

Unveiling the Necrocapitalist Dimensions of the Shadow Carceral State: On Pay-to-Stay to Recoup the Cost of Incarceration

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Abstract

The expansion of monetary sanctions constitutes what Beckett and Murakawa describe as the “shadow carceral state,” where covert penal power is expanded through institutional annexation by blending civil, administrative, and criminal legal authority. A growing body of work on monetary sanctions has begun to dissect covert penal power by tracing increased civil and administrative pipelines to incarceration, civil financial alternatives to criminal sanctions, and innovations to generate criminal justice revenue. However, institutional annexation and innovation in the form of contemporary pay-to-stay practices remain understudied and undertheorized. In this article, I first examine statutes and practices to theorize pay-to-stay as exemplary of the shadow carceral state—an outcome of legal hybridity and institutional annexation legitimated using the legal construction of “not punishment,” which frames monetary sanctions as non-punitive. Second, I expand Beckett and Murakawa’s framework to argue pay-to-stay practices reveal how the shadow carceral state compounds or initiates the civil death of those charged. I broaden our notion of civil death to include financial indebtedness to the shadow carceral state. I suggest covert penal power expands through the accumulation of resources extracted from people marked for civil death through criminal justice contact. Finally, I conclude that monetary sanctions such as pay-to-stay reveal how the shadow carceral state expands covert penal power through necrocapitalism, meaning institutional accumulation occurs through dispossession and the subjugation of life to the power of death.

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Introduction

Monetary sanctions in the criminal justice system vary across jurisdictions with no coherent set of laws or institutions tasked with governing their development or implementation (Harris et al., 2017). Applicable laws are most obviously found in criminal and traffic codes, yet jurisdictions regularly mobilize civil and administrative codes to satisfy criminal justice ends (Beckett & Murakawa, 2012). “Punitive civil sanctions are rapidly expanding” such that “the features distinguishing civil from criminal law become less clear” (Mann, 1992, p. 1798).

Facing monetary sanctions from multiple jurisdictions potentially fosters indebtedness to the city, county, and state at overlapping times, creating a nearly impossible web to navigate (Martin et al., 2018). Competing penal logics such as rehabilitation, retribution, incapacitation, and deterrence further clutter their interpretation, making it even more difficult for penal actors and those ensnared within the criminal justice system to make sense of their usage or purpose. Private entities profiting at various “cost points” from those in contact with the criminal justice system further cloud the landscape (Harris et al., 2019). When asked, people are often unable to answer basic questions, such as how much they owe, to whom, and why (Harris, 2016; Pattillo & Kirk, 2020), with monetary sanctions consequently functioning as a significant predictor of social inequality (Harris et al., 2010) bolstered by a “hidden state” (Thurston, 2020). A multitude of monetary sanctions exist, from fines and restitution imposed at sentencing, to user fees accumulated throughout system processing, serving as a key source of criminal justice revenue (Fernandes et al., 2019; Martin, 2018, 2020; Sances & You, 2017; U.S. Department of Justice, 2015).

Monetary sanctions are a prime example of what Beckett and Murakawa (2012) describe as the “shadow carceral state,” where covert penal power is expanded through the legal construction of “not punishment,” legal hybridity, and institutional annexation. The legal construction of “not punishment” refers to the process of framing statutes and practices as non-punitive, even if they are employed punitively and/or have punitive consequences. Legal hybridity is the blending of civil, administrative, and criminal legal authority. Institutional annexation occurs when institutions that are not officially recognized as penal significantly grow in their capacity to impose punitive sanctions that extend criminal justice contact as a result of increased demand to fund the criminal justice system through monetary sanctions.

A growing body of work on monetary sanctions has begun to dissect what could be described as covert penal power by tracing increased civil and administrative pipelines to incarceration, civil financial alternatives to criminal sanctions, and innovations to generate criminal justice revenue. Covert, meaning the expansion of penal power is not readily visible because it traverses and gains strength through the interlocking of social institutions that are not explicitly conceived as criminal justice. This interlocking

manifests as annexation and innovation designed to generate revenue for the state, such as the seizing of employment pensions to pay criminal justice-related debt. Institutional annexation and innovation are among a lengthy list of reasons scholars suggest we analyze “the carceral state” and its expanding technologies rather than solely study the criminal justice system (see Berger, 2019).

However, institutional annexation and innovation in the form of contemporary pay-to-stay practices remain understudied and particularly undertheorized, especially with regard to civil lawsuits against formerly and currently confined persons to recoup pay-to-stay fees (see Friedman et al., 2019; see Kirk et al., 2020). Pay-to-stay refers to the practice of charging people detained in jail or confined in prison for their own incarceration (Aviram, 2015; Buchanan, 2007; Eisen, 2014, 2015, 2017; Friedman et al., 2019; Gottschalk, 2010; Jackson, 2007; Kirk et al., 2020; Levingston, 2007; Lynch, 2009; Plunkett, 2013; Weisberg, 2007). In this article, I contribute to monetary sanctions scholarship by first examining statutes and practices to theorize pay-to-stay as exemplary of the shadow carceral state—an outcome of legal hybridity and institutional annexation legitimated using the legal construction of “not punishment,” which frames monetary sanctions as non-punitive. Second, I expand Beckett and Murakawa’s (2012) framework to argue pay-to-stay practices reveal how the shadow carceral state compounds or initiates the civil death of those charged.

