

**The Cost of Justice:
Reform Priorities
of People with
Court Fines and Fees**

October 2021





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The authors wish to thank the Minority and Justice Commission for its partnership on this report as well as every justice-involved person who provided invaluable insights and shared their experiences trying to survive and thrive under the heavy burden of court-imposed debt.

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Executive Summary

While drafting *The Price of Justice: Rethinking the Consequences of Justice Fines and Fees* (2021) (hereinafter, “Report”), the Minority and Justice Commission (MJC) requested that the statewide organization, Living with Conviction: Sentenced to Debt for Life in Washington State (LwC), review and provide input into that Report’s findings. *The Cost of Justice* is the result.

LwC is an advocacy partnership between formerly incarcerated individuals and lawyer and law student allies to bring an end to the imposition of onerous legal financial obligations (“LFOs”) at both the policy and individual levels. LwC does this because LFOs are physically, mentally, emotionally, and financially crushing to the individuals with LFOs and their families, both criminalizing poverty and disproportionately impacting the poor and communities of color. To that end, LwC implements two programs: (1) multimedia storytelling to educate the public and lawmakers about the impacts of LFOs; and (2) legal empowerment strategies and tools to help people with LFOs know, claim, and shape their rights to LFO relief.

More broadly, LwC works to end LFOs because Washington’s LFO law and practice, even somewhat improved in 2018, embodies structural racism and systemic oppression. By design, it keeps generations of families of color “shackled” to the criminal justice system, under lifetime supervision,¹ thus perpetuating the institution of mass incarceration.

On behalf of the MJC, LwC convened a series of three virtual sessions with its justice-involved storytellers and trainers for the purpose of considering and discussing the Report findings with the goal of generating their own recommendations for LFO reform. An LwC justice-involved storyteller/trainer facilitated these meetings with the support of two LwC attorneys. The team used a polling function to obtain more exact data on preferences and priorities.

This work has one major limitation. The team was unable to present the bulk and breadth of the Consortium’s highly relevant findings in the time allotted for the sessions. Thus, participants now possess only a narrow view of system actors’ orientation toward LFOs. This constraint necessarily limits the scope of their recommendations presented here.

LwC storyteller and trainer recommendations are categorized as follows: (1) reduce barriers to LFO remission; (2) reduce barriers to paying off LFOs; (3) reduce amount of LFOs imposed; and (4) conduct additional research. Serving merely in a supporting role, LwC’s attorneys did not contribute to the generation of this list but did provide context or legal authority for these recommendations, when appropriate.

¹ One of LwC’s former LFO trainers characterized LFOs in this way.

1. REDUCE BARRIERS TO LFO REMISSION

1.1 Educate people with LFOs about their rights to relief and the process. Although the 2018 LFO reforms were a step in the right direction, there was no budget allocation for public education and no entity tasked with monitoring implementation.

To that end,

- a. **Leverage the Department of Corrections and court communication channels currently in place**, such as including information about the right to relief during community custody, in LFO invoices, on superior court websites, and in emails that clerks' offices send to people with LFOs (a few counties send email LFO payment reminders), to name a few.
- b. **Support expansion of LwC's Legal Empowerment Program to all counties in Washington State**, including promoting the use of LwC's Justice in Motion app by people with LFOs. Like TurboTax, LwC's LFO web app is an online guided interview that helps an impacted individual to: (1) generate the required court documents for requesting LFO relief based on the 2018 reforms; and (2) understand the process for filing and defending the motion in different counties across the state.

1.2 Encourage system actors to grant LFO relief made possible by the law. To that end, educate them on existing laws of mandatory interest waivers and discretionary remission made available in 2018, as well as LFO law that has existed but not always been followed, i.e., a court must find 'means to pay' before imposing discretionary LFOs on a defendant who suffers from a diagnosed mental health condition that prevents them from being employed. RCW 9.94A.777.

1.3 Advocate for court promotion of LwC's Justice in Motion LFO app. Because some counties have not even set up a process for LFO remission, there is a ripe opportunity to advocate that courts make the process as easy as possible, like in King and Whitman counties, where completed motions can be submitted by email.

1.4 Advocate for creation of an AOC-approved form for reduction of LFOs. Newly adopted General Rule 39(d) on Remission of LFOs mandates the use of AOC forms for requests of LFO remission, and yet the one AOC-approved form related to LFOs contains only a request for a waiver of non-restitution interest. Notably, it does *not* include what would be required to properly file a reduction of discretionary LFOs (based on an argument of "manifest hardship" following the legally required findings that the person is no longer in custody and not in contumacious default).

