCTURAL CHANGE IN MONETARY SANCTIONS POLICIES

Mitali Nagrecha and Brook Hopkins

## About the Authors

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## Introduction

In September 2019, the National Criminal Justice Debt Initiative of the Criminal Justice Policy Program at Harvard Law School (CJPP) hosted our second national convening on the imposition and enforcement of monetary sanctions in the criminal legal system. In partnership with Alexes Harris, Professor of Sociology at the University of Washington, CJPP hosted 80 academics and advocates for this event, titled *Progressing Reform of Fees and Fines: Towards A Research and Policy Agenda*.<sup>1</sup> The convening aimed to deepen dialogue between advocates fighting for policy change and academics researching monetary sanctions, related topics, and theoretical frameworks relevant and potentially helpful to the field. The articles in this volume were submitted in response to a call by the *UCLA Criminal Justice Law Review (CJLR)* in connection with our convening.

This introductory essay first explains why CJPP thought it important to bring together scholars and advocates. We then describe the structure of the event and the goals of the convening, the most of important of which was to facilitate partnerships between academics and advocates to generate innovative thinking for ending the harms of monetary sanctions. In the final Part, we highlight contributions in this volume that explore the *hidden* nature of monetary sanctions policies and harms, and how that hiddenness informs strategies for dismantling these systems.

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1. The convening was funded by Arnold Ventures.

## I. The Current State of Fees and Fines Policy Reform

Over the last several years, CJPP has engaged in research and advocacy calling for an end to the punitive practices in U.S. courts that use monetary sanctions to raise revenue from black, brown, and poor communities who are vulnerable to the criminal legal apparatus. While these harms have been inflicted by governments in pursuit of revenue for decades, it has been only over the last few years, since 2015, that the problem has gained policy prominence. It was early in the emergence of the issue, in 2016, that CJPP held its first convening on the topic, *Maintaining Momentum for Criminal Justice Debt Reform*. That brought advocates, policymakers, and court administrators together to strategize state-level judicial and legislative strategies for change. At the time, the fact some state legislatures and courts had shifted their rhetoric away from touting courts as sources of revenue was viewed as a transformative shift. The discussions at the conference centered on what was politically possible given this small opening.

At that convening, and in the years since, advocates have achieved meaningful policy changes across the country. But these early approaches suffer from certain limitations that are apparent in the responses to a survey CJPP sent to national, state, and local advocates and litigators working on the issue of criminal monetary sanctions. We asked these experts about their advocacy, including their successes, their longterm goals and strategies, and the barriers to success. Most respondents work for policy or impact litigation organizations, a handful were legal services entities, and one respondent was from a public defender's office.

The survey confirmed what we in the field know well, which is that there is a tremendous amount of smart advocacy addressing the harms of monetary sanctions across the country. Groups are engaged in systemic change through legislative reform, policy advocacy, and impact litigation, as well as using new strategies in their individual representation. Many organizations are coming together to coordinate in national coalitions, thereby strengthening the individual state-level projects they are pursuing. We also heard about some critical work at the local level.

Respondents overwhelmingly reported that their advocacy has centered on pressuring state and local governments to act in accordance with the holding of *Bearden v. Georgia*, in which the Supreme Court held that people may be punished for failing to pay court debt only if nonpayment was willful.<sup>2</sup> Respondents have focused their advocacy on pushing courts to consider people's ability to pay before imposing monetary sanctions, or, at the very least, before punishing people for not paying. Ability-to-pay advocacy has resulted in meaningful reforms across the country to end debtor's prisons, decrease the use of driver's license suspensions, and create systematic ability-to-pay determinations.

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2. *Bearden v. Georgia*, 461 U.S. 660 (1983).

Respondents expressed hope given these early successes, but they noted that ability-to-pay reforms were only the beginning. Advocates recognized that ability-to-pay reforms can mitigate some harms and serve to build momentum for reform. But they also stressed that such reforms do not fully solve the problems associated with monetary sanctions and courts can easily work around them. Advocates across the country noted two related challenges for ongoing advocacy. First, dependence on the revenue from monetary sanctions forecloses effective policy change, even in places where policymakers say they agree change is needed. Financial dependence on the revenue from monetary sanctions—real or perceived—limits how transformative procedural changes can be and to what degree they will “stick.” Second, advocates reported that true change is unlikely without addressing the racial injustices that permeate the criminal legal system. The harms of monetary sanctions cannot be disentangled from these racist structures.