Civil death is traditionally understood as the loss of a person’s civil rights and the imposition of barriers to civic participation, most commonly associated with the collateral consequences stemming from a criminal record (Chin, 2012; Haase, 2015; Manza & Uggen, 2004, 2006; Pager, 2007). For example, collateral consequences routinely cited include loss of voting rights, inability to register for licenses, loan ineligibility, employment denial, and inability to secure housing, to name a few. I argue monetary sanctions reveal that civil death is not solely the loss of civil rights or imposed barriers to civic participation due to a criminal record. Civil death is also triggered by financial indebtedness and is not necessarily tied to a criminal record but instead to criminal justice contact. For example, financial indebtedness can newly initiate the civil death of a person who only has a minor traffic violation with no criminal record. Financial indebtedness can also compound civil death for those already reeling from a conviction. What the people in both scenarios have in common is that they simply cannot afford to pay their monetary sanctions. As such, civil death exists on a continuum of severity when we include the impact of monetary sanctions debt.

I broaden our notion of civil death to include financial indebtedness to the shadow carceral state. I suggest covert penal power expands through the accumulation of resources extracted from people marked for civil death through criminal justice contact, where even those who have not been convicted of a crime (e.g., jail detainees), must still pay fees in many jurisdictions. Finally, I conclude that monetary sanctions such as pay-to-stay fees and the subsequent threat of civil lawsuits to recoup such fees reveal how the shadow carceral state expands covert penal power through necrocapi-talism, meaning institutional accumulation occurs through dispossession and the subjugation of life to the power of death.

Linking Institutional Arrangements to Consequences

There is an intricate relationship between the production of criminality and the extraction of material resources from the populace (Aviram, 2015; Foucault, 1978; Schept, 2015; Smith, 1965; Wacquant, 2009). Financial penalties coupled with physical punishments have a long history in legal codes across the United States. Dating back to the colonial era, jails and prisons held imprisoned persons responsible for their incarceration in the form of work and at times, monetary payment, often as punishment for and repayment of a debt (Peebles, 2013).

Scholars have questioned the financial incentives of punishment by pointing to the settler colonial roots of contemporary penology in the United States and the means through which criminal justice institutions have been historically mobilized to extract labor and revenue from poor and nonwhite communities, long before the rise of private prisons (Blackmon, 2008; Childs, 2015; Davis, 2011; Du Bois, 1935, 1953; Friedman, 2020; Gilmore, 2007; Haley, 2016; LeFlouria, 2015; Perreira, 2018; Shelden, 2001; Wacquant, 2002; Wells, 1893). Drawing from advances in critical race theory, scholars have linked the financial incentives of punishment to the prison industrial complex and resulting dispossession in the form of bodily subjugation or bio-power (Wang, 2018) and social, civil, and physical death (Gilmore, 2007; Holmes, 2017; Patterson, 1982). What these scholars suggest is that there are particular institutional arrangements within capitalist countries that are designed to foster accumulation by extracting from vulnerable, criminalized communities that are disproportionately nonwhite (Byrd et al., 2018; Du Bois, 1935, 1953; Henricks & Seamster, 2016; Johnson & Kelley, 2018; Melamed, 2011; Robinson, 1983).

Monetary sanctions provide potent evidence for linking connections between institutional arrangements and accumulation to consequences for inequality. The temporary reliance on monetary sanctions to fund some if not all of criminal justice expenditures creates a perverse incentive to expand systems of extraction to historically unprecedented levels. The incentive to fund the system is so strong that in states like North Carolina, judges who go against the system are “bullied” by lawmakers into denying fee waivers to indigent people (Nichol, 2020). This broad reliance on monetary sanctions as revenue is a net widener of civil death for communities already disproportionately affected by the carceral state. In this way, the expansion of monetary sanctions and resulting financial indebtedness to the shadow carceral state are an example of what Skocpol (1980, p. 155) would term a “political response to capitalist crisis.” Scholars have described the contemporary relationship between these institutional arrangements and accumulation as “captive markets” (Plunkett, 2013), “mercenary criminal justice” (Logan & Wright, 2014), “seizure” (Katzenstein & Waller, 2015), “monetary myopia” (Martin, 2018), “stategraft” (Atuahene & Hodge, 2018), “predation” (Page & Soss, 2018), “carceral capitalism,” (Wang, 2018), “extortion” (Pattillo & Kirk, 2020), and “racial capitalism” (Friedman, 2020). This extractive relationship has a number of adverse consequences on the individual, families, and communities by fostering a “punishment continuum” (Harris, 2016) that restricts physical movement in the form of “carceral immobility and financial capture” (Friedman,

2020). These consequences effectively create “indentured citizens” beholden to the financialization of criminal justice (Page & Soss, 2018), which I argue compounds or initiates civil death.

