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POLICY BRIEF 2019-04

Addressing Modern Debtors' Prisons with Graduated Economic Sanctions that Depend on Ability to Pay

MARCH 2019

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Addressing Modern Debtors' Prisons with Graduated Economic Sanctions that Depend on Ability to Pay

Fines and fees are widely applied throughout the U.S. criminal justice system. In many cases, the monetary sanctions go well beyond an individual's ability to pay, leading to criminal debt that accrues additional financial penalties such as interest, late fees, and other assorted collections costs that can exceed the amount initially imposed. This can make it impossible for people of limited means to repay the debt, leading to their ongoing involvement with the criminal justice system and limited labor market options.

In a new Hamilton Project proposal, Beth Colgan describes the harms associated with unmanageable monetary sanctions. Drawing on evidence from day-fines pilot projects, Colgan offers proposals for taking more account of a person's ability to pay when determining sanctions. In support of the core proposals, Colgan also describes related best practices that would maximize the proposals' potential benefits. These practices include allowing postsentence modification in cases when unexpected changes in financial circumstances occur, requiring that collections periods be time-limited, using supportive collections practices, adopting debt forgiveness programs for those with debt that predates reforms, reducing collateral consequences, and developing noncarceral and noneconomic punishment alternatives.

The Challenge

An array of economic sanctions—including statutory fines, surcharges, restitution, and administrative fees—are imposed throughout the U.S. criminal justice system. Figure 1 shows that 60 percent of state inmates and 92 percent of federal inmates are subject to some form of monetary sanction, set at levels that can be difficult or impossible for them to repay. These sanctions differ widely across states but are often similarly high.

The author describes how these economic sanctions accumulate, often turning what would otherwise have been a low statutory fine into a substantial total penalty. For example, a statutory fine of $100 for a traffic ticket in California can rise to $490 as a result of numerous surcharges and fees being added to the fine. Moreover, the cumulative burden of sanctions is often out of proportion to the individual's ability to pay.

Ability to Pay

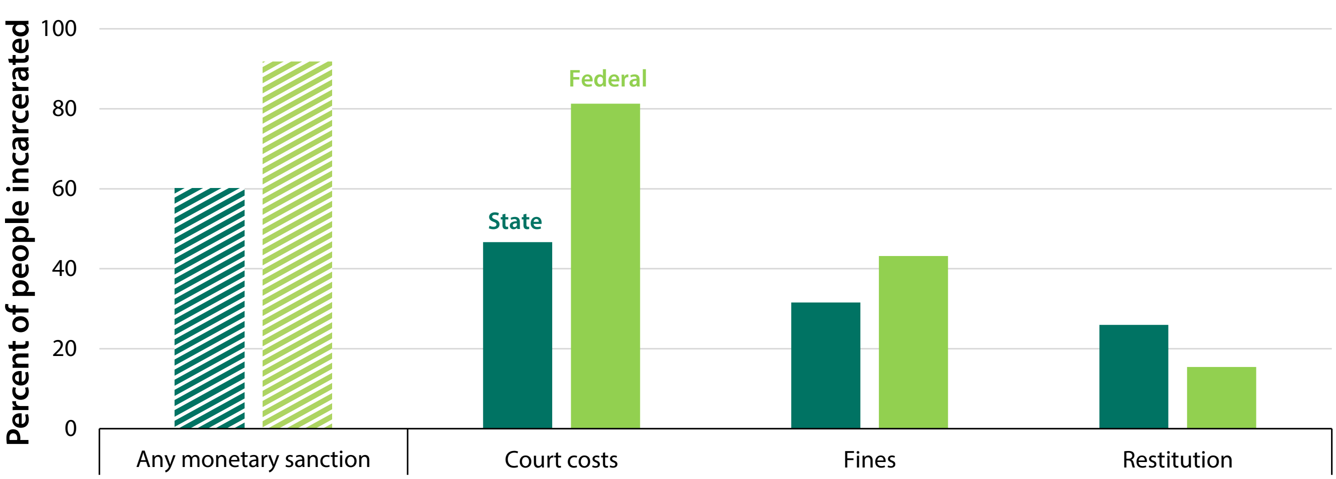
As the Federal Reserve has reported, a broad swath of Americans find it difficult to pay for unexpected expenses: 4 out of 10 adults say that they would be unable to cover an unexpected $400 expense without selling personal effects or borrowing money. Monetary sanctions can often far exceed this level: the author reports a median legal financial obligation of $1,347 for those with felony convictions in Washington State.

