

CASE STUDY

UNRAVELING STATEGRAFT: ENDING CRIMINAL ADMINISTRATIVE FEES IN CALIFORNIA

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In California, like every other state, courts charge administrative fees to people who come into contact with the criminal legal system.¹ As recently as 2020, California authorized over 90 different criminal administrative fees.² Since 2019, a coalition of advocacy groups known as Debt Free Justice California³ have pushed legislation to reduce that number in half by successfully raising questions about the legal and policy rationales for wealth extraction via monetary sanctions like fees.⁴

At nearly every stage in the criminal legal system in California, a person was charged a fee, from booking and arrest through incarceration and supervision once released to record sealing.⁵ Although state law mandated some guidelines, local jurisdictions otherwise had wide discretion to decide what fee amounts to impose and, to some extent, how to allocate any amounts received.⁶ As a result, many jurisdictions enacted

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1. *50-State Fee Surveys*, FINES & FEES JUST. CTR., <https://endjusticefees.org/fee-surveys/> [<https://perma.cc/6VGJ-CP4C>] (last visited Jan. 31, 2024).

2. See S.B. 144, 2019–2020 Leg., Reg. Sess. (Cal. 2019).

3. *About*, DEBT FREE JUST. CAL., <https://ebclc.org/cadebtjustice/about/> (last visited Jan. 31, 2024).

4. *Legislation*, DEBT FREE JUST. CAL., <https://ebclc.org/cadebtjustice/legislation/> (last visited Jan. 31, 2024).

CAL. GOV'T CODE §§ 29550.2–29550.3 (West 2020), *repealed by* Cal. Legis. Serv. 2020, c. 92 (A.B. 1869) § 26 (West) (booking fees); CAL. GOV'T CODE §§ 29550 (West 2023), § 29550.1 (West 2020), *repealed by* Cal. Legis. Serv. 2020, c. 92 (A.B. 1869) § 24 (West) (arrest fees), CAL. PENAL CODE § 1203.1c (West 2021), *repealed by* Cal. Legis. Serv. 2021, c. 257 (A.B. 177), § 25 (West) (incarceration fee); CAL. PENAL CODE § 1203.1b (West 2020), *repealed by* Cal. Legis. Serv. 2020, c. 92 (A.B. 1869) § 47 (West) (probation supervision fee); CAL. PENAL CODE § 1203.45 (West 2023) (record sealing fee), *repealed by* Cal. Legis. Serv. 2023, c. 47 (A.B. 134) § 13 (West)).

6. See CAL. PEN. CODE § 1203.1B (West 2020), *repealed by* Cal. Legis. Serv. 2020, c. 92 (A.B. 1869) § 47 (West) (requiring the “determination of the ability of the defendant to pay all or a portion of the reasonable cost of any probation supervision”); CAL. PEN. CODE § 1203.1C (West 2021), *repealed by* Cal. Legis. Serv. 2021, c. 257 (A.B. 177)

new fees or increased fee amounts in years following economic recessions. Sacramento County, for example, hired consultants to review existing criminal administrative fees “to explore additional avenues of recouping...costs.”⁷ Alameda County increased fees tenfold after local policymakers voted to add five new fees in order to “offset the increased cost of providing probation services” after the Great Recession in 2009.⁸

These efforts to augment state and local coffers through administrative fees in California exemplify what Professor Bernadette Atuahene has termed *stategraft*, “when state agents transfer property from persons to the state in violation of the state’s own laws or basic human rights.”⁹ As will be discussed, California’s fee assessment and collection practices have frequently violated state and federal constitutional and statutory law.

Take for example, the supervision fee, which counties charged to people ordered to serve probation.¹⁰ State law authorized counties to charge probation fees up to the “reasonable cost” of supervision,¹¹ but the San Francisco County Probation Department routinely imposed three years of the \$50 monthly fee up front (\$1,800), regardless of whether or not a person actually spent three years on probation supervision.¹² Alameda County charged the same amount (\$90 per month) to people who were ordered to low risk supervision, which required electronic kiosk check-ins, as people who were ordered to high risk supervision, which mandated in person meetings with probation officers.¹³

§ 25 (West) (requiring all sums paid by a defendant to be deposited in the county general fund and the board of supervisors to determine the reasonable cost of incarceration).