Monetary sanctions are “misguided policy” (Beckett & Harris, 2011) and make it difficult for people to rebuild their lives after criminal justice contact by creating the need to privilege legal debt over other financial responsibilities such as health or family care (Harris, 2016) and disrupting labor market participation (Cadigan & Kirk, 2020). This tension often leads to higher rates of recidivism, suggesting monetary sanctions have criminogenic effects (Bannon et al., 2010; Piquero & Jennings, 2017). Social characteristics such as race, class, offense, and county are notable when determining who has higher amounts of legal financial obligations, with racial and ethnic minorities and the poor more likely to grapple with indebtedness and disproportionate sanctions (Edwards & Harris, 2020; Friedman & Pattillo, 2019; Harris, 2016; Harris et al., 2010, 2011; Henricks, 2019; Henricks & Harvey, 2017; Miller et al., 2018; Sances & You, 2017; U.S. Department of Justice, 2015). This inequality occurs in part because such populations are more likely to be ensnared by the criminal justice system, but it is also because they are more likely to be criminalized by penal actors as especially deserving of monetary sanctions, putting such communities at risk for the multitude of consequences for nonpayment. These consequences include driver’s license revocation, jail time, parole revocation and incarceration, wage garnishment, reporting to creditors, private collections, and civil liens and lawsuits (Friedman & Pattillo, 2019).

I join the conversation by combining advances in critical race theory on the financial incentives of dispossession with theories of covert penal power to shed new light on the institutional arrangements of accumulation that lead to monetary sanctions’ consequences for inequality. I argue these institutional arrangements and incentives are better understood as a shadow carceral state expanding covert penal power through necrocapitalism. I use necrocapitalism rather than “carceral capitalism” (Wang, 2018) or “racial capitalism” (Friedman, 2020) to emphasize the various meanings and manifestations of civil death stemming from blended institutional arrangements designed to extract from those marked as criminal. Through analyzing monetary sanctions, in particular pay-to-stay statutes and practices, I reveal how the shadow carceral state relies on necrocapitalism to maintain both its financial base and political legitimacy, extracting from an ever-increasing pool of criminalized classes to sustain its own livelihood by requiring said classes to die a precarious civil death.

To develop a necrocapitalist theory of the shadow carceral state, I organize the article around linking Beckett and Murakawa’s (2012) concepts of legal hybridity, institutional annexation, and the legal construction of “not punishment” to necrocapitalism (Banerjee, 2008) and the goal of revenue accumulation and the consequence of civil death. I draw from examples of pay-to-stay statutes, practices, and civil lawsuits to further illuminate how this connection flourishes. I chose to focus on pay-to-stay as evidence not only because it is understudied and undertheorized in the literature on monetary sanctions. Pay-to-stay is distinct from other types of monetary sanctions in that people are forced to pay for their own physical containment within a total institution, meaning pay-to-stay is particularly harsh in terms of its physical and

psychological punitiveness. We know that total institutions, such as jails, prisons, detention centers, and asylums, use degradation rituals to transform people into inmates, relegating them to a dehumanized status by purposefully stripping away their individuality (Goffman, 1961). Upon transformation into inmate status, people experience particular “pains” while confined (Sykes, 1958) and often face a loss of civil rights (i.e., civil death) upon release. Forcing people to pay for these types of physical and psychological deprivations is arguably the best example of how accumulation from monetary sanctions renders those targeted to a “living dead” status, which Mbembé (2003) describes as a hellish limbo where people are not physically dead but unable to engage society as full human beings. Mbembé (2003) writes:

[It is] the notion of necropolitics and necropower to account for the various ways in which, in our contemporary world, weapons are deployed in the interest of the maximum destruction of persons and the creation of death-worlds, new and unique forms of social existence in which vast populations are subjected to conditions of life conferring up on them the status of living dead. (p. 40)

Banerjee (2008) argues this living dead status occurs as a result of institutional arrangements designed to generate revenue, which he argues constitutes necrocapitalism.

Given the frequent loss of civil rights as a result of criminal justice contact, this living dead status includes criminal justice-induced civil death, which I argue we see compounded or initiated as a result of not being able to pay monetary sanctions—meaning our notion of civil death should include financial indebtedness given the link between necropolitics and accumulation. Financial indebtedness in the form of monetary sanctions has been shown to foster the inability to participate fully in civic society in a number of ways, including rendering people ineligible for public benefits, employment, voter registration, the inability to apply for a myriad of business licenses, and even the inability to hold a valid driver’s license (Harris, 2016). I argue monetary sanctions more broadly are a part of the everyday necropolitic of life after criminal justice contact.¹ And while monetary sanctions function within the expanding shadow carceral state, pay-to-stay renders the connection between death, accumulation, and covert power even more so to the forefront. Pay-to-stay uniquely withstands most public scrutiny given the sentiment that imprisoned people are particularly undeserving of civility, making it more justifiable to extend their civil death through monetary sanctions.

The Shadowy Foundations of Pay-To-Stay

Legal Hybridity

This section discusses where pay-to-stay statutes reside in the law and how they blend criminal, civil, and administrative legal categories. Pay-to-stay is commonplace across the United States, with the exception of Hawaii and Washington D.C. Forty-nine states have what are known as “inmate reimbursement” statutes, known colloquially as “pay-to-stay,” that allow jails and prisons to charge fees designed to generate revenue

to offset the cost of incarceration (“Is Charging Inmates to Stay in Prison Smart Policy?” 2019). As of 2005, 90% of the 224 jails that responded to a National Institute of Justice survey stated they do charge some sort of pay-to-stay fee. Eisen (2015) found that as of 2015, at least 43 states have prison-level pay-to-stay fees. Significantly, states adopt or expand pay-to-stay statutes and innovate extraction practices during moments of fiscal crisis (e.g., recession), which spur legislative debates over who should pay for what legislators view as the correctional arm of the welfare state (Kirk et al., 2020).