2. REDUCE BARRIERS TO PAYING OFF LFOS

- 2.1 Treat LFOS like student loan debt.** Use income-driven repayment plans and offer forbearance and deferment options, such as while in college. The system calls it a “civil debt” (notably not triggering an individual’s constitutional right to an attorney), so it should be treated as such across the board.
- 2.2 Change penalties, including prohibiting incarceration for nonpayment.** Stop the use of bench warrants to compel appearance at noncompliance hearings when the only violation is failure to pay LFOS. Again, it is considered a civil debt. Said one participant, “And it’s stupid, too. It costs them money to incarcerate people that it doesn’t bring back.” [Session 3 at 00:38:03].
- 2.3 Offer alternatives to financial payments or community service** that meet the goals of the justice system / payment alternatives, but do so with an awareness that treatment, EHM, UAs and other common alternative conditions of a sentence cost money that a poor person will be unable to pay.
- 2.4 Consolidate payment systems across the state,** so that there is only one central billing system, thus reducing the number of jurisdictions simultaneously billing, processing payments, and garnishing. Once operationalized, this system will reduce collection costs. In addition, when a person makes payments toward LFOS in one county, other counties can see that, and the system should favorably consider that person paying toward their LFOS.
- 2.5 Regulate and reduce excessive collection agency fees,** particularly given that by contract with the state, collection agencies can charge an additional 19% to 50% interest without undertaking an ability-to-pay inquiry.
- 2.6 Increase flexibility as to community service, protect the workers, and credit a fair wage.** Broaden the scope of what is considered community service to include work study and other activities that build a person’s capacity for being a productive member of society. Protect people doing community service by requiring that safety standards be followed. Credit a fair market wage for the community service work being done.

3. REDUCE AMOUNT OF LFOS IMPOSED

- 3.1 Advocate for a sliding scale VPA and other mandatory LFOS so that indigent people aren’t ever ordered to pay more than \$100.** For someone who is indigent, paying \$100 already is crippling, and the money likely won’t be collected anyway – resulting instead in jail time or

other sanctions for violating the terms of a sentence. Wealthier individuals could pay as much as \$1,000 to make up some of the difference on the clerk's balance sheets. In this way, more money will likely make it into the state's coffers as a result.

3.2 Advocate for an end to plea offers and alternatives to prosecution conditioned upon payment of LFOs. By conditioning offers of deferred prosecutions and other procedural delays of the proceedings that allow time for the completion of conditions toward dismissal of charges, the promise of a clean record is only available to those who can buy it by paying their LFOs. Participants shared heart wrenching stories about the pain and coercion they felt at the time of their pleas. The fact that roughly 95 percent of criminal cases resolve by plea adds tremendous urgency to this recommendation.

4. CONDUCT MORE RESEARCH

4.1 Survey people with LFOs to understand their LFO-related experiences in the criminal justice system.

4.2 Research the relationship between racial bias and LFO imposition at sentencing and/or post-conviction hearings. The absence of such data is a significant omission of the Consortium's work. In addition to gathering and analyzing historical court data, another effective way of doing this would be through a LFO court-monitoring program.

4.3 Further research debt collection agency practices.

4.4 Research whether LFOs are serving their legislative purpose. Determine if this system is doing what it is intended to do.

4.5 Research the issues surrounding LFOs through the field of economics. Employing economic methods of analysis could shed much-needed light on the issues surrounding LFOs.

Finally, several participants requested the opportunity to meet with the Commission to directly share their lived experiences related to these recommendations.

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1. Background

LwC is an advocacy partnership between formerly incarcerated individuals and lawyer and law student allies to bring an end to the imposition of onerous legal financial obligations (“LFOs”) at both policy and individual levels. LwC does this because LFOs are physically, mentally, emotionally, and financially crushing to individuals with LFOs and their families, both criminalizing poverty and disproportionately impacting the poor and communities of color. To that end, LwC implements two programs: (1) multimedia storytelling to educate the public and lawmakers about the impacts of LFOs; and (2) legal empowerment strategies and tools to help people with LFOs know, claim, and shape their rights to LFO relief.

More broadly, LwC works to end LFOs because Washington’s LFO law and practice, even somewhat improved in 2018, embodies structural racism and systemic oppression. By design, it keeps generations of families of color “shackled” to the criminal justice system, under lifetime supervision,² thus perpetuating the institution of mass incarceration.

1.1 Methodology

In May and June 2021, LwC sent an electronic copy of the Report to 21 storytellers and trainers who are living or have lived under the weight of LFOs. LwC then convened three virtual sessions with nine participants who have direct experience living with LFOs.

The first two sessions included introducing the Commission and its work to participants, including screening the two videos of the MJC co-chairs introducing the Commission and themselves; the DOJ grant objectives; the LFO Consortium’s membership and outputs; and the survey data.