7. Letter from Sacramento Cnty. Prob. Dep’t to Sacramento Cnty. Bd. Supervisors re: Authorize the Probation Department to Collect Additional Fees and to Increase Existing Fees Associated with Care and Maintenance and Probation Services (Dec. 13, 2005) (on file with author); SACRAMENTO CNTY. PROB. DEP’T, USER FEE STUDY: FINAL REPORT (2005) (on file with author).

8. Letter from Donald H. Blevins, former Alameda Cnty. Chief Prob. Officer, to the Alameda Cnty. Bd. Supervisors, Subject: Adoption of Ordinance Amending Chapter 2.42 of Title 2 of the Administrative Code by Amending Section 2.42.190 Relating to Assessing Probation Fees and Adoption of Resolution Determining an Additional Schedule of Probation Fees (Nov. 6, 2009) (on file with author); Alameda Cnty. Bd. Supervisors Resol. 2009-468 (Dec. 21, 2009) (approving supervision fee, electronic monitoring fee, and two separate drug testing fees).

9. Bernadette Atuahene, *A Theory of Stategraft*, 98 N.Y.U. L. REV. 1, 3 (2023).

10. CAL. PENAL CODE § 1203.1b (West 2020), *repealed by* Cal. Legis. Serv. 2020, c. 92 (A.B. 1869), § 47 (West).

11. CAL. PENAL CODE § 1203.1b(a) (West 2020), *repealed by* Cal. Legis. Serv. 2020, c. 92 (A.B. 1869), § 47 (West).

12. Budget & Fin. Sub-Comm., City & Cnty. of San Francisco, Item 1 File 18-0132 (May 10, 2018) (on file with author).

13. THERESA ZHEN & BRANDON GREENE, E. BAY CMTY. L. CTR., *PAY OR PREY: HOW THE ALAMEDA COUNTY CRIMINAL JUSTICE SYSTEM EXTRACTS WEALTH FROM MARGINALIZED COMMUNITIES* 4 (2018), <https://ebclc.org/news/report-pay-or-prey-how->

Another example is the civil assessment fee, which state law authorizes counties to charge to people who fail to appear in court on low-level infractions.¹⁴ All collections from this fee went directly to the Trial Court Trust Fund to support court operations and judicial salaries.¹⁵ Basic due process under the California Constitution and U.S. Constitution's Fourteenth Amendment requires an impartial decisionmaker without a financial interest in the outcome of the case.¹⁶ But, as structured, California courts and judges were benefiting directly from the imposition and collection of civil assessment fees, creating a conflict of interest that federal courts have struck down under similar circumstances.¹⁷

Further, although California law requires state courts to take into consideration a person's ability to pay,¹⁸ most courts do not hold such determinations or do not meaningfully assess a person's lack of resources or income.¹⁹ While courts have disagreed as to which constitutional protections apply to fees, they have agreed that failure to assess a person's ability to pay fees raises significant constitutional concerns:

the-alameda-county-criminal-justice-system-extracts-wealth-from-marginalized-communities/.

14. CAL. PENAL CODE § 1214.1 (West 2023).

15. CAL. PENAL CODE § 1214.1 (West 2021). After the passage of Assembly Bill 199, the civil assessment fee was reduced from \$300 to \$100 and all proceeds from the civil assessment fee now go into the state general fund. CAL. PENAL CODE § 1214.1 (West 2022), *amended by* Cal. Legis. Serv. 2022, c. 57 (A.B. 199) § 18 (West).

16. *See* U.S. CONST. amend. XIV, § 1; CAL. CONST. art. I, § 7(a). *See also Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (holding that it violates a defendant's due process rights when a judge "has a direct, personal, substantial pecuniary interest in reaching a conclusion against" a person).

17. *See Caliste v. Cantrell*, 937 F.3d 525, 532 (5th Cir. 2019) (holding that courts in which judges both impose and administer fees and where judges have a "direct, personal [and] substantial" interest in generating such fees violates due process).

18. *See* CAL. PENAL CODE § 1001.15 (West 2021), *repealed by* Cal. Legis. Serv. 2021, c. 257 (A.B. 177), § 15 (West) (requiring judges to consider a person's ability to pay before ordering diversion program fees); CAL. PENAL CODE § 1203.1ba (West 2020), *repealed by* Cal. Legis. Serv. 2020, c. 92 (A.B. 1869), § 47 (West) (requiring probation officers to determine ability to pay before imposing probation supervision fees); CAL. PENAL CODE § 1203.1ab (West 2021), *repealed by* Cal. Legis. Serv. 2021, c. 257 (A.B. 177), § 15 (West) (requiring probation officers to determine ability to pay before imposing drug and substance abuse testing).

