

ALABAMA IS US: Concealed Fees in Jails and Prisons

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In March, 2018, a very diligent investigative reporter broke the news that an Alabama Sheriff had skimmed ‘excess’ money from the jail food budget, buying a \$740,000 beach house with the proceeds.¹ The Sheriff claimed, with some basis, that profiteering from so-called “surplus” food money was legal in Alabama. Indeed, 55 of Alabama’s 67 counties appeared to allow sheriffs to appropriate unspent cash from the monies designated to feed the jail population.²

Initially, the revelation of what seems to have been a hidden albeit legal practice ignited outrage. And yet, media attention soon died. Alabama seemed to be an outlier.

1. Connor Sheets, *Etowah Sheriff Pockets \$750k in Jail Food Funds, Buys \$740k Beach House*, ADVANCE LOC. (Mar. 13, 2018), https://www.al.com/news/birmingham/2018/03/etowah_sheriff_pocketed_over_7.html [<https://perma.cc/SQ3G-YKJK>].
2. *Sheriff Arrested Over Prison Food Scam*, CBS NEWS (Oct. 3, 2019), <https://www.cbsnews.com/news/sheriff-arrested-over-prison-food-scam> [<https://perma.cc/QHT9-UZWR>]; Connor Sheets, *Alabama Ethics Commission Drops Case against ‘Beach House Sheriff’* ADVANCE LOC., (Oct. 4, 2018), https://www.al.com/news/2018/10/alabama_ethics_commission_drop.html [<https://perma.cc/CA2D-6MMB>]; Alan Blinder, *Alabama Moves to Limit Sheriffs From Pocketing Jail Food Money*, N.Y. TIMES, (July 11, 2018), <https://www.nytimes.com/2018/07/11/us/alabama-jail-food-money.html> [<https://perma.cc/BYR9-B99S>]; *Civil Rights Groups Sue 49 Alabama Sheriffs for Access to Public Records Showing How Sheriffs Personally Profit from Funds Allocated for Feeding People in Jail*, S. CTR. FOR HUM. RTS., (Oct. 3, 2019), https://www.schr.org/resources/civil_rights_groups_sue_49_alabama_sheriffs_for_access_to_public_records_showing_how [<https://perma.cc/PX3A-CXSR>].

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But, in fact, we are *all* Alabamians. A concealed and legalized commission system operates throughout jails and prisons in thousands of counties and all fifty states. In every state there is a flagrant, predatory and legalized diversion of funds intended for the needs of incarcerated populations. This financial arrangement takes the form of commissions or signing bonuses or (in the language of its critics) corporate *kickbacks* paid by private firms to secure entry to, and often monopoly control over, any commercial transactions that involve the prisoner population. Typically these include phone calls, commissary purchases, and access to services such as video conferencing and money transfers. The commissions/kickbacks are then by law deposited by jails and prisons into so-called “inmate welfare funds” where, through legal machinations, they are increasingly spent on expenditures only remotely related to “inmate welfare.” Stephen Raher has usefully termed this vendor system “prison retailing,” which he defines as “a mechanism by which a state liability (i.e., the subsistence needs of incarcerated people) becomes a potential source of revenue for both public agencies and private firms.”³

Few sheriff and prison administrators may be buying beach houses, but corporate commissions/kickbacks are financing their occupational livelihoods. Jails, prisons, and even general county operations are funded with monies levied on services provided to the incarcerated population and paid for by incarcerated men, women, and their families. The system is abetted, simply put, by what Mary Fainsod Katzenstein and Maureen R. Waller depict as “Taxing the Poor.”⁴ Corporations seek market entry; public prisons seek budgetary support; and prisoners and their families—the vast majority of whom are poor—pay the price.

We understand commissions/kickbacks as a form of fees. Fees imposed on prisoners are itemized charges for specific services related to the use of courts, supervision, and incarceration. Commissions/kickbacks function in a similar way. When incarcerated individuals or their families or friends pay for phone, commissary or other services intended to benefit only incarcerated persons, the payment includes the hidden commission/kickback-related charge that underwrites both the operations of private business (their profits) and the ongoing operation of the jails or prisons. What we refer to as hidden here, however, is not a price markup, although jails/prisons and private companies both mark up some services. Rather, this charge results from a premium paid out by businesses to jails and prisons to win, secure and maintain contracts with public carceral facilities. These payments, which yield profits for private corporations and commissions/kickbacks for the public jail or prison entity, are then

3. Stephen Raher, *The Company Store and the Literally Captive Market: Consumer Law in Prisons and Jails*, (unpublished manuscript) (on file with author), <https://www.law.berkeley.edu/wp-content/uploads/2019/07/Raher-Prison-Consumer-Law.pdf>.