² One of LwC’s former LFO trainers characterized LFOs in this way.

During the final session, LwC participants generated their own recommendations based on issues raised in the Report, the previous two sessions and their own experiences with the system. The team used a polling function to obtain more exact data on preferences and priorities.

The nine LwC storytellers and trainers, who will remain anonymous, consisted of seven women and two men, of which three are African American, one Asian-Pacific Islander, one Latino, one Native American, and three white. Participants reside in the following counties: King (2), Kitsap (3), Pierce (1), and Spokane (3). Each participant received an honorarium in recognition of their contribution of time.

Reminder: MJC's Mission 3

Foster and support a fair and bias-free system of justice by:

- 1) identifying bias of racial, ethnic, national origin and similar nature that affects the quality of justice in Washington State courts and judicial systems;
- 2) taking affirmative steps to address and eliminate such bias, and taking appropriate steps to prevent any reoccurrence of such bias; and
- 3) working collaboratively with the other Supreme Court Commissions and other justice system partners.

The LwC team consisted of Carmen Pacheco-Jones, a formerly incarcerated thought leader and health equity consultant, who facilitated the sessions, with support from LwC attorneys Deborah Espinosa and Anna Bosch. The slide presentations and polling data are included in Appendices 1 - 3.

1.2 Limitations

This work has one major limitation. The Report and annexes contain enormous amounts of information and insights into LFO law, system actors' interpretations and application of that law, and their practices regarding LFOs imposition and collection. As such, given the time and budget, the team had to selectively choose which topics and data to present to participants. Guiding the team's choices were an understanding of the LFO experiences of the storytellers and trainers as well as an intention to anchor the discussion about the Report to the participants' own lived experiences. The team was unable to present the bulk and breadth of the Consortium's highly relevant findings in the time allotted for the sessions. Thus, participants now possess only a narrow view of system actors' orientation toward LFOs. This constraint necessarily limits the scope of their recommendations.

2. Initial Impressions

This section discusses participants' impressions of the scope of the surveys, the Consortium's work, and general survey questions regarding state judges' reasons for imposing LFOs and whether they consider LFOs "essential" or not.

After introducing MJC and the DOJ grant objectives, and before presenting summaries of the LFO Consortium survey data and Report, the team explained that the surveys are based on a limited number of respondents, particularly among prosecutors³ and tribal judges:

Respondents	
Judges	98
Tribal judges	8
Prosecutors	18
Public defenders / civil legal aid	77
Clerks	38

Because of the limited number of respondents in each group, the survey results do not represent a statistically significant sample.⁴ As such, the team cautioned participants against drawing too many conclusions from the surveys. Rather, the survey results are anecdotal or snapshots of what a few system actors think.

Participants expressed their disappointment in the stark omission of a survey of people with "lived experience." One participant who also attended a few LFO Consortium meetings recalled:

I remember there being a lot of discussion about this at the meetings, the LFO consortium meetings that I went to, how were we going to get that piece [of information]? They had split us up into different groups and given different groups tasks. And it was mostly the **county clerks**, I believe, who were in charge of the survey, and they **couldn't wrap their minds around a way to capture that information from people who actually had LFOs**, or at least so they said, but it's kind of a long time ago. So I can't remember all the details, but I, I do remember that myself and . . .

³ Only 18 prosecutors responded and yet the King County Prosecuting Attorney's Office alone has 210 attorneys in their criminal and civil divisions. See <https://kingcounty.gov/depts/prosecutor/mission.aspx>. From the information included with the Report, the team could not tell if individual prosecutors received the surveys or each of the 39 counties' prosecutor's offices received one to answer for the office.

⁴ One participant wanted to know how many people per group the LFO Consortium sent the surveys to, in order to understand the percentage of people who responded to each survey. The person suggested that that information may provide insights into which of the surveyed groups is most invested in LFO reform. The team could not find that information.

judges included more than one reason, the number of “Xs” are greater than the number of survey respondents.

For one participant, this list jogged a memory of appearing in front of different judges around the same time on different cases, observing that the second judge undid some of what the first judge ordered, prompting him to say:

And so I feel like, you know, [it’s] sometimes **just up to the judges’ discretion**; they don’t even have to do it. ... They can take it all the way; they can lower it. They can raise it, **they can do whatever they want to, whatever they impose on the person.** ... I never even thought of the reasons, but I always think about, man, a judge can undo what another judge [has] done. **So it’s really, just up to that judge**, basically that individual judge. [Session 1 at 00:34:27]

Similar sentiments that referenced the starkly different treatment experienced in different counties and/or in front of different individual judges were echoed by others throughout the sessions.