The difficulty of paying for unexpected expenses is compounded for low-income people who are sentenced to terms of incarceration. Employment for inmates within correctional facilities is often sparse and wages there can range from a few cents to a few dollars per hour.

After release, a criminal conviction damages employment prospects because of both occupational licensing restrictions and employers'

FIGURE 1.

Percent of People Incarcerated with a Court-Imposed Monetary Sanction, by Type of Sanction and Level of Government



Source: Liu, Nunn, and Shambaugh (2019) based on data from the Survey of Inmates in State and Federal Correctional Facilities, BLS (2004).
Note: Data are restricted to inmates sentenced to serve time. See Harris, Evans, and Beckett (2010) for additional information.

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Roadmap

- State legislatures will set up ability-to-pay assessment systems that allow for graduation of monetary sanctions with flat reductions in payments, a sliding scale of payment reductions, or a day-fines approach.
- State legislatures will implement repayment time limits and supportive collections practices that enhance the likelihood of criminal justice debt repayment.
- To maximize an individual's ability to pay the sanction, state legislatures will remove collateral consequences (e.g., occupational licensing restrictions or revocation of a driver's license) associated with conviction or failure to pay.
- To complement these graduated economic sanctions, federal and state policymakers will develop alternative noncarceral and noneconomic forms of punishment.

reluctance to hire. Those fortunate enough to find employment are likely to be compensated poorly.

Colgan describes the interest and monthly collections costs imposed by many jurisdictions, often at levels that make it difficult for a person of limited means to repay the principal debt. Furthermore, in some jurisdictions the failure to pay can result in what are now known as poverty penalties, which include ineligibility for public benefits or for occupational or driver's licenses, the deprivation of voting rights, and even incarceration.

With rare exceptions, even people on probation or parole are charged supervision fees for the period of their community supervision. The inability to pay economic sanctions can lead to extended terms of probation or parole, meaning that people are subject to continued supervision—and therefore subject to the risk of incarceration for a technical violation of their supervision conditions—because they have no meaningful ability to complete payment.

Incompatibility with Criminal Justice Goals

While fees are levied to pay for the criminal justice system, fines are imposed to punish offenders and to deter crime. Relatively few studies have examined this, and some of those have found evidence of deterrent effects. But whether economic sanctions are effective deterrents is only one side of the equation, according to the author. The other side includes the negative repercussions for people owing criminal debt, as well as for their families. Unmanageable economic sanctions for people of limited means have been tied to reduced access to basic human needs, reduced employment opportunities, and family separations. Colgan presents evidence suggesting that unmanageable economic sanctions are criminogenic, pushing people to commit offenses to obtain money to pay off criminal debt. Moreover, economic sanctions also have significant repercussions for innocent family members who often help to repay criminal justice debt.

A New Approach

Colgan proposes ways of addressing many of the most common issues that lawmakers face in devising an ability-to-pay mechanism. The author provides policy options for using a person's adjusted daily income to determine the amount of the economic sanctions they face. Colgan builds on evidence from several day-fines pilot projects, resulting in a proposal better designed to achieve criminal justice objectives.

Assess Ability to Pay

The calculation of a person's ability to pay the criminal justice system begins with an assessment of income and a subtraction of deductions for basic needs and other expenses. Deciding what constitutes income and what deductions should be allowed, however, is more complicated. For example, lawmakers must consider how to treat public benefits, volatile income, family members' income, and other potential sources of income.

The author argues that lawmakers should exclude from base income funds set aside for education, the support and care of people with disabilities, or other particularized needs (as is often done in the public benefits and student aid contexts). Off-the-books or criminal activities present a different issue: the author proposes that money or property obtained in this manner be recognized at the time of sentencing, but with no expectation of future income that would require continuation of those activities.

Choose a Mechanism for Adjustment

The next step for policymakers, Colgan explains, is for them to decide how to use the ability-to-pay determination for persons with limited financial capacity. They must decide whether to use a flat reduction approach, a sliding scale approach, or a day-fines approach.