Pay-to-stay fees fall into two categories and most often, both categories are charged simultaneously when applicable: room and board and service-specific costs. Room and board fees are charged at a per diem rate for the length of incarceration that is either calculated by the Department of Corrections or is pre-specified in the statute. The second type of pay-to-stay that can be charged in conjunction with or in place of room and board per diems are known as service-specific costs. These include charges for medical care, education classes, or daily commodities necessary for survival in jail and prison such as telephone calls and commissary items.

Although found in criminal codes, pay-to-stay statutes include language that allows for the filing of civil lawsuits to recoup these fees and if unpaid, the placement of civil liens or judgments. This affords hybrid legal authority to the jurisdiction in an effort to secure their ability to collect the unpaid fees as a civil debt. Criminal statutes are designed to govern misdemeanor and felony convictions, though adding civil penalties to a criminal statute then allows for people to be subjected to criminal and civil law simultaneously, although civil law is traditionally used to resolve personal injuries. States use language in their criminal statutes framing correctional agencies as the victim of nonpayment and deserving of civil damages, with confined persons labeled as freely consuming correctional services and willfully not paying (Friedman et al., 2019).

For example, Florida’s two pay-to-stay statutes reside in Title XLVII: Criminal Procedure and Corrections, yet the statutes grant the state and counties explicit authorization to mobilize civil law against persons convicted under criminal law.² The first criminal statute achieves this by defining pay-to-stay fees as civil damages and alluding to the state and counties as victims of crimes (FL 960.293(2)):

960.293 Determination of damages and losses.—

(1) In a civil suit for damages filed by a crime victim against a convicted offender, the crime victim is entitled to liquidated damages in an amount equal to the actual damages award.

(2) Upon conviction, a convicted offender is liable to the state and its local subdivisions for damages and losses for incarceration costs and other correctional costs.

(a) If the conviction is for a capital or life felony, the convicted offender is liable for incarceration costs and other correctional costs in the liquidated damage amount of \$250,000.

(b) If the conviction is for an offense other than a capital or life felony, a liquidated damage amount of \$50 per day of the convicted offender's sentence shall be assessed against the convicted offender and in favor of the state or its local subdivisions. Damages shall be based upon the length of the sentence imposed by the court at the time of sentencing.

The second criminal statute determines pay-to-stay fees can be pursued in civil court on the grounds that they constitute victim's restitution to the government (FL 960.297):

960.297 Authorization for governmental right of restitution for costs of incarceration.—

(1) The state and its local subdivisions, in a separate civil action or as counterclaim in any civil action, may seek recovery of the damages and losses set forth in s. 960.293.

(2) For those convicted offenders convicted before July 1, 1994, the state and its local subdivisions, in a separate civil action or as a counterclaim in any civil action, may seek recovery of the damages and losses set forth in s. 960.293, for the convicted offender's remaining sentence after July 1, 1994.

(3) Civil actions authorized by this section may be commenced at any time during the offender's incarceration and up to 5 years after the date of the offender's release from incarceration or supervision, whichever occurs later.

Florida's pay-to-stay statutes are housed under Chapter 960: Victim Assistance, granting further credence to the state's argument that while pay-to-stay fees are triggered with criminal conduct, they nevertheless constitute restitution for a personal injury against the state, shifting the legal construction of incarceration from a criminal sanction to a financial and thus civil debt. Legal hybridity opens up the person to increased yet unforeseen civil law-enforced punitiveness, such as wage garnishment and credit reporting as a result of unpaid debt.

Pay-to-stay debt in Florida can be calculated according to one's sentence, despite the fact that people are often released before their full sentence has been served, which can legitimate a predisposition toward prescribing lengthy sentences. As such, a person's owed civil damages reflect the amount of time sentenced rather than the actual amount of time spent within a correctional institution purportedly using valuable resources. For example, in *Freeman v. Florida* (2015), Allister Freeman was ordered to pay the total amount that was calculated based on his sentence rather than the time he actually spent in prison. Freeman, represented by a public defender, appealed an earlier ruling in the 19th Judicial Circuit Court where he sued the State of Florida arguing that the total civil lien he received for US\$282,750 violated criminal statute 960.293(2) because he was charged US\$50 per day for his entire 15 year and 6 month sentence. The appellate court instead ruled in favor of the State of Florida and the Department of Corrections, represented by the Attorney General and Assistant Attorney General. The appellate court opinioned the following, citing a 2014 case as precedence:

The Eleventh Circuit has held that section 960.293(2) does not limit costs to those incurred after conviction . . . in arriving at its conclusion, the court reasoned that a contrary interpretation would undermine the stated intent of the statute . . . [to] fully compensate . . . the state and its local subdivisions for damages and losses incurred as a result of criminal conduct.