Participants also had this to say about these survey results:

- “Given how much **cost recovery** is really framing the way judges think about LFOs, I was wondering, the Report didn't really say a lot about like why Washington state is 49th in funding [as indicated in the Report] or why it's not getting funded very well. Given how much people care about criminal justice in the state, it'd just be interesting to get a little more information about what's causing the funding issues and stuff.” [Session 2 at 00:39:23]
- “Well, from the looks of this, it clearly shows it doesn't affect them. It is because it always has been **cost recovery** – why a lot of judges will not pull something from collections, like a ticket or something, when it would be easier to pay that way.” [Session 2 at 00:40:19]
- “**Punishment**, which always seems to be that ultimate or a pervasive ideology within the justice system.” [Session 1 at 00:29:48]
- “**Deterrence is nothing. You don't think about that when you're breaking the law.** I didn't. Right, right. Yeah. Yeah. **I have an LFO story that's to die for** and sure. **I've actually paid my \$28,000, like a moron. I was a single mom making \$12 an hour.** Not anymore.” [Session 2 at 00:39:00]
- “I was looking at the, the **victim’s reimbursement**. Even for my past crimes, what if you really didn't get anything? So what am I reimbursing? ... So. The victim’s reimbursement part. Where is it going to, whose pocket is it going into? Cause I know it's not going into the victim because . . . who are you guys calling the victim per se for my crime? I wrote

checks to stores. **Stores have insurance, so they will get their money back.** So ... they have insurance for when people go in there and shoplift, steal, whatever the case may be. They are still getting their money back. So I'm paying, I'm paying a victim's cost to who? [Session 1 at 00:35:31]

The team explained that the Victim Penalty Assessment (VPA) funds victim services (regardless of the offense) and victim restitution is a legal means of making victims whole.

Said the same participant about the restitution she was ordered to pay for writing fraudulent checks:

Because I know you're not giving it back to the store, because if they have this insurance, so then **what's the purpose of companies having insurance for cases like this?** So where's the money going to? That's crazy. Cause I just, I didn't even think about it. . . . Where is this money going to? Where is the money being allocated to, is it being allocated to the, to that city and, and, and for what? Like, I want to see it going to, if I'm going to give up my money, but I know that somebody else has already got, already is getting the money back from recouping it back because of their insurance. Then do it, **give it to an organization that's in need**, not the county, cause they're not in need in my case. [Session 1 at 00:37:09]

LwC trainers are especially aware of the special status held by restitution within the hierarchy of LFOs – understanding that the law treats it differently and offers less relief for reducing it than other LFOs. In subsequent sessions, the group discussed a perceived lack of fairness for courts to treat insurance companies like individual victims for purposes of ordering restitution. In a follow-up poll after the conclusion of the sessions, 7 of 9 participants indicated they thought the law should treat insurance companies differently than individual victims, for purposes of ordering restitution.

Finally, both the team and a participant noted with disappointment that this question and the other questions were not also asked of the other groups of system actors. Said one participant:

I would be interested to hear more about **the reasoning and philosophy of all three groups**, not just the judges, especially the prosecutors and the county clerks. **Even though the county clerks don't make actual decisions about handing LFOs out, they create the processes** for filing motions and other types of important processes that people have to go through. [Session 1 at 00:34:27]

The Consortium survey also asked state court judges, “Do you consider LFOs to be essential to the criminal justice process? Please explain.”⁶ The team compiled and shared the Report’s survey data, indicating that fifty percent of state judges responded that LFOs are not essential to the system, although 3% of those said not essential, except for restitution.

This slide generated extensive discussion. In response to these results, one participant asked, “What do these folks think that money gets used for? If they have a faulty impression of what the LFO money actually gets used for once that's collected, then this question is obviously going to be tainted.” [Session 2 at 00:45:27]

The participants briefly debated whether knowing judges’ reasoning and philosophy about whether they consider LFOs “essential” was important:

I understand why they would ask the judges these questions, because they're the ones that are sitting there imposing the LFOs. So I think getting their theory on it as well on if they consider it essential or not, because if you look at it, **44% of them said no**, but they have to do it just because that's what everybody's been doing. [Session 1 at 00:47:00]

Another responded,

I'm not disagreeing with what you're saying, but at the same time, there is some judges that will say, you know what? No, they shouldn't be [paying], ... if they cannot afford to pay LFOs. ... They shouldn't [pay], but then you got that county, like Spokane, Everett, Vancouver, and I can go on and on because **I've been to a lot of counties that really do not care** and only thinking about their self.

