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UNIVERSITY OF WISCONSIN–MADISON

“The Costs of Monetary Legal Sanctions for the Poor”

Podcast transcript and edited interview

Featuring Alexes Harris

Hosted by Dave Chancellor

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Chancellor Hello, you’re listening to a podcast from the Institute for Research on Poverty at the University of Wisconsin–Madison. I’m Dave Chancellor.

For this, our June 2016 podcast, I talked with University of Washington Sociology professor Alexes Harris about monetary legal sanctions. Harris has a book coming out this month called *Pound of Flesh: Monetary Sanctions as Punishment for the Poor*. When Professor Harris visited IRP in April of this year, she gave a seminar based on some of the work she did for the book and I had the opportunity to sit down with her for an interview.

When we first started talking, Harris said her project on legal sanctions and debt initially grew out of a request for proposals, or RFP, from the Washington State Minority and Justice Commission to which she and a collaborator responded.

Harris They were looking for researchers to study legal financial obligations, LFOs, in Washington State. And, my collaborator just forwarded the email to me and said, ‘hey, what do you think?’ The RFP wanted statistical analysis of state court data but we’re both qualitative researchers so we said we’d do 50 interviews too. And so, that’s sort of where it came out of. We knew nothing about Legal Financial Obligations, we just thought it would be an interesting project and it sort of just -- statistically it was interesting in terms of looking at the variation in the amounts of fines and fees that were imposed across Washington State and the variation by which counties imposed them and, qualitatively, what the interviewees, the people who owed the debt were describing in terms of the different practices by counties in terms of how they were being sentenced, many with no real discussion of what they would be able to pay, and then the sanctions for nonpayment, that they would actually go to jail if they didn’t make payment, was really interesting.

And so after that work with the collaborator, I just decided I wanted to go sit in on the courts and do observations of sentencing hearings and observations of sanctioning hearings, essentially when people were brought to court because they hadn’t made payments. What were judges doing, saying, and what were the consequences for individuals?

Chancellor Professor Harris says there are actually several categories of what, in Washington State, are called legal financial obligations or LFOs. She says that a main one that a lot of people think of is restitution, or the sanction that’s assessed to the defendant to repay or make up for harm caused to the victim. But there are many other types of LFOs.

Harris The other sort of buckets are fines that are associated with the specific offense that's supposed to be the punishment. So, a \$1,000 fine for a drug fee, for example. There's fees, there's user fees of the court system and these are just to recoup costs related to offending. So, costs for a jury if you opt to have a jury trial, costs for court costs. There's a general court cost in Washington State for \$200, there's the cost for the use of your public defender, which can cost — in one county it's regularly \$450. There is a DNA cost for the collection and banking of the defendant's DNA. There's a victim penalty assessment cost, even if you don't have a victim you're charged \$500 so there are a whole bunch of costs associated. Restitution, fines, fees, and then there are surcharges which are calculated on top of the total principal. 10%, for example, is money that goes to a clean elections fund. So if you're running for a campaign in Washington, you can apply to tap into these funds to help run your political campaign.

So restitution, fines, fees, surcharges, and then there's collection costs. And those can be in the form of interest that calculated on top of the total amount owed, and then collection charges. And that exists, annually in Washington, we have a \$100 collection charge, but then counties and municipalities also charge for per-payment fees, convenience fees if you're going to pay online or use a credit card. So there's a host of monetary sanctions that people are responsible to pay.

Chancellor I asked Harris to give me a sense of the financial situations of the people on the receiving end of these legal financial obligations.

Harris It depends on which jurisdiction, but in some jurisdictions, 80% of the population before the court rely on a public defender. They've been certified by the court that they're indigent enough to the extent that they can be provided a public defender. These generally are poor people, many sociological and criminological studies have found that people who make contact with the court system tend to be underemployed or unemployed. Tend to have mental health problems, drug and alcohol addiction. Work by Becky Pettit and Bruce Western found that, particularly, men who drop out of high school have high likelihood of having contact or being incarcerated. So this isn't a population that's highly functioning in society in general. So it's sort of counterintuitive to create a system that we're going to fund the local governments based on this population of people and this population of people can't even support themselves.