Flat Reduction in Penalties

Under a flat reduction approach, once a person's net income is determined to be under a given threshold, courts would reduce the baseline economic sanction by a fixed percentage. The advantage of this approach is the ease of application; the disadvantages are, first, that it offers no relief for people who are slightly over the qualifying financial threshold, and, second, that it may offer insufficient relief to those with very low (or no) net income. Therefore, this method of graduation may be best suited for relatively minor violations for which economic sanctions are typically small.

Sliding Scale of Penalties

Another alternative is to use a sliding scale approach, which offers more precision. Under this approach, the assessed sanction declines as the person's ability to pay becomes more limited. This likely does not create significant administrative burdens beyond that of the flat reduction approach, as the sliding scale could easily be applied to standardized forms linking income levels with percentages of deduction.

The advantages of the sliding scale approach over the flat reduction are two-fold. First, it allows for economic sanctions that are more precisely tailored to the circumstances of the individual, and that do a better job of balancing deterrence and ability to pay. Second, it avoids arbitrary and abrupt changes in sanctions as net income approaches a threshold.

The Day-fines Model

A third option is to adopt a day-fines model, which is a specific type of sliding scale for penalties. In a day-fines system, planners begin by ranking offenses according to seriousness. Once ranked, penalty units are assigned for each offense or offense type. Even if lawmakers are planning a day-fines system for only a limited set of offenses, it is still useful to consider the relative seriousness of other possible offenses within the jurisdiction to ensure that the penalty units are not set too high or too low in comparison.

Upon conviction for an offense, the penalty unit for that offense is then multiplied by the person's adjusted daily income. The dollar value of this multiplication would result in the total amount of economic sanctions imposed. For example, if Offense A was valued at one penalty unit, and the person's adjusted daily income was $5 per day, the resulting day-fines would be $5; if the person's adjusted daily income was $100 per day, the day-fines would be $100.

Apply Graduation to All Forms of Economic Sanction and Adopt Clear Distribution Priorities

The author emphasizes that all monetary sanctions should be graduated. The addition of ungraduated economic sanctions (e.g., collections costs) imposed on top of a graduated amount could put the full package of sanctions beyond a person's financial capacity, thereby undermining the goal of addressing unmanageable sanctions.

If graduated economic sanctions are lower than the restitution amount for which victims would otherwise be eligible, policymakers could adopt distribution schemes that prioritize the payment of restitution over all other payments.

Allow for Postsentence Modifications

Colgan proposes that those with criminal justice debt be allowed to seek a reduction in the sanctions imposed, or substitution of alternative sanctions, if their financial circumstances deteriorate. If a person is delinquent on a payment without having yet sought a reduction, collections staff should quickly issue a delinquency notice, explaining not only the potential repercussions but also the steps a debtor can take to seek a reduction of payment if necessary.

Impose Time Limits on Collections Periods

Payment of economic sanctions is most likely when graduated to ability to pay, when the payment period is as short as possible, and when there is an identifiable end-date to the punishment. Limiting collections periods is beneficial to debtors; in addition, administrative benefits are likely to accrue. One such benefit is that it limits the time during which a person may experience a significant change in

BOX 1.

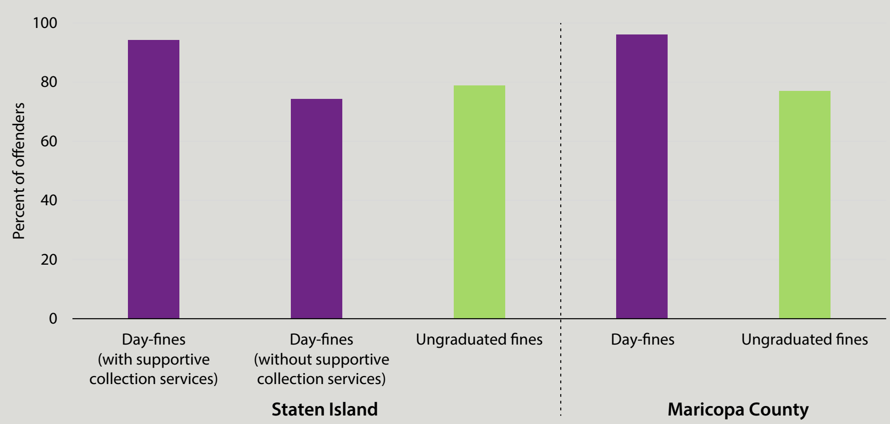
Evidence on Criminal Justice Debt Repayment under Graduated Sanctions

Day-fines pilots in the late 1980s and early 1990s generally revealed that graduated sanctions increased average repayment. This might be counterintuitive but, as with standard taxation, there likely exist economic sanctions that are so large as to be self-defeating, yielding lower revenue than could be achieved with more-realistic sanctions.