And that's where I'm saying, them counties is the ones that actually should be able to submit the surveys, not the actual judges or attorneys, because they're getting paid. They can, **if they got imposed a fine, they probably could afford it. Some of us, we cannot**, especially when you have more than one county that you have to pay to. [Session 1 at 00:47:00]

And a third said,


⁶ Id. at State Judges Q15.

2. Judges on “Reasoning and Philosophy” of LFOs (cont’d)

Table 3. LFO as essential to the criminal justice system

Q) Do you consider LFOs to be essential to the criminal justice process? Please explain.	Number of respondents (N) = 97	% respondents ³
Yes	30	31%
Depends/ sometimes	13	13%
No	43	44%
No, except restitution (or other victim compensation)	3	3%
Not really	3	3%
Not applicable/ no comment	5	5%

What influences these perceptions?

p.19 

It's good to get that understanding of, do judges feel like it's essential? I feel like ... that's part of actually getting down to ... **why do we still have these [LFOs]**? ... So it's like, it makes it makes perfect sense why you would ask them, **because if it doesn't make sense to the judge, as the one who's giving you these LFOs, then it's like who, who made them up?** ... At least they're willing to answer questions like these. Cause you know, ... that really matters. **A lot [of the judges] said 'yes' ... but more said 'no'**. So, I mean, I can tell [you] the counties that said, 'yes!' [laughing at being able to list counties that considered LFOs 'essential.']. [Session 1 at 00:49:00]

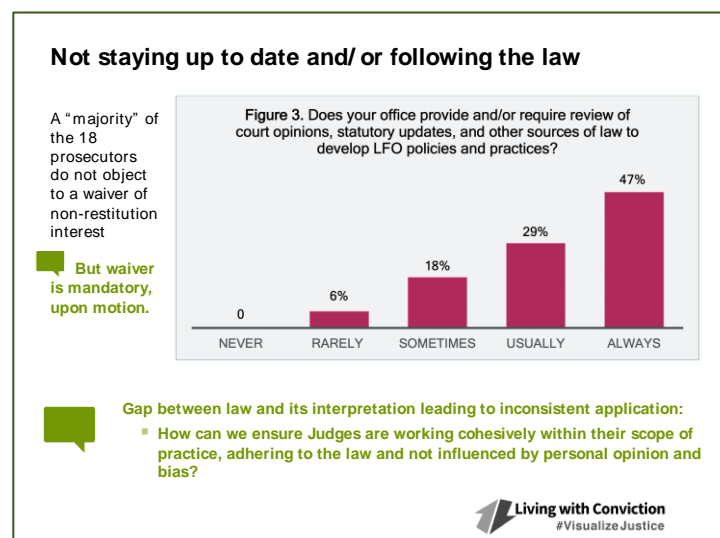
As the discussion wound down, the team shared that the Consortium did invite and listened to a Living with Conviction panel of impacted individuals during one of their regular meetings, as well as during the 2018 Washington State Supreme Court Symposium.⁷

Underlying these discussions seemed to be a deep disappointment that people with LFOs were not also surveyed – along with skepticism about the usefulness of the information collected.

2.2 System Actors' Knowledge of the Law

Some survey results were disturbing to participants, in that the results reflect system actors' lack of knowledge of LFO law, or worse, an unwillingness to follow the law.

For example, the Report noted that, a “majority” of the 18 prosecutors who responded to the survey indicated that they did not object to a waiver of non-restitution interest.⁸ For the LwC trainers, this was an unexpected response from prosecutors, because the trainers know that it is mandatory for the court to waive such interest upon a properly filed motion and would expect prosecutors – and judges – to know that as well. One person recalled, “When we started filing these motions [for a waiver of non-restitution interest], there were judges saying, ‘well, if you make two or three good payments, then I'll waive the rest.’ And we're just like, no, it says ‘shall’ – you *shall* do



⁷ Washington State Supreme Court Symposium 2018, *Legal Financial Obligations (LFOs): Beyond Defining the Problem; Advancing Solutions*

⁸ Report, Fig. 3 at 9.

this? So it's definitely been a little bit of a challenge here with the interpretation of the law.”
[Session 1 at 00:49:18]

Similarly, participants also expressed disappointment in data indicating that only 47% of prosecutor’s offices provide or require review of potential changes in LFO law. They recognize that under such circumstances their access to justice may be undermined.

2.3 LFO Tools for Judges

The team presented the tools that the Commission has created to help judges as they consider how much in LFOs to impose: LFO Bench Guides and the LFO Calculator. The team also explained that the judges’ use of these tools is voluntary. One person suggested that a research study compare over time the amount of LFOs imposed in jurisdictions where judges are using these tools with those where the judges are not using them.