In summary, while we have celebrated the paradigmatic shift towards recognizing monetary sanctions as harmful, we as advocates must also confront strategy questions of how to effectively address and prevent those harms within the context of the criminal legal system where monetary sanctions operate. These policy challenges were the guiding drivers of CJPP’s second convening.

## II. Advances in Research

In planning the convening, CJPP was guided by the belief that confronting these policy challenges requires fostering connections between on-the-ground policy advocates, legal scholars, empirical researchers, and theoretical thinkers. We brought together researchers from diverse disciplines including sociology, criminology, public policy, law, economics, and political science. We invited people who research monetary sanctions as well as people who focus on related topics. Overall, the diversity of perspectives assembled generated important insights as people were challenged to approach the research and policy questions from new angles. The works in this Volume are a window into this generative dialogue.

As *Alexes Harris* explains more fully in the companion introduction, the pieces in this volume teach us about how monetary sanctions policies and practices work and how they affect the people who must pay. This volume includes research by *Thea Sebastian, et al.* on monetary sanctions and disenfranchisement; *Karima Modjadidi, et al.* on due process and driver’s license suspensions; *Nathan W. Link, et al.* on monetary sanctions and probation and parole; *Vicki Turetsky* and *Maureen R. Waller* on the intersection between monetary sanctions and child support; *Leslie Paik* on restitution (a monetary sanction that has been largely ignored in advocacy because of thorny political questions around victims’ rights); and *Megan M. O’Neil* and *Daniel Strellman* on the impacts of monetary sanctions on people with substance use disorders.

The convening also expanded our understanding of the interplay between punishment and state and private financial incentives, tackling the first challenge raised by our survey participants. *Brittany Friedman*, with a theoretical contribution, offers a framework of “neoliberal penology,” arguing that neoliberalism inserts market logics into punishment policies. *Raúl Carrillo* challenges advocacy messaging that narrowly aims to appeal to the negative implications for “taxpayers” of monetary sanctions. Carrillo shows how “taxpayer” in advocacy has usually been a white identity. Carrillo urges a national movement against monetary sanctions that moves away from these racialized concepts, and away from austerity politics. *Matthew J. Menendez, et al.* show the seemingly irrational behavior of courts. Despite the uncollectibility of monetary sanctions debts—because people can’t afford to pay—jurisdictions spend lots of time and money on back-end collections, but very little time on ability-to-pay inquiries to tailor monetary sanctions at sentencing. *Karin D. Martin* provides a history of how policymakers and courts have viewed monetary sanctions as sources of court funding, showing how these perspectives have changed over time. Martin suggests there is hope for a shift away from monetary sanctions funding of courts, particularly if researchers and practitioners work together to better understand the fiscal incentives. *Frank Edwards* evaluates the relationship between local government finances, the Great Recession, and monetary sanctions policies, finding a higher amount of monetary sanctions imposed during the Great Recession. *Sharon Brett* reminds us that in Ferguson, Missouri, the police were central to the jurisdiction’s revenue-raising apparatus, which received national attention in the Department of Justice’s Investigation of the Ferguson Police Department.<sup>3</sup> Finally, *Gene Nichol* writes on politicized legislative efforts to erode the independence of the judiciary in North Carolina by dictating courts’ approaches to monetary sanctions in the cases they decide.

Critically, the convening also brought a political economy lens to monetary sanctions. A political economy approach considers the role of monetary sanctions policies within economic power structures. Joe Soss, a Professor of Sociology at the University of Minnesota, started the convening with his view of monetary sanctions as predation, a framework that examines state and market practices that target marginalized groups for resource extraction. Viewed from this lens, today’s monetary sanctions policies are a form of financial takings from marginalized communities. Predatory dispossession operates as institutionalized segregation that sustains exploitation in an economy of racialized capitalism. Soss’ work cautions that it may be futile to target one form of predation—monetary sanctions—without also targeting the underlying structures of racial capitalism. Otherwise, monetary sanctions policies may be reformed while

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3. U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIVISION, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (Mar. 4, 2015).

at the same time morphing into a different type of taking, perhaps without being recognized as such.