The ruling suggests that legal hybridity blurs understandings of what type of criteria should be used to judge behavior as offensive. People are simultaneously guilty of “criminal conduct” while also guilty of causing civil “damages” to the state, requiring a dual intervention to rectify the multiple legal categorization of one action. Significantly, the consequences of legal hybridity extend beyond the individual. Florida, like Illinois, allows for any civil liens generated from pay-to-stay fees to survive the physical death of a formerly or currently incarcerated person, exposing their next of kin to civil death by holding them financially responsible. In this way, “criminal conduct” has expansive consequences beyond what is explicitly visible as a criminal punitive sanction. Posthumous civil damages reveal the shadow carceral state circumscribes financial debt upon the body in perpetuity, permitting the exposure of family members to civil death even if the person originally sanctioned is physically dead.

The legal hybridity of pay-to-stay statutes also spreads covert penal power by increasing surveillance across all types of law enforcement. For example, in Illinois, the same blending of criminal and civil legal authority seen in Florida is taken a step further to also operationalize administrative law: “Administrative law governs interactions between state agencies and members of the public” (Beckett & Murakawa, 2012, p. 225). Specifically, Illinois’ pay-to-stay statutes authorize the Illinois Department of Revenue to seize the tax refunds of those whom they have civil liens against and similarly, Michigan statutes allow the Department of Corrections to seize employment pensions. Missouri authorizes similar practices regarding disability benefits, which was upheld by the Missouri Supreme Court in *Nixon v. Powell* (2005). The court opined that Missouri’s pay-to-stay statutes are not “unconstitutionally vague” although they do not specify in totality which assets are extractable to pay for the cost of incarceration. States also routinely prevent people from hiding potential revenue sources by requiring them to declare their assets upon incarceration, permitting correctional institutions to regularly monitor any deposits in their inmate trust fund account, which are subjected to discretionary seizure (Friedman et al., 2019). The Michigan Department of Corrections takes it a step further by requiring people to keep all of their assets in their inmate trust fund account and prohibits them from having outside accounts (Kirk et al., 2020).

Institutional Annexation

This section shows how the legal hybridity of pay-to-stay statutes expands covert penal power by blurring the lines of who has the authority to enforce the imperative of the criminal justice system, leading to institutional annexation. Institutional annexation occurs when sites and actors not officially recognized as penal have significantly

grown in their capacity to impose punitive sanctions that extend the criminal justice system (Beckett & Murakawa, 2012). Because states write pay-to-stay fees as criminal law, but then explicitly authorize their enforcement as civil and administrative law, they effectively coopt under the umbrella of the carceral state, institutions traditionally thought to rectify private injuries or administer interactions between people and government service agencies.

For example, in Illinois, legal hybridity has led to the Office of the Attorney General acting directly on behalf of the Department of Corrections by filing civil lawsuits and seeking judgments to recoup pay-to-stay fees. The Illinois Office of the Attorney General is the state's chief legal officer and describes some of the requisite duties as "protecting consumers, advocating for women, advocating for older citizens, and helping crime victims," yet nowhere does the office description mention its chief role in enforcing Illinois' pay-to-stay statutes.³ Illinois pay-to-stay statutes legally *require* the Attorney General's Office to investigate any complaints brought to them by the Illinois Department of Corrections, giving them limited discretion over whether they should launch an investigation (Friedman et al., 2019). In 2015, then Attorney General Lisa Madigan released a statement both questioning whether or not recouping pay-to-stay fees should even fall under the mission of her agency and if the State of Illinois should have pay-to-stay statutes all together. She wrote (Mills & Lighty, 2015):

The legislature should revisit whether this law is appropriate . . . these recoveries may raise roadblocks to former inmates trying to lead successful lives out of prison. As a result, the judgments that must be made in attempting to recover incarceration costs raise moral questions that legislators need to address.

Even still, in 2016, Illinois Governor Bruce Rauner vetoed a bill that would have significantly curtailed pay-to-stay practices, citing the need to maintain the fees as a source of revenue extraction from wealthy inmates, despite the reality that the vast majority of formerly and currently incarcerated persons in Illinois are poor or working class (Friedman & Pattillo, 2019).⁴

A similar example of the consequences of legal hybridity resides in the institutional annexation of Michigan's Department of the Treasury. A Freedom of Information Act (FOIA) request filed in 2019 by the author with the Michigan Attorney General's Office to retrieve records of pay-to-stay civil lawsuits revealed that in Michigan, it is the Department of the Treasury that initiates the complaints. The FOIA administrator for the Michigan Attorney General's Office responded to the author with the following:⁵

The Department does not possess records under that part of the request for information that you describe as, "civil complaints initiated on behalf of the Michigan Department of Corrections against current and former inmates for the reimbursement of corrections associated fees." The Department, however, does possess civil complaints initiated on behalf of the Michigan Department of Treasury against current and former inmates for the reimbursement of corrections associated fees and these complaints and accompanying exhibits, if any, constitute the material granted above.

The response suggests that state agencies concerned with finance more broadly are available for institutional annexation by the criminal justice system, rather than solely limiting cooptation to agencies traditionally understood as litigating civil law on behalf of the state. This explains why agencies that fall under administrative law such as state employment agencies, benefits agencies, and treasuries can be used to enforce criminal statutes, further evidencing the argument that pay-to-stay only remains viable as a result of the expansion of covert rather than strictly overt penal power.