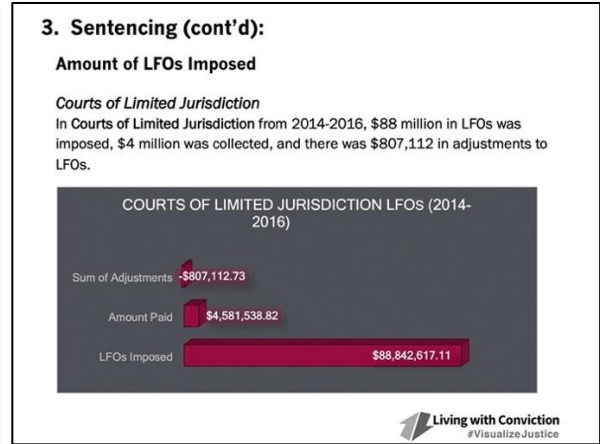
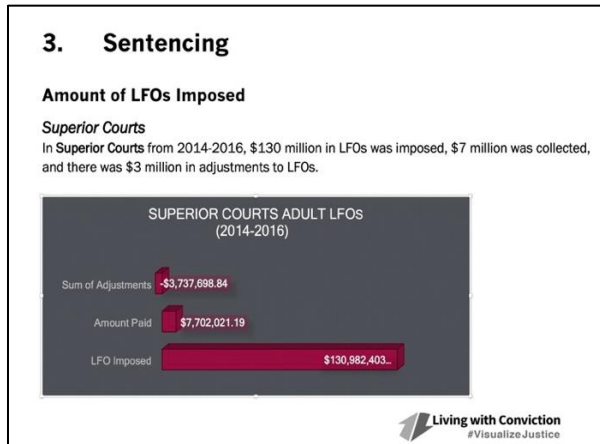
The team also shared data that 41% of judges indicated that they had used the LFO Calculator and the number one reason for not using it was that it takes too much time.⁹ One participant immediately asked: “I was wondering why the Supreme Court doesn't require them [the judges] to do it.” A conversation ensued about judicial independence, which they found to be dissatisfying when there is so much inconsistent application of LFO laws across counties. The team also brought up the new General Rule 39, which should help provide some level of consistency going forward.

2.4 Volume of LFOs Imposed and Collected

To provide financial context to the later discussion of priorities for reform, the team presented Consortium data on the amount of LFOs imposed by Washington courts as compared to the amounts paid and/or adjusted, for both superior courts and courts of limited jurisdiction. Noting that the data was a three-year snapshot, the team shared the following tables from the Report¹⁰:

⁹ Report at 16.

¹⁰ Id. at 20-21.



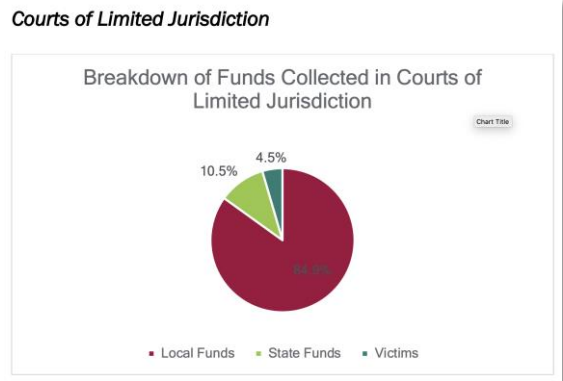
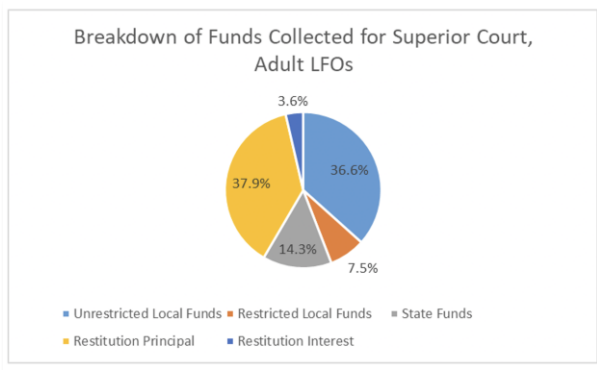
At the first session, these tables were met with shaking heads, and one person describing it as “insanity” because of the large disparity between amounts imposed and paid. One participant asked whether the “Sum of Adjustments” in the charts could possibly account for the difference between what is listed as the “Amount Paid” and “LFO imposed.” The answer was no – there is simply a lot of uncollected debt, which, as one participant noted, itself was costing money to attempt to collect. They shared an experience of going to an advocacy meeting that discussed how:

[It] was costing more to collect the LFOs, ... they weren’t making any money, it was actually costing the courts money, in incarcerating people, and bringing them back to court. [Session 2 at 01:05:00]

Though the group was interested in seeing more complete data than just three years, these tables presented an opportunity to highlight one of the major challenges faced by LFO reform advocates in Washington state that can be traced back to its non-unified court systems – namely, the difficulty of data collection across all the different courts in the state’s 39 counties.