In Maricopa County, the mean imposed economic sanction dropped with the use of day-fines, but people receiving day-fines paid more ($669 on average) than those with ungraduated sanctions ($344 on average). Box figure 1 shows that a greater share of offenders paid at least some of their fine under the day-fines model in both the Staten Island and the Maricopa County pilots. Repayment was also timelier: while only 20.3 percent of people with ungraduated sanctions paid in full within a year, 52.7 percent of those with graduated sanctions did so.

BOX FIGURE 1.

Percent of People Who Paid At Least Part of Their Fine, Selected Day Fines Pilots



Source: Turner and Petersilia 1996; Winterfield and Hillsman 1991.

Note: "Ungraduated fines" refers to the current practice of fine assignment in the respective counties. For the Staten Island pilot, there were two experimental groups: the first group paid fines on a day-fines model and received supportive collection services, while the second group only used the day-fines model but was not provided supportive collection services.

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Learn More about This Proposal

This policy brief is based on the Hamilton Project policy proposal, "Addressing Modern Debtors' Prisons with Graduated Economic Sanctions that Depend on Ability to Pay," which was authored by

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financial circumstances that would necessitate an adjustment of the economic sanctions imposed.

When establishing limitations on collections periods, lawmakers should ensure that those periods correspond with offense seriousness. If criminal debt remains at the end of the collections period, the court should have the authority to extend the collection term, impose additional sanctions, forgive or reduce the remaining debt, or substitute nonincarcerative alternative sanctions.

Combine Graduated Sanctions with Supportive Collections Practices

Colgan emphasizes that supportive collections practices must offer clarity to a person about the nature of the economic sanctions imposed and how collections will proceed. At the outset, a clear explanation of the amount imposed and how it was calculated should occur at sentencing. Where the graduated economic sanctions imposed are sufficiently high that the person will require a payment plan, the periodic payment amount, the frequency of the payment periods, and exactly how payments should be made must also be explicitly described.

Along with providing clear information about amounts owed and the payment process, supportive collections practices should make the act of paying as easy as possible by including multiple avenues for making payments (e.g., online, through the mail, or in person) and accepting several forms of payment (e.g., cash, check, or credit card).

Use Debt Forgiveness Programs for Those with Debt Predating the Reforms

In order to increase overall system equity, Colgan proposes partial criminal justice debt forgiveness for people with outstanding economic sanctions. This would include late payment fees and other expenses associated with the debt being in arrears, while offering an opportunity to establish a payment plan for all other outstanding economic sanctions.

Restrict the Use of Collateral Consequences and Eliminate Poverty Penalties that Make Payment Less Feasible

The author notes that many jurisdictions respond to the failure to pay economic sanctions with the revocation of driver's licenses or public benefits, even when such restrictions were not a collateral consequence of the conviction itself. In doing so, these restrictions make it less likely that those subject to economic sanctions will be able to complete payment. Best practices outlined by the National Employment Law Project suggest that policymakers should limit bans on licensing access to cases where there is an identifiable public safety risk.

Develop Noncarceral or Noneconomic Alternative Punishments

For those cases in which a person has no meaningful ability to pay, Colgan proposes the use of nonincarcerative or noneconomic alternative punishments. Texas, for example, adopted reforms in 2017 that allowed courts to substitute community service for economic sanctions when a person was unable to pay, and included as a form of community service attendance at employment training programs, GED courses, chemical dependency treatment, counseling, mentoring programs, and similar activities.

Lawmakers should aim to design alternatives that are not more punitive than the economic sanctions they replace. Supportive services programs also must be designed to avoid enhanced government control over people's lives.

Benefits and Costs

Reforming current economic sanction policies in the criminal justice system will improve outcomes for people with criminal justice debt, administrators, and victims. For offenders with debt, graduating economic sanctions based on their ability to pay will make repayment more feasible and prevent them from becoming trapped in an endless cycle of sanction accrual. For administrators, simplifying the system will reduce complications associated with misinformation about the system, failure to pay, and potential income fluctuations on the part of the debtor. Finally, evidence suggests that victims entitled to restitution will receive their money more reliably when sanctions are graduated.