Legal Construction of “Not Punishment”

Rationales justifying pay-to-stay statutes routinely do not recognize them as a form of punishment, similar to how other types of fee-based monetary sanctions accrued prior to imprisonment are called user costs. This legal construction of “not punishment” allows pay-to-stay statutes to routinely survive legal arguments alleging double punishment, or that pay-to-stay statutes violate the excessive fines and fees clause of the U.S. Constitution (re monetary sanctions in general, see Colgan, 2018). State legislators argue pay-to-stay statutes are a viable source of revenue because those charged do not deserve free public expenditures, an argument which gains traction particularly during times of fiscal austerity. Austerity arguments in states like Michigan (est. 1935) and Illinois (est. 1981) during the statutes’ initial expansion explicitly cite pay-to-stay as the opposite of punishment and simply an attempt to shift the financial burden away from taxpayers (Kirk et al., 2020).

For example, a report written by Michigan’s Macomb County Sheriff reveals the county has collected US\$20,000,000 since 1985, after a 1984 state law standardized and expanded use of pay-to-stay at the county level. In positioning the fees as a solution to taxpayer burdens in his county, Sheriff Wickersham (n.d.) wrote (“Inmate Reimbursement”):

This is the largest and most successful program in Michigan. I hope this package will help you develop a similar program in your community. I urge you to review this information carefully and take advantage of this concept, which requires prisoners to pay for their jail stay. Many prisoners are sufficiently affluent and it seems offensive for them to live at taxpayers’ expense.

His extended explanation supports previous work on Illinois that found lawmakers justify pay-to-stay civil lawsuits by framing captivity as a public service, with prisoners seen as “free riding consumers” of incarceration (Friedman et al., 2019). For example, Sheriff Wickersham (n.d.) continues further down:

The cost of maintaining prisoners typically represents a major portion of county budget. Both to many taxpayers and to Sheriff Anthony Wickersham it seems unfair to be burdened with providing food, clothing, shelter, medical and other expenses for persons convicted of criminal wrongdoing. The taxpayer also must bear costs for offender apprehension and prosecution, as well as, in many cases, high insurance premiums for the

county. Studies by the county reveal that it costs approximately \$94.32 a day to house each prisoner in Macomb County.

He specifically cites the work release program as a mechanism for recouping fees before people leave the county jail, furthering supporting his rationale that pay-to-stay is not punishment but instead a means to collect debts:

Work release inmates are required to pay two hours of their hourly rate per day and must make payments weekly or biweekly depending on their pay period. Prisoners, who fail to pay regular payments, are subject to removal from the work release program. The payment plan is designed to have each inmate paid in full by his or her release date . . . the amount owed from previous incarcerations are rolled into the current balance and divided into a number of payments. The goal is have them paid in full for most if not all of their entire debt both past and present.

Yet, only a sentence later Sheriff Macomb acknowledges the reality that mechanisms to recoup payment often do not yield large returns and counties and states tend to break even or in some cases, lose money attempting to recoup fees. He writes, “Note: Due to budget cuts the work release program was suspended in 2010.”

Courts in Florida have also upheld similar rationales, dismissing the claim that pay-to-stay statutes are anything more than a civil recoupment strategy designed to foster revenue accumulation for state entities. In *Florida Department of Corrections v. Goad* (2000), the court opined:

Section 960.29, Florida Statutes contains a finding that “there is an urgent need to alleviate the increasing financial burden on the state and its local subdivisions caused by the expenses of incarcerating convicted offenders.” Subsection (1)(a) then explains that the main purpose of the Civil Restitution Lien and Crime Victims’ Remedy Act is to provide a legal mechanism “that will enable crime victims, the state, and other aggrieved parties to recover damages and losses arising out of criminal acts.” It is clear from these declarations that the Legislature intended to provide a purely civil remedy. This point is underscored by the Legislature’s statement in section 960.29(3)(b) that the statute “rests upon the principle of remediation and not punishment.”

The court is clearly upholding the legal construction of pay-to-stay as “not punishment” on the basis of legislator’s intentions rather than on the statutes’ ability to expand the reach of the criminal justice system. For example, the opinion does not consider the social ramifications of shifting the financial burden of incarceration costs onto the incarcerated such that the ability to reenter society would be especially onerous. In addition to revenue generation rationales, pay-to-stay statutes are also justified by framing them as serving a rehabilitative function. For example, in Kansas, pay-to-stay statutes are thought to both “teach fiscal responsibility” and reimburse the state for the costs of incarceration (see *Elliott v. Simmons*, 2004).

In a few states, there are examples of penal actors mobilizing pay-to-stay as both a deterrent and source of revenue. For example, in New York, the former corrections

commissioner describes pay-to-stay as both a practice to “deter misconduct that oftentimes endangers staff or other inmates, or to teach inmates that there is a cost associated with the privileges that they seek” (Eisen, 2014). He uses this framing to broadly maintain the legitimacy of corrections as a societal endeavor, despite his state’s statutes outlining the fees not as punishment, but as a superb “financial solution” (Andolena, 2010). The New York example suggests that the widespread legal construction of pay-to-stay as “not punishment” does not entirely prevent the mobilization of long-standing “tough-on-crime” narratives when deemed politically viable—in fact, they are able to work in tandem and are complementary, as Beckett and Murakawa (2012) would predict.