19. *See* BERKELEY L. POL'Y ADVOC. CLINIC, MAKING FAMILIES PAY: THE HARMFUL, UNLAWFUL, AND COSTLY PRACTICE OF CHARGING JUVENILE ADMINISTRATIVE FEES IN CALIFORNIA 2 (2017), <https://www.law.berkeley.edu/wp-content/uploads/2015/12/Making-Families-Pay.pdf> [<https://perma.cc/DU7U-HVUC>]; ACLU S. CAL., LET'S GET FREE LA, COSTS OF INJUSTICE: HOW CRIMINAL SYSTEM FEES ARE HURTING LOS ANGELES COUNTY FAMILIES 15 (2019), https://www.aclusocal.org/sites/default/files/aclu_social_costs_of_injustice.pdf [<https://perma.cc/9SU9-BJ76>]; ZHEN & GREENE, *supra* note 13 at 7–8.

- In *People v. Dueñas*²⁰ and *People v. Kopp*,²¹ Courts of Appeal held that imposing fees without consideration of a person’s ability to pay raises due process concerns, holding that “imposing unpayable fines on indigent defendants is not only unfair, it serves no rational purpose, fails to further the legislative intent, and may be counterproductive.”²²
- The court in *Dueñas* also raised equal protection concerns in holding that fees in the criminal system should “be treated no differently than their civil counterpart...and imposed only on those with the means to pay them.”²³ Imposing such fees on top of a criminal sentence “transform[s] a funding mechanism for the courts into additional punishment for a criminal conviction for those unable to pay.”²⁴
- In *People v. Cowan*,²⁵ the Court of Appeal held that fees should be reviewed under the Eighth Amendment’s excessive fines clause and that ability to pay is a relevant consideration in determining excessiveness.²⁶

In addition to legal concerns about the ways in which California assesses and collects criminal administrative fees, fee revenue has proven minimal.²⁷ Many courts spend significant resources trying to collect fees from people who simply cannot afford to pay, and collection rates decline significantly as the debt ages,²⁸ resulting in little net revenue or even net

20. 30 Cal. App. 5th 1157 (2019).

21. 38 Cal. App. 5th 47 (2019).

22. *Dueñas*, 30 Cal. App. 5th at 1167; *Kopp*, 38 Cal. App. 5th at 95. The courts ultimately differed on who should bear the burden of showing ability or inability to pay on remand and whether future ability to pay could be taken into consideration.

23. *Dueñas*, 30 Cal. App. 5th at 1169. Justice Streeter’s concurrence in *People v. Cowan* raised similar equal protection concerns. 38 Cal. App. 5th 47, 52 (2020) (“Because these fees are mandatory—allowing no opportunity for an indigent defendant facing them to demonstrate that delinquency and its consequences are unavoidable—I believe their imposition without consideration of ability to pay violates the precept that ‘[t]here can be no equal justice’ where the kind of justice ‘a man gets depends on the amount of money he has.’”).

24. *Dueñas*, 30 Cal. App. 5th at 1168.

25. 47 Cal. App. 5th 32 (2020).

26. *Id.* at 43–47 (2020).

27. See BERKELEY L. POL’Y ADVOC. CLINIC, *supra* note 19, at 17; LET’S GET FREE LA, *supra* note 19, at 4; ZHEN & GREENE, *supra* note 13, at 14.

28. ALAMEDA CNTY. CENT. COLLECTIONS, QUARTERLY AGING ANALYSIS REPORT (2017) (on file with author) (showing that cases less than six months old have an 8% collection rate, cases 7-18 months a 4% collection rate, cases 19-36 months a 2% collection rate, and cases over 36 months old a 0% collection rate).

loss.²⁹ Recognizing that they could not implement a fair, efficient, or lawful ability to pay process, several counties opted to end all fee assessments ahead of statewide legislation requiring such cessation.³⁰

