

**Staff Memorandum 2023-10**  
**Issues at the Intersection of Poverty and Criminal Law:**  
**Preliminary Proposals**

At its June 2023 meeting, the Committee discussed selected issues at the intersection of poverty and criminal law. Based on direction from the Committee at that meeting, this memorandum presents preliminary staff proposals for further discussion and analysis by the Committee.

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**Preliminary Staff Proposals**

**1. Focus welfare fraud prosecutions on the most serious cases.**

*Summary Staff Proposal*

Direct cases of suspected welfare fraud to the existing administrative process unless there is clear evidence of intentional fraud, such as when a person applies for benefits in multiple counties, uses a fake identity, or receives an excessive amount of benefits significantly higher than the monetary threshold under current law.

*Current Law*

Welfare fraud can be prosecuted as a felony if the amount of loss is \$950 or more and in other defined scenarios. State and federal regulations allow counties to decide whether to handle allegations of welfare fraud administratively or in the criminal system.

*Background*

California’s public assistance programs, including CalWorks and CalFresh, serve millions of people every year. Fraud — when a person “willfully and knowingly, with the intent to deceive, makes a false statement or representation or knowingly fails to disclose a material fact” to obtain a benefit<sup>1</sup> — occurs in a small proportion of cases. Still, over a 10-year span from 2012–2021, there were over 24,000 arrests and 11,000 convictions for welfare fraud in California.<sup>2</sup>

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<sup>1</sup> Welfare and Institutions Code § 10980.

<sup>2</sup> The data about welfare fraud convictions and arrests in this memorandum comes from analysis of the California Department of Justice Automated Criminal History System (ACHS) performed by the California Policy Lab.

Federal law requires that states take steps to prevent fraud and address it when it is discovered but states are given the discretion to decide whether to handle cases of suspected fraud through either a criminal or administrative process.<sup>3</sup> The administrative process carries significant consequences: findings of fraud can result in orders to repay excess benefits, the suspension of benefits, or lifetime bans from receiving assistance.<sup>4</sup> And while state regulations direct county welfare departments to refer cases to the District Attorney when there is clear and convincing evidence that fraud occurred,<sup>5</sup> there is a great deal of variation in whether criminal charges are brought because each District Attorney has a different monetary threshold for prosecuting fraud.<sup>6</sup> And some counties rarely prosecute these offenses.<sup>7</sup>

While some prosecutors focus their attention on fraud that occurs over a long period of time and results in high monetary losses, there is no statutory requirement for prosecutors to do so.<sup>8</sup> At its June 2023 meeting, John Martire, President of the California Welfare Fraud Investigators Association, told the Committee that in some counties the prosecutor-established threshold is as high as \$15,000, while in others it is \$3,000. Current law allows a person to be prosecuted for welfare fraud regardless of the amount of loss but in most cases requires a person to receive \$950 or more in excess benefits to be convicted of a felony.<sup>9</sup> According to California Department of Social Services CalFresh and Nutrition Branch Chief Andrea Brayboy, \$950 is just one month of benefits for some families.<sup>10</sup>

In counties that do prosecute welfare fraud, arrest and conviction data show alarming race and gender disparities: women comprise 75% of arrests and

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<sup>3</sup> 7 Code of Federal Regulations § 273.16(a).

<sup>4</sup> See California Department of Social Services Manual of Policies and Procedures §§ 20-300.3, 20-353.

<sup>5</sup> California Department of Social Services Manual of Policies and Procedures § 20-300.21.

<sup>6</sup> See California State Auditor, *Department of Social Services: For the CalWorks and Food Stamp Programs, It Lacks Assessments of Cost-Effectiveness and Misses Opportunities to Improve Counties Antifraud Efforts* (November 2009) (finding that that counties had inconsistent prosecution thresholds and recommending that DSS work with counties to implement more consistent prosecution methods); California State Auditor, *Follow-Up — California Department of Social Services: It Has Not Corrected Previously Recognized Deficiencies in Its Oversight of Counties' Antifraud Efforts for the CalWorks and CalFresh Programs* (June 2015) (finding that DSS had not taken action to implement previous recommendations). See also California Department of Social Services All County Letter 17-118.

<sup>7</sup> More details of this analysis will be provided in subsequent materials from the Committee.

<sup>8</sup> See Welfare and Institutions Code § 10980.