When the Consequences Are Civil Death

As an outcome of legal hybridity, institutional annexation, and the legal construction of “not punishment,” pay-to-stay ignites a number of consequences for how people grappling with the mark of criminal justice contact are able to fully participate in society. These consequences constitute civil death and are intimately dependent on the accumulation of revenue and resulting dispossession facilitated by the foundations of the shadow carceral state. Profiting from civil death renders the shadow carceral state a vast necrocapitalist enterprise. We know that as of 2019, 10 million people owe over US\$50 billion in monetary sanctions accrued debt (“Is Charging Inmates to Stay in Prison Smart Policy?,” 2019), yet the amount owed specifically in pay-to-stay fees remains obscured.⁶

80% of incarcerated people are indigent and thus slightly shifting the cost of incarceration onto them is a significant burden (Eisen, 2014). Many forego basic needs such as hygiene or medical treatment to prevent their family members from depositing funds that will be seized by the correctional institution to pay monetary sanctions. Upon release, people recount their continued reliance on family and community members to assist with paying their civil incarceration debt.

A man in Michigan described being released from a 255-day jail stint and immediately receiving a bill of approximately US\$6,500. He explains how he did not have any steady employment and thus could not afford even the smallest payment plan (Roelofs, 2016, para. 16):

I didn’t have any income, the kind of steady employment, where I could afford the payment plan . . . When people see your credit history, see you owe \$14,000 to the county. They wonder, “what’s that about?” . . . it’s a constant fear and stress that someone is going to come looking for you.

His attorney commented (Roelofs, 2016, para. 25):

These guys are trying to get their lives on track and then a couple years later they are hit with this civil lawsuit to collect the fees. I don’t think it’s appropriate to do that to these individuals who are trying to get on with their lives and become productive citizens.

Unable to rely on his family for financial support coupled with a second jail stay adding US\$1,250 to his bill, his debt was turned over to a private collection agency, which is a common pay-to-stay practice. The county eventually sued him in civil court. The young man was only able to settle the bill for the much lower amount of US\$3,500 after consulting with an attorney from Legal Aid of Western Michigan; however, the bill took a substantial toll by preventing him from applying for loans, maintaining a residence, or seeking gainful employment.

A case in Illinois follows a similar trend, yet the person charged and sued ended up in a homeless shelter as a result. The Illinois Department of Corrections learned that he received US\$31,690 in a lawsuit over his mother's death and decided to sue him for unpaid pay-to-stay fees to extract some of his settlement. His family describes how he had planned to use the money to start his life over. Instead, the Department won nearly US\$20,000 in the suit and once he was paroled, he was forced to apply for food stamps and died destitute not too many months after his release. His sister commented, "he didn't have a dime. We had to scuffle up money to cremate him" (Mills & Lighty, 2015).

The Ohio American Civil Liberties Union (ACLU) investigated the relationship between pay-to-stay debt and social inequality in their state, with findings that mirror other states. They found that some of the jails with the highest pay-to-stay fees are located in Ohio counties with high rates of poverty, up to a 19.6% poverty rate in some instances. Many of the counties do not consider indigence and routinely send the debts to private collections. These findings are consistent with my argument that pay-to-stay exemplifies how the shadow carceral state operates as a necrocapitalist enterprise, where the end goal is accumulation first and foremost, and at all costs.

After interviewing several people, the Ohio ACLU compiled thematic vignettes, which I use to further demonstrate how pay-to-stay compounds civil death and prevents people from fully living. Similar to the accounts from Illinois and Michigan, one man's experience with civil death is described as follows ("In Jail and in Debt: Ohio's Pay-to-Stay Fees," 2015, p. 10):

As a consequence of his conviction, he was unable to take the tutoring position he was pursuing and all future possibilities of working in the education field are now gone . . . he was forced to sign a payment agreement for his pay-to-stay fees. He recalls being told if the owed amount was not paid by his release, they would put his fees on his credit report . . . Roughly half of his income goes to child support and the rest towards bills, leaving him no extra income to pay the fees he received over five years ago. With these fees hanging over his head, he is concerned about how this is affecting his credit and the future of his finances. These fees have stopped Derrick from pursuing his dreams. He would like to start his own business but knows it is next to impossible to receive a loan with these fees on his credit report.

In one portion of the interview, he even laments about wanting to "control my own destiny":

There are so many hurdles and even when you get over them, there is no guarantee of making it . . . there is already so much against you. Every day, every moment is survival.

If you're putting this on my credit you're stopping me from jobs. I can't apply to be a manager because they run a financial check and they will see it and think I am not responsible, that I am a criminal and I can't pay my bills or debts.

This is the workforce you have me bound to [fast food restaurant]. I was never the working poor . . . wow, welcome to poverty. But I guess being in prison and sleeping on iron prepared me for this.

His vignette suggests pay-to-stay fees, the resulting financial debt, and the extractive practices employed by the shadow carceral state to recoup his debt (e.g., credit reporting), extend precarity by keeping him civilly dead.

People also note in particular how they feel both unable to fully live and routinely dehumanized by the experience. For example, one man describes calls with collections agencies as "harsh and degrading . . . it gives you a sense of hopelessness when someone's on the phone telling you you'll never get a house until you pay this. [It] made me feel like less of a man or person" ("In Jail and in Debt: Ohio's Pay-to-Stay Fees," 2015, p. 12).