The political economy framework revealed open questions and even tensions within the field. In particular, the tension between designing and prioritizing immediately identifiable policy solutions—such as ideas coming from the research summarized above—and advocacy aimed at changing the structures of racial capitalism. Though the two may overlap, at times they may suggest different paths. The political economy approach may also help explain why certain policy reforms that do not change underlying structures can result in the same problems re-emerging in a slightly different form and why they lack staying power.

### **III. Hiddenness and Monetary Sanctions: Advocacy Implications**

The political economy perspective helped convening participants focus on a crucial feature of monetary sanctions: the fact that the broader power structures that underpin them are often hidden. While advocates and legal scholars increasingly understand the historical and structural dimensions of mass incarceration, they are less familiar with how our criminal legal system, and monetary sanctions in particular, are driven by racial capitalism. Also hidden, due to opaque and complex statutes, rules, and local practice, is the precise workings of monetary sanctions. And finally, despite recent attention, the injustices and human impact of monetary sanctions remain largely hidden from public view. These hidden aspects of monetary sanctions—at the structural, policy, and human level—make it difficult to conceive effective reform strategies.

*Chloe Thurston* considered the hiddenness of monetary sanctions and the implications for policy change in our opening panel and contributes her analysis to this volume. Thurston suggests that what is hidden from the people impacted by monetary sanctions and the broader public is the role of the state in generating the harms of monetary sanctions. Political scientists have defined policy areas in which the role of the state is out of public view as policies of the “hidden state.” These policies have low public visibility, present attribution challenges, and involve delegation, which creates powerful stakeholders. Thurston argues that monetary sanctions policies meet all of these criteria, and that activities of the hidden state present unique challenges for policy change.

In this Part, we discuss possibilities for change, given this landscape of hiddenness. What types of information directed at which audiences will advance our cause? How can research improve our ability to consider some of the tensions and open questions raised by the political economy approach? We start to answer these questions by drawing on additional contributions to this volume that comment on the hiddenness of monetary sanctions in different ways.

As advocates, we should recognize that people who are impacted already know—more than many of us—that these monetary sanctions

cause injustice. Their experiences and expertise are essential to the cause and they should therefore lead our efforts. We should focus our energies as advocates on supporting the voices of impacted people and their advocates. We can also strengthen and complement those voices with research that uncovers some of the hidden aspects of monetary sanctions, both in individual cases and structurally. In our conclusion, we share hopeful findings from our survey that the most impactful strategy has been sharing the economic injustices experienced by people and communities because of monetary sanctions.

### **A. *The People and Communities Harmed by Monetary Sanctions Understand the Injustices***

Advocacy efforts to build strong coalitions led by and including people and communities impacted by monetary sanctions can help expose then hidden injustices of monetary sanctions.

Thurston suggests that people impacted by monetary sanctions and their advocates are critical partners to achieve the mobilization and build the coalitions required for policy change. Together, they will be able to raise the visibility of the issue, change how the public thinks about the issue, and address entrenched interests. Advocacy should “render the role of government policy and administration legible and visible to the public as well as to those who experience these issues.” Thurston suggests that a possible challenge with organizing people impacted by monetary sanctions is that they may blame themselves rather than hold government responsible for the harms of monetary sanctions. In part, this may be true. *Mary Pattillo and Gabriela Kirk*, in their article in this collection, show how people who have court debts have internalized that they deserve *some* punishment—they believe in retributive justice.

However, Pattillo and Kirk also share how people rarely say this without also mentioning the disproportionality of their punishment through monetary sanctions. People understand viscerally the injustices of these policies, and they blame the state for their experiences. Pattillo and Kirk provide accounts of people impacted by monetary sanctions calling the state out for inflicting “double punishment” disproportionate to their offenses. Their interviewees understand monetary sanctions policies as perpetuated by a greedy state: “I feel as a member in society that they’re double charging us [first in taxes, then in monetary sanctions].” People have an intuitive sense of the financial incentives and the callousness operating behind these court practices.

Said another way, the injustices of these policies are—perhaps obviously—not hidden from the people who are impacted. People’s experiences and their characterizations of the injustices behind punishment for profit are a strong starting place for mobilizing people with similar experiences and exposing the harms of monetary sanctions to the broader public.