4. Mary Fainsod Katzenstein & Maureen R. Waller, *Taxing the Poor: Incarceration, Poverty Governance, and the Seizure of Family Resources*, 13 PERSP. ON POL., 638, (2015), <https://doi.org/10.1017/S153759271500122X>.

repurposed by jails and prisons to support their operational expenses. They are, in essence, fees but by another name.

The operation of commissions/kickbacks is one manifestation of a systemic shift in the imposition of punishment in the U.S. “Commercialized (In)justice,” Brian Highsmith’s term, has now become imbricated in the norms and policies of the criminal legal system.⁵ Since the 1990s, private power not only began to gain dominion over the administration of many prisons across the United States⁶ but also, and just as importantly, over the provision of services in public carceral facilities. Phones, food and commissary management, visitation, package delivery, money deposits, tablet sales, music and message downloading, health care, bail, probation, parole services, prisoner transport, and immigrant detention, have all become silage for corporate appetites. Public jails and prisons profit no less than private corporations from this arrangement. As the co-beneficiaries of privatization, jails and prisons invite corporations to compete for contracts, often selecting those that promise the highest commission/kickback.⁷ The Prison Policy Initiative (a nonprofit research organization) terms this practice “the arms race for higher commissions.”⁸

Alongside commercialization, monetization now also suffuses the criminal legal system, marked by the metastasis of fees and fines. The 2014 Ferguson, Missouri protests brought the practice of imposing fees and fines to public attention, but the imposition of Legal Financial Obligations (LFOs) in the form of fees and fines has burgeoned since the 1980s, becoming a standard tool of courts, prosecutors, police, and used as well by states, cities, and counties for a broad range of what are deemed to be legal expenses and infractions. They include, as Alexes Harris specifies, a profusion of user fees, surcharges, collection costs and restitution payments.⁹

Two structural shifts in the American economy—the flattening out of tax revenue collection and the ascendance of private equity—have, we speculate, driven both this monetization and commercialization at the

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5. Brian Highsmith, *Commercialized (In)Justice: Consumer Abuses in the Bail and Corrections Industry*, NAT’L CONSUMER L. CTR., (Mar. 18, 2019), <https://www.nclc.org/issues/commercialized-injustice-consumer-abuses-in-the-bail-and-corrections-industry.html> [<https://perma.cc/LVH2-WMGW>].
 6. *Private Prisons in the United States*, SENT’G PROJECT (Oct. 24, 2019), <https://www.sentencingproject.org/publications/private-prisons-united-states> [<https://perma.cc/9GEB-NZK7>].
 7. Alexi Jones & Peter Wagner, *On Kickbacks and Commissions in the Prison and Jail Phone Market*, PRISON POL’Y INITIATIVE (Feb. 11, 2019), <https://www.prison-policy.org/blog/2019/02/11/kickbacks-and-commissions> [<https://perma.cc/P98M-NTN5>].
 8. *Id.*
 9. Alexes Harris et al., *Monetary Sanctions in the Criminal Justice System: A Review of Law and Policy in California, Georgia, Illinois, Minnesota, Missouri, New York, North Carolina, Texas, and Washington*, LAURA AND JOHN ARNOLD FOUND. (Apr. 2017); ALEXES HARRIS, *A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR* (2016).

county and state level. The declining reliance on property taxes has confronted county law enforcement with a revenue shortage. Between 1900 and 2000, the percentage of property taxes collected of “own source” general revenue fell from 78 percent to 45 percent.¹⁰ The restricted availability of tax revenue has led county and state law enforcement in the last decades to seek supplementary budget sources through the monetization of fees and fines. One study entitled, “Addicted to Fines,” estimates that six hundred jurisdictions, mostly in the South, depend on fines and fees for between 10 to 20 percent of their general fund revenues—and some for up to 70 percent of their revenue cache.¹¹ This dependency reflects the decline of property tax collection—particularly injurious at the county level where property taxes had been the core (70 percent) of county tax revenue.¹² In the 1970s (the decade of local tax revolts led by Proposition 13 in California) property tax collections fell by 2.89 percent in the 1970s and early 1980s, climbing back only slightly—by 0.19 percent—between 1980 and 2004.¹³ Meanwhile in the same period, the county jail population rate rose by four hundred percent.¹⁴ Expenditures raced ahead of revenue.