Conclusion

Pay-to-stay adeptly unveils the necrocapitalist underpinnings of the shadow carceral state—meaning it is a state which expands covert penal power by perpetuating a "living dead" status that people experience as civil rejection—surviving in limbo between incarceration and endless debt. And if we expand civil death to include financial indebtedness to the shadow carceral state, then civil death is not only tied to felony disenfranchisement or a criminal record. Civil death is tied to the collateral consequences of merely coming into contact with the criminal justice system, with or without a conviction. As such, financial debt can initiate, compound, and extend civil death.

By embracing a necrocapitalist interpretation of monetary sanctions, as scholars we can directly tie civil death to the inability to pay for liberty in a system where the true slogan of our society could be summarized as "give me money or we give you death." Even people with traffic violations and misdemeanor convictions are rendered civilly dead as a result of the multitude of institutions that work in tandem to extract revenue, such as treasuries, creditors, and benefits agencies all reporting directly to the criminal justice system. It is this veiled linking of institutions and the broadening of covert penal power that facilitates the imposition and expansion of civil death, revealing the shadow carceral state to be a necrocapitalist enterprise.

Moving beyond the criminal justice system, necrocapitalism as a theoretical intervention suggests these institutional arrangements are drawn from a larger capitalist economic system that is founded upon and directly and indirectly dependent on deadly dispossession, whether such deaths are social, civil, or physical. I take this position to conclude that monetary sanctions should be understood within larger theories of the prison industrial complex that explicitly maintain punishment cannot be disentangled

from material accumulation targeting the “underclasses.” This targeting occurs because the foundation of our current economic model relies on centuries of deadly dispossession in the form of chattel slavery, indigenous genocide, and settler colonial wealth, what I would categorize as overt penal power. Yet, contemporary monetary sanctions are often the result of covert penal power, where accumulation as the goal is not always readily obvious in legal codes such that the targets of such power are often dismayed at how much they owe or who exactly to pay. Thus, by theoretically linking the shadow carceral state to civil death and necrocapitalism, I provide more specificity to the types of institutional arrangements necessary to achieve the unequal consequences of pay-to-stay fees as monetary sanctions. I move us toward a conceptual framework that jointly emphasizes the covert aspects of penal power, their material linkage to broader economies of dispossession, and the symbolic linkage between extraction and death—in particular, the notion of civil death expanded to explicitly include financial indebtedness as a result of criminal justice contact.

In this way, civil death is expansive, holds millions in precarious limbo, and is supported by the highest court in our nation. My argument and theoretical contribution help us understand the context from which the U.S. Supreme Court boldly produced its recent landmark opinion legitimating the necrocapitalist dimensions of the shadow carceral state. In July 2020, the U.S. Supreme Court decided that Florida has legal authority to deny the right to vote to those who are convicted of a felony and unable to pay monetary sanctions (*Raysor v. DeSantis*, 2020). In 2018, Florida voters approved Amendment 4 which amended the state constitution to restore voting rights to those convicted of a felony who had completed the terms of their sentence. Reports suggest nearly 1 million people anticipated regaining their voting rights (Stern, 2020). The Florida legislature acted swiftly to prevent this step toward emancipation from occurring. The legislature passed Senate Bill 7066 interpreting the Amendment to mean that repayment of all fines, fees, and restitution also constitutes the terms of a sentence. The action effectively protects the foundations of the shadow carceral state, which bind monetary sanctions as a revenue stream to the consequence of civil death. On appeal, the Florida Supreme Court upheld the bill, with the U.S. Supreme Court’s 2020 ruling effectively securing the staying power of accumulation that kills.

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Notes

1. See Mayblin and colleagues (2019) for a discussion of how necropolitics fosters hierarchical conceptions of human worth that affect everyday life and constitute what they call “slow violence.”
2. Florida state statutes are available online at: <http://www.leg.state.fl.us/Statutes/index.cfm?Mode=View%20Statutes&Submenu=1&Tab=statutes&CFID=90560512&CFTOKEN=bdf14673190a157d-EAAAED7F-5056-B837-1A09D1D4C3A9FBB7>.
3. See <http://illinoisattorneygeneral.gov/about/>
4. Illinois’ state statute authorizing pay-to-stay fees charged to state prisoners was finally repealed through HB0900 in 2019 after a significant rise in advocacy following the publication of a series of articles beginning in 2015 documenting the harm caused by civil lawsuits and pay-to-stay fees in general. Following public backlash, the state began decreasing the number of civil lawsuits filed against state prisoners to recoup pay-to-stay fees and decreasing the charging of pay-to-stay fees at large (Mills & Lighty, 2017). HB0900 was filed January 2019 and passed August 2019, going into effect January 2020.
5. November 4, 2019, Response to author’s FOIA request.
6. States do not provide a systematic review of the total amount accumulated from each person through pay-to-stay criminal statutes and their civil and administrative enforcement mechanisms. Available information is hidden from public view and often requires a FOIA request to get a fraction of the data necessary for a complete overview. For example, we do know from 2010 to 2015, Illinois collected about US\$500,000 in civil lawsuits to recoup pay-to-stay fees (Friedman & Pattillo, 2019). Illinois recovered very little in pay-to-stay fees given the Illinois correctional budget skyrocketed by US\$110 million from 2010 to 2015, and annually averages almost US\$1.5 billion (Jackson-Green, 2015). Rather than release data on how much they collect in pay-to-stay fees, across the country jurisdictions instead only release information on how they calculate their per diem and specific cost rates for each correctional institution.

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