Chancellor Because of the combined factors of many of these defendants being poor, unemployed, having mental health issues, and chemical addiction issues, Harris says that they simply don't have the means to pay all of these costs, which puts them in a position of receiving what she calls a 'permanent punishment.'

Harris Many don't have the ability to make payments, even if it's a \$20 a month payment, in Washington, with the 12% interest and the \$100 annual collection, their bill keeps growing. So even if they make a \$20 payment per month, that bill goes up every month. And so what happens is because this debt, you cannot declare bankruptcy on it, it can never go away, it becomes a permanent punishment for so many people who have criminal convictions in Washington State. We essentially have created a two-tiered system of justice. If you're of means, you can do your time in prison, you can pay your fines and fees, and wash your hands. You'll still have the stigma, the felony conviction, and related collateral consequences, but you can at least start to move forward. If you're poor, you do your time just like the wealthy person did, but you can't pay your fines and fees, you are stuck, you're under the purview of the criminal justice system. You're tethered to the criminal justice system for the rest of your life. Even if you're making regular payments, you still have to show up and make a regular payment every month, right? But if you can't make your monthly payment, it becomes even more intense, the surveillance or supervision where you have to regularly report to court and, if you don't do that, you'll be summonsed to court and literally brought to court by police via warrants.

Chancellor Harris says that one of the challenges of really understanding this issue is that there is so much local variation. So, while the legal statutes are largely created at the state level, many municipalities have their own fines and fees -- and, when we think about the people working within the justice system who enforce and implement these policies, there's a lot of individual discretion.

Harris We have our state legislators who create the policy, and then it goes down to judges who have the discretion to assess the amounts of fines and fees, and then key actors, the stars of the story, are the clerks. The clerks of the court manage the systems of monetary sanctions, they determine who's making payments and sufficient payments, they determine the payment plans. They can examine — at least in Washington — employment data. In some states you have tax intercept programs where they can look in to see if people are anticipating refund checks from the government and intercept those monies. So the clerks get to sort of manage and raise a red flag when they believe someone is out of compliance or a willful nonpayer and bring that person to the court. There's a great deal of discretion and power there. You have prosecutors that can also raise red flags about whether people are making appropriate payments or not, but it's really the state legislators who set the policy, judges who impose it, and then the court clerks who have, with little, little accountability, have the ability to manage individuals.

Chancellor As an example of how a statute involving monetary sanctions can be interpreted and enforced in very different ways across municipalities, Harris points to the difference between the use of "shall" and "may" in legal statutes.

Harris Generally in state statute, legislators will indicate whether something is mandatory or discretionary by saying "shall," right? So 'The judge shall impose a \$500 victim penalty assessment.' So that means you must impose this, versus 'Judges may impose a \$1000 fine for drug convictions' or there may be language indicating that if a person is deemed indigent, they shall not be charged these fines. So, generally, people within the state have a sense of what's mandatory based on the shall language, but many times, court actors or judges, mainly, will interpret the "may" language as something that's mandatory as well. And so interestingly, across the state, at least the counties that I examined, some judges would say that something is mandatory when it wasn't. And it would just be the norm of that court to impose the \$500 VPA, the \$100 DNA, the \$200 court costs. Because it was allowable, it became mandatory, it was really interesting language, and there's little contemplation about whether those fees should be imposed to those individuals because there has not been individualized assessment of those individual's ability to pay once they come before the court at sentencing.

Chancellor A 2015 Washington State Supreme Court decision in *State v. Blazina* addressed this situation; it mandated that judges provide an individualized assessment of defendants' current and future ability to pay during sentencing. According to Harris, this decision has had really significant consequences in some unexpected ways.