The turn towards commercialization has been no less important, galvanized in particular by the ascendance of private equity.¹⁵ Worth Rises, an organization that maps the growth of private corporations involved in incarceration, has calculated that there are about 4000 companies (inclusive of an additional 800 companies entering the market just this past year) that now profit from “prison retailing.”¹⁶ It is not surpris-

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10. “Own source” refers to the county’s own sources, e.g. excluding grants from other governments. Glenn W. Fisher, *History of Property Taxes in the United States*, <https://eh.net/encyclopedia/history-of-property-taxes-in-the-united-states> (last visited October 31, 2019) [<https://perma.cc/YC6W-Q4XE>]. See also ISAAC WILLIAM MARTIN, *THE PERMANENT TAX REVOLT: HOW THE PROPERTY TAX TRANSFORMED AMERICAN POLITICS* (2008).
 11. Mike Maciag, *Addicted to Fines: Small Towns in Much of the Country are Dangerously Dependent on Punitive Fines and Fees*, GOVERNING (Sept. 2019), <https://www.governing.com/topics/finance/gov-addicted-to-fines.html> [<https://perma.cc/52G2-HY9B>].
 12. JENNIFER GRAVELLE & SALLY WALLACE, *EROSION OF THE PROPERTY TAX BASE: TRENDS, CAUSES, CONSEQUENCES 3* (Nancy Y. Augustine et al. 2009).
 13. Jennifer Gravelle & Sally Wallace, *Overview of the Trends in Property Tax Base Erosion*, in *EROSION OF THE PROPERTY TAX BASE: TRENDS, CAUSES, CONSEQUENCES 36 tbl.1* (Nancy Y. Augustine et al. eds., 2009).
 14. NAT’L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 315* (Jeremy Travis et al. eds., 2014).
 15. Tim Requarth, *How Private Equity Is Turning Public Prisons Into Big Profits*, NATION (Apr. 30, 2019), <https://www.thenation.com/article/prison-privatization-private-equity-hig> [<https://perma.cc/A9RW-J37R>]; Marsha McLeod, *The Private Option*, ATLANTIC (Sept. 12, 2019), <https://www.theatlantic.com/politics/archive/2019/09/private-equitys-grip-on-jail-health-care/597871> [<https://perma.cc/6ESQ-8TCV>].
 16. *The Prison Industrial Complex: Mapping Private Sector Players*, WORTH RISES (Apr., 2019), <https://worthrises.org/picreport2019> [<https://perma.cc/R9JN-9SYA>].

ing that most of these are private equity corporations.¹⁷ To meet investor expectations, private equity corporations seek continuous profits, which promotes constant roll up—a practice where many small companies in relevant service sectors (health, food, telephones) are bought and merged. These private equity imperatives make them particularly suitable to the small market structure of the over two thousand county jails and hundreds of prison jurisdictions that make up the carceral bazaar. This active, growth-oriented buying/selling/merging describes the last decades' economic activity of multibillion dollar private equity companies like H.I.G. Capital (the parent company of the recently combined Keefe Commissary and Trinity Services) and Platinum Equity, which owns the recently acquired Securus and JPay. Both operate as major players in the prison vendor system.¹⁸

Part of the story of private equity's influence on the carceral state is the incentive structure it has generated *within* public carceral facilities. Private firms are incentivized to find additional ways to shift the cost burden of incarceration *onto* prisoners and their families, precisely because they profit from each facet of prison life that can be given a price (to which a cost and fee is attached). In other words, if these firms find or create ways for incarcerated persons and their families to shoulder more of the costs of incarceration *for the state*, it also redounds *to their* (the firms') *own profit*. From this perspective, the profit interests of private firms shape public policy as they leverage their ability to provide the carceral state with surplus funds for their own financial benefit.