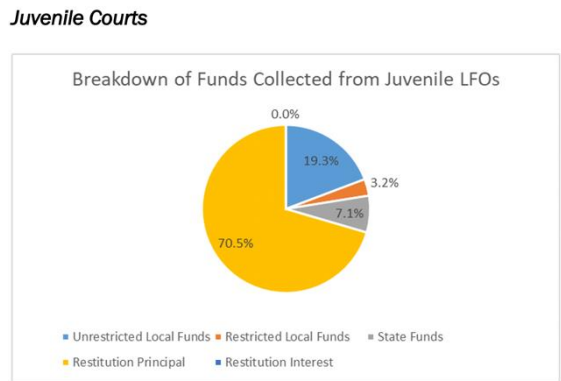
The Consortium also collected data on the amount and allocation of adult LFOs.¹¹ Presumably, “local” means allocation to county budgets, although that is not clear. “Restricted local funds” is also unclear.

¹¹ Report at 25-26.



Participants were gratified to see in the above charts that a relatively large portion of superior court LFOs collected were allocated to victim restitution. At the same time, however, they noted that an almost equal amount of superior court LFOs collected go to “unrestricted local funds.” They also noted that 84.9% of CLJ LFOs collected are allocated to local funds. They thus concluded that local jurisdictions are incentivized to impose even more LFOs to keep themselves funded and employed.

But when allocation of adult LFOs is compared to the allocation of juvenile LFOs, participants wished that 70.5% of adult LFOs similarly went to victim restitution. To them, a high percentage of LFOs allocated to restitution seems more appropriate and just than the varied allocation of LFOs as “unrestricted” funds allocated across several public budgets.



2.5 Poll Results about Having LFOs

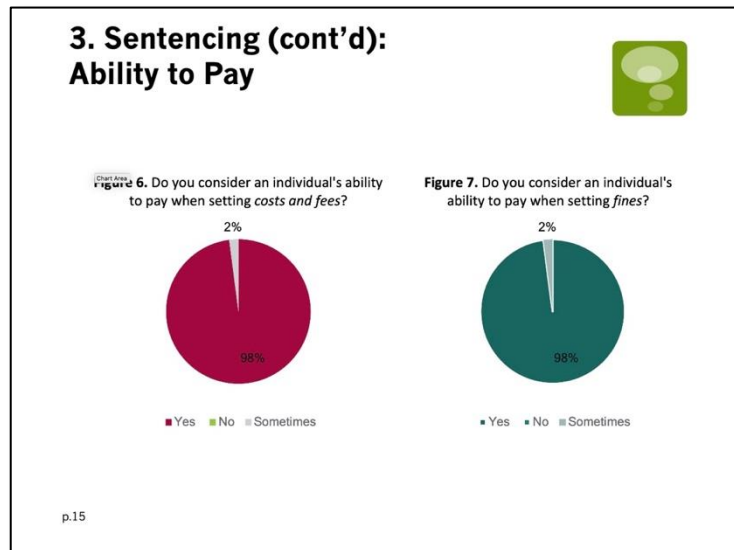
To LwC’s storytellers and trainers, the terms, “LFOs imposed” and “LFOs allocated” represent much more than numbers in a chart. A poll of participants indicated that 89 percent of participants owe or owed LFOs in Washington state. Four participants reported having (had) LFOs in just one county, three participants had LFOs in two counties, and two participants owe LFOs to five counties. One participant didn’t know if they owed LFOs.

3. Plea and Sentencing Stages

During the first two sessions, the team presented a summary of Consortium findings regarding: (1) ability-to-pay inquiries; (2) the role of plea bargaining in the imposition of LFOs; and (3) performing community service instead of paying LFOs. The team grouped them this way because all are related to specific parts of the criminal process – specifically, pleas and sentencing. By anchoring the discussions around these specific events in the participants’ lives, the team hoped to create conditions conducive to soliciting participants’ lived experiences.

3.1 Ability-to-Pay Inquiries

The team presented the following slide, depicting pie charts from the Consortium’s survey to judges about whether they consider a person’s ability to pay when imposing “costs and fees” as well as “fines.”¹² That 98 percent of judges answered “yes” they *do* consider “ability to pay” when imposing LFOs was met with a question. One person recalled the pre-sentencing summary prepared in their case for the judge involving questions of their employment, and other financial information, and then commented on the slide:



“I see here that they take it into consideration. But do they apply it?” [Session 1 at 01:10:00]

Another participant responded to the question this way:

[They] ignore it because there’s no way! I mean, when you’re a kid, they still impose these fines, knowing that you don’t have a job, knowing that you still live at home with your parents. ...