Harris Essentially, you have to do what the state statute calls for, but it really rattled judges across the state because many are complaining that they don't have the time to do individualized assessments because they have so many people that they're sentencing, but they also don't have the information. Who's responsible for providing the information? Can they mandate that the defendant brings the information or is it the prosecutor's responsibility? So, in some ways it helped because it allowed for judges who wanted to do meaningful individualized assessments, they now could or had to do it. But it also helped because, from what I've heard, is that some judges just said 'I don't have time to do it, I don't have the information, I'm just not going to impose discretionary fines and fees,' which is a good thing. I also heard recently that some judges are mandating that if a person is going to enter into a plea deal, they have to waive their right to *Blazina*, which is scary.

Chancellor Harris uses this example in way to show that even in cases where state-level policy or court decisions mandate a particular practice, discretion may still be exercised at the local level.

Harris So, it's hard to change the practice of justice. We think it's black and white, we think it's a law, but whenever there's individuals, be it judges or clerks or prosecutors interpreting or applying the law, discretion is going to enter and there's going to be variation in how it acts out. I argue in the book that it's really about individual court officials' orientation to justice and punishment in terms of how this process is going to play out. So it's a pessimistic view of change. But I think the more and more that we can structure how this process is supposed to play out at sentencing to sanctioning, the better the constitutional rights of defendants will be.

- Chancellor Given this, I asked Professor Harris what she suggests in terms of policy alternatives to the present system.
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- Harris Overall when I show up at the Washington State legislature, I argue that we need to stop the implication of nonrestitution fines and fees. I argue that that prioritizes victims, that if we don't have these additional fines and fees and interest, then defendants will pay restitution and they'll have the ability to pay restitution and prioritize that. However, if we have to maintain the system of monetary sanctions as it stands in terms of the same amounts that we're imposing, an alternative would be to use a credit system. People aren't paying, so let's figure out ways in which we can incentivize them to move forward with their lives. So, one judge I met in Washington gives a \$1000 credit towards LFO debt to defendants who get their GEDs or high school diplomas. So, thinking about ways we can structure these credits that help people really move forward. We could also — a lot of judges — say, well, that works in felony court but what about misdemeanor court. If my only option is a fine or a fee, what do we do there? I would argue that we look at options of day fines where we have the offense score and the severity of the offense, ranging from zero to sixteen, and we have the defendant's ability to pay their average daily wage and we multiply those scores so the cost that's assessed to the individual is proportionate to the severity of the offense and proportionate to what the individual has the ability to pay.
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- Chancellor Harris says that, in terms of policy alternatives, one of the broader issues here is that many local jurisdictions use these fines and fees to fund their justice system operations and that we need to think about ways to cut costs if we hope to make those systems less reliant on monetary sanctions as a revenue source.
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- Harris Sometimes I talk about the Mercedes Benz criminal justice system budget — maybe we can figure out how to do a Volkswagen — I don't know — a cheaper car budget... for the criminal justice system. But really thinking, ok, do we need to have all of these people in the system? Right, can we decriminalize certain types of acts and not bring them into the system so they're costing us money, so like in Washington State, we decriminalized cannabis. Can we think about doing pre-arrest diversion programs where it will be costly in the front end, but in the long run, it's going to save us arrests, prosecution, incarceration, and then all of the related collateral consequences and recidivism that's going to come from that. So, thinking about how we can give people clean and sober housing, drug and alcohol treatment, education, employment before we incarcerate them and give them a felony. If that might work a little bit better. So, there's a lot of different ways in which we can rethink the punishment, but I think, practically, those are the policy recommendations. But, even broader, I think we need to have a conversation about punishment. What is the point — is 10 years enough for assault, or do we need to have financial penalties attached to that? Do we need to have this slew of other types of punishments from electronic home monitoring, DOC supervision, drug and alcohol treatment, all of these other things that cost individuals. So, if we step back and say 'what will make a person accountable, remorseful, and make the victim whole? Can we rethink that package of punishment, and maybe think about how when they're done they're done? And then these are ways in which we can reintegrate them into society. And in the long run, I think that prioritizes safety. It sort of helps victims and it helps individuals who have been incarcerated and convicted, and their families, be more successful.
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- Chancellor Thanks to Alexis Harris for sharing her work with us. Her book, *Pound of Flesh*, is being published by the Russell Sage Foundation Press and will be released on June 8th.
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