This form of leveraging payment from prisoners and their families is also highly advantageous to the state for a number of reasons. Unlike fees and fines, which are often unpaid, prison retail is an upfront fee-for-service. Imprisoned people and their families cannot buy from the commissary or make a telephone call without this effectively invisible fee being paid at the time of purchase. And there is an inbuilt incentive for corrections to get the biggest payout by selecting a company's services based on the highest bid/commission.

These fees are not only widespread but of substantial monetary significance: Consider the example of the Los Angeles County jail. In 1998 a Los Angeles Grand Jury appointed a Criminal Justice Committee that investigated the Inmate Welfare Fund (IWF).¹⁹ Constituted almost entirely by telephone and commissary commissions, the IWF had generated a total of nearly \$70 million dollars. Were this \$70 million dollars to have been expended primarily for the benefit and education of the jail

17. *Id.*

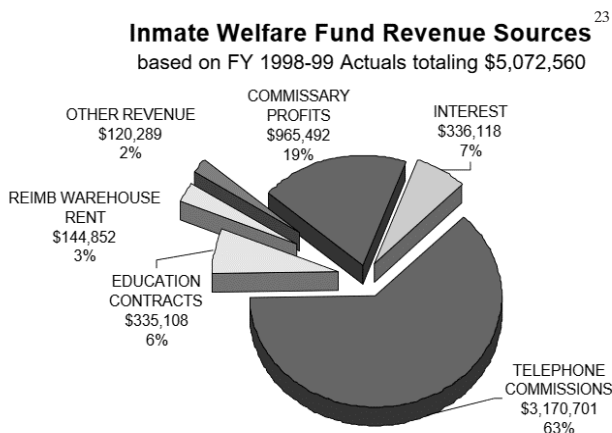
18. Stephen Rahe, *Paging Anti-Trust Lawyers: Prison Commissary Giants Prepare to Merge*, PRISON POL'Y INITIATIVE (July 15, 2016), <https://www.prisonpolicy.org/blog/2016/07/05/commissary-merger> [<https://perma.cc/UDT5-TAQ3>].

19. L.A. CTY. GRAND JURY, CRIMINAL JUSTICE COMMITTEE, <http://grandjury.co.la.ca.us/gjury99/REPORTgj-03.htm> [<https://perma.cc/PW4H-TAQ4>] (last visited Oct. 3, 2019).

population as required by the California Penal Code, there would have been significant potential for establishing rehabilitative programs.

This was not the case. Instead, as the Committee concluded, the IWF was “not being used directly for inmate services.” Barely 16 million dollars were spent in total, of which large amounts went to jail operations (auto, bus and truck repairs, printing equipment, laundry equipment, work orders, computers and even “police supplies).”²⁰ Police supplies (a later 2015 report noted) included “tasers, mannequin face shields, podium microphones.”²¹ Legal or not, money expended by incarcerated people and their families on telephones and commissaries is directed to the daily operations of carceral facilities and to instruments of coercion and confinement. And, as these fee arrangements become more common and continuous, they become harder to recognize and resist.

In nearby Orange County, just south of Los Angeles, the jail’s revenue and expenditures were similarly apportioned. Commissary profits and telephone commissions accounted for just over 80 percent of the IWF intake.²²



In the Orange County jail, only a small proportion of expenditures were allocated for the direct benefit of the incarcerated population. The

20. ORANGE CTY. GRAND JURY, INMATE WELFARE FUND 12 app. A. (June 28, 2000), <http://www.ocgrandjury.org/pdfs/GJInmate.pdf> [https://perma.cc/KB2W-ZU6P].

21. L.A. POLICE DEP’T, INMATE WELFARE FUND AUDIT 10 (Aug. 19, 2015), <http://assets.lapdonline.org/assets/pdf/14-058%20inmate-welfare-fund.pdf> [https://perma.cc/8RPX-74PW]. This audit, expressing what is evidently some doubt about the legality of the IWF expenditures, allows that, “It is recommended that the Department continue to assess the appropriateness of expenditures to ensure they are made within the context of the California Penal Code Part 3, Title 4, Chapter 1, County Jails, Section 4025 (e) and Section 4025.5 (b); and Title 7, Chapter 1, Department of Correction and Rehabilitation, Section 5006.1 (*Other Related Matters*).” *Id.* at 12 (emphasis in original).