In addition, by improving outcomes for debtors, graduated sanctions will have wide-ranging economic benefits. To the extent that unpaid debt and continued criminal justice involvement are harmful to labor market prospects, graduated sanctions can mitigate these negative consequences.

Conclusion

Colgan shows that graduating economic sanctions according to ability to pay will help alleviate their inherently regressive qualities, and in doing so will render the use of economic sanctions to be more equitable while minimizing their negative effects on the economy. Graduated sanctions can eliminate many of the downstream consequences of unmanageable economic sanctions. This will result in improved financial and social stability for people struggling with criminal debt, as well as for their families. It will also benefit society through reduced recidivism, improved repayment outcomes, and greater criminal justice equity.

Questions and Concerns

1. Is the graduation of economic sanctions according to ability to pay administratively feasible?

The process of establishing the ability-to-pay mechanism, distribution scheme, and, if a day-fines model is used, the penalty units for each offense or offense category, is sufficiently complex that its design will require time and resources. Once designed, however, each aspect of the system lends itself to the creation of standardized forms and tables. In the day-fines pilot projects, for example, planners developed grids setting out penalty units by offense; once a judge determined the appropriate penalty unit given the offense of conviction, that unit number need only be multiplied by the person's adjusted daily income. To calculate that adjusted daily income, administrators also used forms to fill in each possible category of income and each possible deduction (e.g., a percent deducted per dependent), with the calculation that followed necessitating only simple math.

2. If the day-fines experiments were successful, why did they disappear?

Day-fines failed to catch on, in no small part because they were introduced at the height of the tough-on-crime frenzy of the late 1980s and early 1990s. The effects of that tough-on-crime focus on the use of day-fines, for example, was evident in Iowa. There had been hope that the Iowa legislature would make the day-fines pilot project a permanent fixture in 1996, but lawmakers turned their attention instead to establishing new criminal offenses and higher penalties, and to expanding the scope of the state's sex offender registry.

In addition, the day-fines pilot projects did not catch on for a variety of reasons unique to each jurisdiction. Bridgeport, Connecticut abandoned its project due to a series of technological problems related to the computer systems used to track day-fines amounts, the need to engage in complicated court procedures brought on by complexities in Connecticut law, and the out rotation to another court of the judge trained to use day-fines. The fear of revenue declines in Milwaukee, Wisconsin, led officials there to allow its 12-week pilot project to sunset—despite evidence of improved collections and a potential for cost savings that could have been gained by avoiding jail expenditures, arrest warrants, court appearances, and more.

Highlights

In this paper, Beth Colgan of the University of California, Los Angeles School of Law describes the harms associated with unmanageable monetary sanctions. Drawing on evidence from day-fine pilot projects, Colgan offers proposals for taking more account of a person's ability to pay when determining sanctions.

In support of the core proposals, Colgan also describes related best practices that would maximize the proposals' potential benefits.

The Proposals

- **Devise a system for ability-to-pay calculations.** Policymakers will set guidelines for what sorts of income should be used as the basis for graduated sanctions. This will require decisions about how to treat potential sources of income such as public benefits, other family members' income, volatile employment income, financial assets, and others.

- **Choose a mechanism for adjustment.** Policymakers will select one of three methods for applying graduation to existing economic sanctions based on an individual's ability to pay. The three proposed models are: a flat reduction in penalties, a sliding scale of penalties, or a day-fines model.

- **Apply graduation to all forms of economic sanction.** Policymakers will graduate all forms of economic sanctions including fines, fees, surcharges, and restitution.

- **Allow for post-sentence modifications.** Policymakers will allow courts to adjust criminal justice debts when the individual's financial situation changes after the sentencing period.

- **Impose time limits on collections periods.** Policymakers will establish clear deadlines for payment to occur so that individuals are not trapped in an endless cycle of payment.

Benefits

Reforming monetary sanction policies in the criminal justice system will improve efficiency and efficacy for debtors, administrators, and victims. For debtors, graduating economic sanctions based on an individual's ability to pay will make repayment more feasible and prevent them from getting trapped in an endless cycle of fee accrual. For administrators, simplifying the system will reduce complications associated with failure to pay. Lastly, evidence suggests that victims entitled to restitution will be recompensed more reliably.

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