<sup>9</sup> *Id.* Knowingly making more than one application for aid, or making an application for aid for a fictitious or nonexistent person is a felony regardless of the amount of loss. See Welfare and Institutions Code § 10980(b)

<sup>10</sup> See also Department of Social Services, *All County Information Notice No. 1-78-21* (indicating a maximum CalFresh benefit of \$992 per month for a family of 5).

convictions, and Black and Hispanic women account for over 50% of all arrests and convictions combined.<sup>11</sup> Data also indicate that the vast majority (80%) of people convicted for welfare fraud do not have any prior convictions.<sup>12</sup>

While some allegations of welfare fraud are based on egregious cases — such as when a person uses a fictitious name to secure benefits, intentionally receives benefits in multiple counties, or unlawfully sells or purchases benefits — according to advocates for people accused of welfare fraud, many prosecutions are based on evidence that the welfare recipient merely failed to report income or other relevant information to the county as required. In these cases, complicated reporting requirements that can vary between programs and hardships related to the recipient’s poverty, disability, or language access can be reasons for noncompliance.

California uses several mechanisms to safeguard public benefits from fraud including a federally-mandated fraud-detection system.<sup>13</sup> This system uses multiple sources to collect information about the welfare recipient’s earnings and compares it to what the person reported to receive benefits.<sup>14</sup> Counties must quickly follow up on any income discrepancies to limit and recover any overpayments.<sup>15</sup>

While the state should continue efforts to prevent fraud, welfare fraud prosecutions have a sordid racial history<sup>16</sup> and the administrative process already in place is sufficient to handle most cases. Focusing welfare fraud prosecutions on the most serious cases, as specified below, can free up scarce criminal justice resources and improve confidence in our legal system.

#### *Staff Proposal*

The Committee should consider recommending that welfare fraud prosecutions be limited to cases where:

- Multiple counties: a person intentionally and unlawfully receives aid in more than one county;

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<sup>11</sup> California Policy Lab analysis of ACHS data.

<sup>12</sup> *Id.*

<sup>13</sup> 7 Code of Federal Regulations § 272(8)(c); See also California Department of Social Services, *All County Letter 17-41*.

<sup>14</sup> California Department of Social Services, *All County Letter 17-41*. Legislation authored by Senator Skinner prohibits prosecution for any overpayments made if counties failed to respond to the IEVS notification within the specified timeframe. See SB 360 (Skinner 2017) (adding subdivision (j) to Welfare and Institutions Code § 10980).

<sup>15</sup> California Department of Social Services Manual of Policies and Procedures § 20-006.4.

<sup>16</sup> See Kaaryn Gustafson, *The Criminalization of Poverty*, 99 *Journal of Criminal Law and Criminology* 643, 648–64 (2009).

- Stolen or fake identities: a person intentionally receives aid using a fictitious identity;
- Trafficking: a person “traffics” benefits by using, selling, or transferring them unlawfully;
- Excessive amounts: the amount of benefits received exceeds a threshold significantly higher than the current \$950 such that it demonstrates sustained fraud over a long period of time; or
- Prosecution is otherwise required by federal law.

## **2. Reduce the scope of criminal fines and fees.**

### *Summary Staff Proposal*

Eliminate add-on charges (including additional fees, assessments, and surcharges) in all circumstances. Prohibit courts from ordering people convicted of misdemeanors or felonies to pay fines if the court finds that they are indigent. Provide guidance for the amount of fine that should be ordered in remaining cases.

### *Current Law*

Courts can sentence people to pay fines without consideration of their ability to pay. When fines are imposed, add-on charges (additional fees, surcharges, and assessments) are calculated based on the fine amount and added to the total and often are far greater than the underlying fine. There is scant guidance in the Penal Code or Rules of Court for how a judge should determine an appropriate fine.

### *Background*

Criminal fines and fees are widely used both to punish people convicted of crimes and to generate revenue for state and local public safety programs.<sup>17</sup> While sentencing a person to pay a fine has often been considered a less harsh alternative to incarceration, people are often ordered to pay fines in addition to being incarcerated.