22. ORANGE CTY. GRAND JURY, *supra* note 20, at 12 app. A.

23. *Id.*

“total spent for benefit, education, and welfare for inmates was \$552,000 amounting to 12 percent (excluding staff salaries) of the total expenditure for FY 1998–99.”²⁴ By contrast, a large proportion of funds were directed towards a new commissary building and towards the expansion of the jail. Orange County soon had a \$2.8 million-dollar expansion of the Theo Lacy jail and a handsome new warehouse at a price tag of an additional \$2.9 million. This raised questions for a Grand Jury:²⁵

The Grand Jury recognizes the wide latitude the fund administrators are allowed under the California Penal Code 4025(e) in managing the fund. However 41 percent of total expenditure for building programs over the past three years seems excessive in light of the code’s language: . . . The fund shall be expended by the Sheriff primarily for the benefit, education, and welfare of the inmates . . . Any funds that are not needed for the welfare of the inmates may be expended for the MAINTENANCE of county jail facilities . . . (emphasis in original).²⁶

Moreover, the Grand Jury might have, but did not, address the funding of the jail’s law library. For one, the jail allocated \$32,000 for the library, a tiny sum relative to the amount designated for the commissary building and jail expansion. For another, although not legally required to do so, the jail might have considered funding the law library as an essential operational expense, similar, for instance, to health care.²⁷ Instead, the commissions/kickbacks arrangement in effect requires poor families to subsidize access for their loved ones to legal resources.

These new buildings, along with some law books, were due to the beneficence of the prisoners of Orange County and their families and friends. But nothing further was questioned about the expenditure of inmate welfare funds. There would have been no reason to: no law, otherwise, was apparently broken. The IWF’s standard of “primarily for the benefit, education, and welfare of the inmates” gave the county great latitude.

The law works here less to expose than to conceal. What do we mean, here, by concealment? We use the word deliberately, although these are not instances of a classic cover-up. By concealment, we refer to the ways that in a carceral context public institutions utilize information out of the ready reach of public scrutiny as well as in the absence of

24. ORANGE CTY. GRAND JURY, *supra* note 20, at 6.

25. California empanels a body of 19–23 members annually to investigate civil and criminal matters. *What is the Grand Jury?*, ORANGE CTY. GRAND JURY, www.ocgrandjury.org [<https://perma.cc/B2S2-77G6>] (last accessed Mar. 20, 2020).

26. ORANGE CTY. GRAND JURY, *supra* note 20, at 8.

27. Although incarcerated people do not possess a Constitutional right to a law library—but only access to the courts—law libraries can be vital tools through which incarcerated individuals can challenge their convictions or their conditions of confinement. Given the importance of law libraries, the jail’s reliance on financing by the families of incarcerated persons rather than on general taxpayer funds is ethically questionable at best. *See* *Lewis v. Casey*, 518 U.S. 343 (1996); *Bounds v. Smith*, 430 U.S. 817, 828 (1977).

market competition. When account audits are irregular, it may be concealment. When categories or items listed in a budget are ambiguous or vague, it may be concealment. When the agency or body overseeing the jail fund is not a disinterested entity but is appointed by the sheriff, it may be concealment.²⁸ When the corporations that run the phone companies and commissaries are private equity businesses and are not required to report their dealings to stockholders, it may be concealment.