However, some jurisdictions remain firm in their beliefs that fees serve a deterrent value, even though research suggests that administrative fees may contribute to crime and undermine community safety. Unpaid court debt not only exposes people to further criminalization,³¹ but court involvement might lead to increased rates of recidivism, particularly for low-income people. Additionally, one study found that jurisdictions that collect a greater share of revenue from fines and fees solve violent and property crimes at lower rates, in part because of the resources needed to be put toward collection rather than crime clearance.³²

Given the targeted surveillance and over-punishment of Black, brown, and low-income communities, as Atuahene also notes, it is often the most marginalized or “segments of the population poorly positioned to fight back” who bear the brunt of such extraction.³³ Researchers have

29. BERKELEY L. POL’Y ADVOC. CLINIC, *supra* note 19, at 17; MATTHEW MENENDEZ, LAUREN-BROOKE EISEN, NOAH ATCHISON & MICHAEL CROWLEY, BRENNAN CTR. FOR JUST., THE STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES 16–19 (2019), <https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines> [<https://perma.cc/7EH4-PEUF>].

30. S.F., Cal., Ordinance 131-18 Amending the Administrative Code to Abolish Fees Associated with Probation Costs, Restitution, Booking, the Sheriff’s Work Alternative Program, the Automated County Warrant System, the Sheriff’s Home Detention Program, and to Abolish Local Penalties Associated with Alcohol Testing and Court-Ordered Penalties for Misdemeanor and Felony Offenses (June 5, 2018) (on file with author); Letter from Alameda Cnty. Prob. Dep’t to Alameda Cnty. Bd. Supervisors re: Recommendation to Adopt an Ordinance Eliminating All Adult Fees for Criminal-Justice Involved Persons by Amending Administrative Code Section 2.42.190 to Prohibit Collection and Assessment of Adult Fees for Probation Services and Repealing Fee Schedules for Probation, Sheriff, and Public Defender and Indigent Defense Counsel (Oct. 31, 2018) (on file with author); Contra Costa Cnty. Bd. Supervisors, Resol. No. 2019/522 (Sep. 17, 2019); Hilda L. Solis & Sheila Kuehl, Los Angeles Cnty. Bd. Supervisors, Motion re: Eliminating Los Angeles County Criminal System Administrative Fees (Feb. 18, 2020) (on file with author).

31. Devah Pager, Rebecca Goldstein, Helen Ho & Bruce Western, *Criminalizing Poverty: The Consequences of Court Fees in a Randomized Experiment*, 87 AM. SOCIO. REV. 529, 544 (2022); KEITH FINLAY, MATTHEW GROSS, CARL LIEBERMAN, ELIZABETH LUH & MICHAEL MUELLER-SMITH, THE IMPACT OF CRIMINAL FINANCIAL SANCTIONS: A MULTI-STATE ANALYSIS OF SURVEY AND ADMINISTRATIVE DATA 11–12 (Aug. 10, 2023), https://sites.lsa.umich.edu/mgms/wp-content/uploads/sites/283/2023/08/CJARS_Fines_20230810.pdf [<https://perma.cc/BB4M-NKPA>].

32. Rebecca Goldstein, Michael W. Sances & Hye Young You, *Exploitative Revenues, Law Enforcement, and the Quality of Government Service*, 56 URB. AFFS. REV. 5, 21–22 (2020).

33. Atuahene, *supra* note 9, at 2.

found that the proportion of Black residents in a jurisdiction is robustly connected to the use of fees and fines for revenue.³⁴

Fortunately, advocates have successfully persuaded the California Legislature to abolish the probation supervision fee and reduce the civil assessment fee so that 45 administrative fees no longer exist in California.³⁵ While California has led the nation in rolling back these regressive fees and discharging over \$18.2 billion in fee debt,³⁶ there is ongoing work necessary to unravel the remaining fees and other laws and practices that continue to contribute to the wealth and resource extraction from poor, Black, and brown Californians.

34. Michael Sances & Hye Young You, *Who Pays for Government? Descriptive Representation and Exploitative Revenue Sources*, 79 J. POL. 1090, 1092 (2017).

35. See A.B. 1869, 2019–2020 Leg., Reg. Sess. (Cal. 2020); A.B. 177, 2021–2022 Leg., Reg. Sess. (Cal. 2021); A.B. 134, 2023–2024 Leg., Reg. Sess. (Cal. 2023).

36. Estimates based on records and data gathered from public record act requests filed with all 58 counties in California (on file with author).