The many add-on charges authorized under current law are not typically considered to be part of the punishment but are instead considered administrative costs that the convicted person must pay for using the criminal system.<sup>18</sup> For example, a sentence to pay a base fine of \$500 will have add-ons of

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<sup>17</sup> See Anjali Verma and Bryan L. Sykes, *Beyond the Penal Code: The Legal Capacity of Monetary Sanctions in the Corpus of California Law*, *The Russell Sage Foundation Journal of the Social Sciences*, 8(1) 36–62 (January 2022).

<sup>18</sup> See *Assessments & Surcharges: A 50-State Survey of Supplemental Fees, Fines & Fees* Justice Center (December 2022).

a \$500 state penalty assessment, a \$350 county penalty assessment, and a \$100 state surcharge, among others.<sup>19</sup> Unlike fines which judges use their discretion to set within a range authorized by statute, judges do not have discretion to determine the amount of add-on charges. As explained to the Committee by Lisa Foster, a former California Superior Court Judge and current Co-Executive Director of the Fines and Fees Justice Center, California's current system of add-on charges creates a tax system that only applies to the most marginalized groups in society.<sup>20</sup>

California's current system of criminal fines and add-on charges has resulted in billions of dollars of unpaid debt which the state and counties struggle to collect.<sup>21</sup> Despite their widespread use, a recent multi-state analysis found no evidence that imposing fines and fees deterred crime.<sup>22</sup> The study found that fines and fees were concentrated on those less likely to pay, placing them at higher risk of other negative outcomes such as arrest warrants and additional fines.<sup>23</sup>

While the Legislature and courts have implemented several reforms over the last decade to address the disproportionate impacts of criminal fines and fees on low-income and minority communities,<sup>24</sup> current law — which is in flux as appellate courts have reached conflicting results<sup>25</sup> — still allows courts to sentence people convicted of misdemeanors and felonies to pay fines and fees without considering their ability to pay.<sup>26</sup> Judges can sentence people to pay fines and fees even when their likelihood of paying the debt is unrealistic because they are also serving a sentence of incarceration.<sup>27</sup> At the June 2023 meeting, Anita Lee, Senior Fiscal Policy Analyst at the California Legislative Analyst's Office, reiterated the need for the Legislature to evaluate the goals and structure of the criminal fine and fee system.

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<sup>19</sup> See Penal Code §§ 1464, 1465.7; Government Code § 76000.

<sup>20</sup> See Written Submission of Lisa Foster to Committee on Revision of the Penal Code, June 23, 2023.

<sup>21</sup> *Report on Statewide Collection of Court-Ordered Debt for 2021–22*, Judicial Council of California, 5-13 (December 2022).

<sup>22</sup> Keith Finlay et al., *The Impact of Criminal Financial Sanctions: A Multi-State Analysis of Survey and Administrative Data*, NBER Working Paper No. w31581 (August 2023).

<sup>23</sup> *Id.*

<sup>24</sup> SB 857 (2010 Committee on Budget and Fiscal Review); SB 85 (2015 Committee on Budget and Fiscal Review); SB 190 (2017 Mitchell); SB 847 (2018 Committee on Budget and Fiscal Review); AB 143 (2021 Committee on Budget); AB 1869 (2020 Committee on Budget); AB 177 (2021 Committee on Budget).

<sup>25</sup> *People v. Dueñas*, 30 Cal.App.5th 1157; See also *People v. Hicks*, 40 Cal.App.5th 320 (2019) (review granted); See also *People v. Kopp*, 38 Cal.App.5th 47 (2019) (review granted).

<sup>26</sup> Penal Code §§ 19, 672, 1202.4, 1464, 1465.7, 1465.8. See also Gov't Code §§ 70372, 76000, 76000.5, 76104.6, 76104.7.

<sup>27</sup> Penal Code §§ 19, 672.

Other state legislatures have made ability-to-pay considerations an explicit part of their fine and fee systems. At the Committee's June 2023 meeting, Washington State Representative Tarra Simmons shared her personal experience with court-ordered debt and described laws in her state requiring judges to consider a person's ability to pay. Indeed, Washington law specifies that people who receive public benefits, earn 125% or less of the federal poverty standard, or are represented by a public defender are presumed to be unable to pay discretionary fines.<sup>28</sup> Recently-passed legislation from Ms. Simmons eliminated add-on charges that were previously required to be issued upon conviction.<sup>29</sup> Advocates in the state anticipate that the reforms will result in the total elimination of court-ordered fines and fees for indigent people.

