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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.