Other examples are easier to identify. It is concealment when the families whose money is spent on phone calls and commissaries are uninformed about the uses of those funds. It *is* concealment, as a searing report by the Prison Policy Initiative documents, when the law bars companies from offering commissions so they, instead, “bundle” services under the label of a single “telephone” commission or secure a contract from the jail or prison and provide equipment or other services in lieu of commissions.²⁹

Further, what makes these forms of concealment perhaps more insidious than a classic cover-up is that the law openly operates as cover. Nowhere is this better illustrated than in subtle—indeed barely noticeable—shifts in statutory language. This story of commissions and kickbacks is remarkable for what can be concealed with just the change of a single statutory word—a verbal modifier so inconspicuous and seemingly inconsequential as to merit no particular public or political attention. For instance, in 1993 the California State Legislature deftly replaced the word “solely” with “primarily,” thereby directing the stock of commissions to be spent “primarily” for the benefit of the inmate.³⁰ In 2000, under the auspices of the then-new Los Angeles County Sheriff, the word “primarily” was defined to require only that 51 percent of the Fund be spent on the “welfare” of the inmate and 49 percent spent on

28. The inmate welfare fund in Los Angeles is governed by an Inmate Welfare Fund Commission comprised of 6 private citizens appointed by the Sheriff. See L.A. CTY. GRAND JURY, *supra* note 19. In San Diego “The inmate welfare fund is overseen by a committee of public-safety officials that meets monthly to determine how the money should be spent. The panel includes a dozen sheriff’s officials—and one representative of the public.” Jeff McDonald, *Money Meant for Inmate Welfare Spent on Education, Staff, and Sheriff’s Department Expenses*, SAN DIEGO TRIB. (Apr. 22, 2019), <https://www.sandiegouniontribune.com/news/watchdog/story/2019-04-21/money-meant-for-inmate-welfare-spent-on-staff-sheriffs-expenses> [<https://perma.cc/5TE8-FXTB>].

29. Jones & Wagner, *supra* note 7.

30. A recent California State Senate bill proposed by State Senator Holly Mitchell, aims to insert the word “solely” to replace “primarily,” indicating that some pushback against the impact of these shifts in statutory language is occurring at the state level. See An Act to Amend Section 4025 of the Penal Code, and to add Chapter 3.2 (commencing with Section 22120) and Chapter 5 (commencing with Section 22180) to Part 3 of Division 2 of the Public Contract Code, relating to detention facilities, S.B. 555, California Legislature 2019–2020 Session, https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=2019202005B555.

prison operations.³¹ In this way, purported public servants accomplished a major legal heist of the resources of Los Angeles' poor.

Adverbial calisthenics were at work elsewhere with the insertion or shift in language, often in a single word or phrase. In *Florida*: "Profits from the commissary shall be used for *overall* inmate welfare."³² In *Indiana*: "*including but not limited to*" inmate welfare.³³ In *Kentucky*: "*include but not be limited to*."³⁴ In *Montana*: "*primarily*" and for purposes when funds were "*otherwise not needed*" . . . Any funds *that are not needed* for the welfare of the inmates can be expended for the maintenance of county jail facilities."³⁵

Those who defend the law's role here would say that jails and prisons are acting democratically, in the interests of the public: they are seeking out resources to replace the limited tax revenues that confront so many communities. By contrast, our point here is simple: law cannot advance the norms of democracy without sunlight. What seemed in Alabama to be a legal relic of a southern state is, as we have shown here, emblematic of a deeper—and hidden—problem throughout the carceral state. The law, when it is used to conceal changes in our institutions of punishment, forecloses democratic scrutiny, debate, and contestation.

Indeed, the concealment we trace here acts as a weapon of the powerful, as carceral facilities gain additional revenue and private firms accrue ever-increasing profits. As long as these financial arrangements remain shrouded, the law exclusively benefits these actors. A first step in redressing these practices must be to uncloak such arrangements and expose how, through them, the law is being used to exploit incarcerated populations. The carceral state and private firms may benefit, that is, but bringing to light these forms of legal exploitation can help us all—including those who are incarcerated and their families—better evaluate the true *cost* of these "benefits" to our democratic life.

31. L.A. CTY. CIVIL GRAND JURY, CIVIL GRAND JURY REPORT 118 (2001-02), <http://grand-jury.co.la.ca.us/gjury01-02/grandjury01-02.pdf> [<https://perma.cc/56W3-6TH3>].

32. FLA. STAT. ANN. § 951.23 (West 2014).

33. IND. CODE ANN. § 36-8-10-21 (West 2007).

34. KY. REV. STAT. ANN. § 441.135 (West 2018).

35. *Inmate Welfare Fund Account*, SUTTER COUNTY SHERIFF, <https://www.suttersheriff.org/div/jail/inmates/inmateWelfareFund.aspx>.