New Mexico also recently passed similar legislation that abolished most criminal legal fees imposed as administrative costs to fund government programs.<sup>30</sup>

California has begun taking similar steps and requires ability-to-pay determinations in infraction cases.<sup>31</sup> Courts are advised to consider factors such as whether a person receives public benefits, whether their income is 125% or less of federal poverty guidelines, and to use their discretion to issue fines in amounts that are reasonable and compatible with the person's financial ability.<sup>32</sup> Early results presented to the Committee at its June 2023 meeting demonstrated that setting fines and fees at amounts people can afford can result in increased repayment rates and revenue.<sup>33</sup>

Expanding similar ability-to-pay reforms to misdemeanor and felony cases would make California's system more equitable and efficient and eliminating add-on charges would greatly simplify the law.

### *Staff Proposal*

The Committee should consider recommending that:

- All add-on fees be eliminated so that any fine amount ordered by a court reflects the true cost of what a person owes;

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<sup>28</sup> See *State v. Blazina*, 182 Wash.2d 827 (holding that sentencing courts must make individualized inquiries into a person's current and future ability to pay before imposing discretionary fines); RCW 10.101.160(3) (specifying that courts shall not order a person to pay costs if they are indigent); RCW 10.101.010(3) (defining indigency).

<sup>29</sup> HB 1169 (Simmons 2023-2024 Regular Session).

<sup>30</sup> HB 139 (Cadena 2023 Regular Session).

<sup>31</sup> California Rules of Court Rule 4.335.

<sup>32</sup> California Rules of Court Rule 4.335 Advisory Committee Comment.

<sup>33</sup> See *Report to the Legislature: Online Infraction Adjudication and Ability-to-Pay Determinations*, Judicial Council of California, 9 (February 2023).

- Courts be prohibited from imposing fines when a person is:
  - Convicted of a misdemeanor or felony; and
  - Is indigent as indicated by their receipt of public benefits, earning 125% or less of the federal poverty standard, or representation by a public defender; and
- For remaining cases, courts should be required to conduct ability-to-pay determinations before imposing fines and use their discretion to set fines in amounts compatible with a person's financial ability.

### **3. Expand Law Enforcement Assisted Diversion (LEAD)**

#### *Summary Staff Proposal*

Offer additional LEAD pilots and allow police officers to defer arrested people to community-based services in lieu of booking them into jail.

#### *Current Law*

The Penal Code contains no active provisions related to LEAD: state funding for LEAD pilot programs expired in 2019 and only certain offenses were eligible for pre-booking diversion under the pilot.

#### *Background*

Low-level offenses dominate California's criminal legal system. In 2022, over 500,000 of the nearly 800,000 arrests made by law enforcement (66%) were for misdemeanor offenses,<sup>34</sup> while drug and property offenses accounted for over 30% of all felony arrests.<sup>35</sup> In 2016, California began experimenting with a new approach to addressing low-level repeat arrests by launching the Law Enforcement Assisted Diversion Pilot Program.<sup>36</sup> In LEAD, police officers divert people to intensive case management and supportive services instead of arresting them for low-level offenses related to addiction and prostitution. The LEAD pilot programs were established in two locations, San Francisco and Los Angeles, and were limited to low-level drug and prostitution offenses.<sup>37</sup>

As explained to the Committee by Los Angeles County Sheriff's Department Captain Geoffrey Deedrick, LEAD enhances community safety by putting frequently arrested people on a path to success. Research has demonstrated that LEAD was a successful alternative to traditional case processing in both California pilot sites — rates of future misdemeanor and felony arrests and

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<sup>34</sup> California Department of Justice, *Crime in California 2022*, Table 30.

<sup>35</sup> *Id.* at Table 32.

<sup>36</sup> Penal Code §§ 1001.85–1001.88.

<sup>37</sup> Penal Code § 1001.87(b).

overall system costs were significantly lower among LEAD participants than in comparison groups.<sup>38</sup>

Despite the successes of the pilot programs, utilization of LEAD since the initial pilot funding expired has been mixed. While Los Angeles County has continued the funding beyond the pilot and expanded the program to serve more people, the LEAD program in San Francisco was discontinued when the pilot expired. Notably, San Francisco Chief of Police Bill Scott has recently said he wants to reintroduce the program to help address the city's drug problem.<sup>39</sup>

Though not funded by the initial pilot program, other cities throughout the state have also experimented with LEAD-type programs.<sup>40</sup> According to Dr. Aili Malm, who presented her evaluation of the LEAD pilot programs to the Committee, momentum that could have encouraged the development of additional LEAD programs was stalled by the COVID-19 pandemic.