## **B. *We Should Use Our Research to Support People Impacted by Monetary Sanctions Mobilizing for Reform***

As impacted people and communities mobilize, scholars and advocates may be able to support their work with research that make less hidden and give shape and detail to the precise policy mechanisms that generate the injustices of monetary sanctions.

Two primary categories of research will be particularly helpful. The first is work that untangles the byzantine and inconsistent policies and practices that make up monetary sanctions regimes across the country. *Sarah Shannon et al.* find a lack of transparency in the eight states they study, as well as inconsistencies in the application of monetary sanctions policies, even within jurisdictions. Their interviews with people impacted by monetary sanctions debts revealed that people did not know how much they owed, how the debts had been calculated, how much they had left to pay, and how the court processes work. The facts of individual cases are hidden, making it nearly impossible to pay off debts, let alone fight for policy reform. Researchers and advocates have made considerable progress in mapping these legal and policy landscapes, which may be helpful to impacted people as they navigate their own cases. Getting out from under their debts may also give people the bandwidth to engage in advocacy.

Second, more research is needed about *how* and *why* these monetary sanctions policies exist as they do. As *Mary Fainsod Katzenstein et al.* argue, in the case of fees charges to impacted people and their families for prison and jail phone calls, commissary, and other “services,” a “first step in redressing these practices must be to unlock such arrangements and expose how, through them, the law is being used to exploit incarcerated populations.” The authors suggest that research will be helpful not only in uncovering the workings of these policies—for example, the commissary contract details that explain the high amounts people are charged for common goods and who profits from these arrangements—but also in revealing precisely how this exploitation is possible without government accountability. In the case of jail fees, the authors describe how subtle changes in statutory language allow jurisdictions to divert commissary revenues from their original intended use for “inmate welfare,” and how this vague language serves as a shield against attempts to hold governments accountable. Research revealing these mechanisms might help address Thurston’s concern that people blame themselves for their struggles with monetary sanctions because it would show the intent behind these policies. Understanding these mechanisms will also help advocates develop effective strategies for dismantling them.

## **C. *We Should Channel the Energy of Newly Mobilized Groups***

Supporting the mobilization of impacted people and communities with targeted research is a promising start. But the pieces in this volume flag potential obstacles to this work. As Thurston raises in her



conclusion, while hidden-state theory suggests that revealing predatory government policies can support advocacy, the theory says less about whether this is effective when those policies mostly impact marginalized communities. She asks, for example, whether revealing the high costs of collections merely reinforces the notion that these systems are expensive, and that if someone is going to pay for them, why not the communities least enfranchised to resist.

There is also good reason to question whether exposing the harms of monetary sanctions can lead to meaningful change. As CJPP has seen in its advocacy, educating judges about the harms of monetary sanctions does not always shift their perspective, even when combined with education about the unconstitutionality of their practices. As Pattillo and Kirk points out, monetary sanctions may be an example of what David Garland calls “penal excess,” or policies that amount to “damaging and humiliating a marginalized population and doing so under the cover of the law. Just as Garland shows that lynchings were not extralegal in the way often assumed, the extraction of monetary sanctions happens in plain sight and with full participation of officers of the court.” We will all have to do the collective work of figuring out how to fight policies that persist despite acknowledgments of illegality and injustices for which the law itself provides cover.

### **Conclusion**

The works in this volume advance our understanding of monetary sanctions and suggest some ways in which we should conduct our advocacy going forward. But many open questions about messaging and strategy remain.

The responses from CJPP’s survey suggest some promising answers. First respondents reported that legislators, judicial leadership, and the public are starting to understand the harms that monetary sanctions inflict on people. This understanding seems to make people more invested in change. Second, we heard that framing the issue as one of economic justice and explaining the harms not just to individuals, but also to families and entire communities has been effective.

These accounts suggest that there is power in people sharing their experiences to reveal the structural injustices of racial capitalism. A key limitation of ability-to-pay reforms is that they lead advocates to focus their energy on right-sizing monetary sanctions. But if we can broaden our arguments and narratives to expose the structural economic injustices of monetary sanctions, it may be more possible to abolish them. We should pursue this opportunity.