Other states, including Colorado, Maryland, New Mexico, and Washington have established state-funded LEAD programs.<sup>41</sup> Similar to California's program, these states designate a state agency responsible for issuing grants to local jurisdictions and assisting them in implementing LEAD. Other states, including New Jersey, have secured grant funding to establish LEAD programs.<sup>42</sup> In New Jersey, the list of LEAD-eligible offenses is more expansive than what was included in California's pilot program and includes theft, fraud, and trespass offenses.<sup>43</sup> As recommended to the Committee by Erica Shehane, Los Angeles County Office of Diversion and Reentry Director for LEAD, California should expand the list of eligible crimes and give counties the flexibility to decide which offenses to address with the program.

In addition to expanding LEAD-eligible offenses, the Penal Code can be updated to encourage law enforcement agencies that do not have official LEAD programs

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<sup>38</sup> Aili Malm, Dina Perrone, and Erica Magaña, *Law Enforcement Assisted Diversion (LEAD) External Evaluation Report to the California State Legislature*, 14, 55 (2020). See also Aili Malm and Dina Perrone, *Law Enforcement Assisted Diversion (LEAD) External Evaluation Report to the California State Legislature — 2020 Addendum*, 13–14 (2021).

<sup>39</sup> David Sjostedt, *San Francisco Police Chief Pushes To Restart Program to Help Drug Users*, *The San Francisco Standard* (June 23, 2023).

<sup>40</sup> See Sara Bastomski, Lindsey Cramer, and Emily Reimal, *Evaluation of the Contra Costa County Law Enforcement Assisted Diversion Plus Program*, Urban Institute (August 2019). See also Aaron Leathley, *Bike Officers, Others Reassigned Amid Stockton Police Staff Shortages, Union Says*, *Stockton Record* (March 30, 2023).

<sup>41</sup> Colorado Senate Bill 17-207 (2017 Regular Session); Maryland House Bill 432 (2018 Regular Session); New Mexico House Bill 453 (First Session, 2019); Washington Substitute Senate Bill 5380 (2019 Regular Session).

<sup>42</sup> See State of New Jersey Department of Law & Public Safety, *Law Enforcement Assisted Diversion*.

<sup>43</sup> Committee staff received this information from the New Jersey Office of Attorney General.



to develop similar pre-booking diversion practices utilizing the supportive services in their communities. Current law, Penal Code section 849, specifies when officers can release an arrested person without further proceedings, including when a person is arrested for being under the influence of drugs but is delivered to a hospital for treatment.<sup>44</sup> This law can be expanded to list additional circumstances including when a person is referred to community-based supportive service programs like addiction or mental health counseling. According to Los Angeles Sheriff's Department Captain Geoffrey Deedrick, a Penal Code provision encouraging officers to use pre-booking diversion (through LEAD or other similar programs) would empower law enforcement to use their discretion to divert appropriate cases.<sup>45</sup>

### *Staff Proposal*

The Committee should consider recommending:

- Re-establish LEAD pilot programs with an expanded list of eligible offenses. Eligible offenses should at a minimum include those that were in the original LEAD pilot (offenses related to drug possession, subsistence drug sales, and prostitution), as well as offenses related to theft, burglary, and trespassing.
  - Counties should be allowed to expand the list of offenses eligible for pre-booking diversion to meet the needs of their jurisdiction.
- Update Penal Code section 849 so that police officers can release people arrested for low-level offenses to LEAD or similar community-based supportive service programs in lieu of jail booking and referral to prosecution.

## **Conclusion**

Staff looks forward to discussing the proposals presented in this memorandum.

Respectfully submitted,

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<sup>44</sup> Penal Code § 849.

<sup>45</sup> An example of this type of provision can be found in Washington state, which in addition to establishing grant funding for LEAD programs, directs police officers to offer any person arrested for possession of drugs a referral to supportive services, including but not limited to LEAD, in lieu of booking. RCWA §§ 10.31.115, 36.28A.450.