I don’t understand how they consider it when they know people are homeless out there. If you’re in jail, you don’t have a job. And most likely, ... for a crime to get some money because you don’t have that. [Session 1 at 01:11:12]

This incredulity at the judges’ meaningful consideration of “ability to pay” was met with vocal agreement, with another person sharing:

I feel like there’s this **illusion of justice** – where if people aren’t asking the right questions, then the right thing isn’t being done. [Session 1 at 01:11:25]

¹² Report at 18. The team wasn’t sure if the distinction between costs and fees (or “user” costs of the system), and fines (which are punitive), was a distinction that mattered – whether to the judges imposing or individuals living with and owing them. Participants didn’t have any opinions on the matter.

Also mentioned was what felt like a contradiction between the earlier survey question asked of judges about the reasons for imposing LFOs. As recalled by one participant, the judges' reasons for imposing LFOs included, among others, punishment, deterrence, and funding the court system; and yet here there is a near-unanimous claim by the judges that they consider 'ability to pay' at the time of sentencing. How can both, they wondered, be true?

Several related questions were raised: What exactly does this "consideration" of ability to pay consist of? How meaningful are these ability-to-pay inquiries in reality when the law says that ability to pay *should* matter when setting non-mandatory fines and fees, and yet the amounts imposed are what they are? And what about the inconsistent (and incorrect) application of the law revealed elsewhere in the Report and its supporting survey data?

Further skepticism was expressed by another participant, who pointed out that the survey data of defense attorneys contradicted judges' answers on the ability to pay. Specifically:

[M]ost judges mentioned that they consider someone's ability to pay when they're setting costs and fees and fines, but when they get to the defense attorneys, only 21% reported [that] the judges actually used the actual standards that are outlined for indigent people. [Session 2 at 01:07:08]

In sum, LwC participants were not optimistic about impacted persons' chances of having the ability-to-pay inquiry result in imposition of reduced LFOs, or that it would be applied consistently across the state of Washington. This is not surprising given their own lived experience with different judges using their discretion differently, and otherwise inconsistent application of the law.

3.1.1 Poll Results about LFO Information Provided at Sentencing

The team conducted a poll of participants asking what, if anything, they learned about LFOs at their sentencing hearing(s). Only one participant reported feeling fully informed about LFOs at their sentencing hearing – to include that they need to pay LFOs to fulfill the sentence, and that any unpaid debt would still be owing even after the other conditions of sentence were met. A majority of participants reported not knowing if they were advised about LFOs at their sentencing at all because, according to the multiple-choice answer picked by most: "the whole thing was a blur." The remaining three participants indicated that they don't recall LFOs being mentioned at all at their sentencing hearing(s) – let alone remember having participated in any "ability-to-pay" inquiry by the judge, or otherwise.

It bears repeating that all but one participant reported not absorbing any information about LFOs during their sentencing hearings. A similar sentiment is seen below in the information about plea bargaining and is also corroborated elsewhere by other LwC storytellers who did not participate in these sessions but have shared similar experiences.¹³

¹³ See stories shared on *Living with Conviction*, <https://www.livingwithconviction.org/>.

These lived experiences cannot be satisfactorily reconciled with the 98 percent of judges surveyed who reported always conducting ability-to-pay inquiries when imposing fines and fees.

3.2 Role of Plea Bargaining in the Imposition of LFOs

The team presented a slide featuring a few quotes from the Report¹⁴ and survey data¹⁵ to generate a discussion about the intersection of plea bargaining and the imposition of LFOs, as experienced by LwC participants.

The slide was presented with the background information that roughly 95 percent of criminal cases resolve by guilty plea,¹⁶ which, as supported by the shared survey quotes, likely involves an agreement to pay LFOs. It was not lost on the participants that common alternatives to prosecution (such as stipulated orders of continuance and deferred prosecutions, as mentioned in the slide) necessarily include full payment on LFOs – meaning someone without the ability to pay could not take advantage of these alternatives that avoid a criminal conviction. For a defendant who would otherwise qualify for one of these alternatives, the inability to pay LFOs has the real-world effect of criminalizing poverty.

In reading and discussing the quotes on this slide, participants shared feeling shuttled through a highly coercive system. In response to the question of how much participants felt like they understood about LFOs at the time of their pleas, one participant said:

I would have signed anything they'd given me! Yeah, I would have signed anything, because I had committed a crime and they told me those are my options. **I didn't know what I was signing.** ... And it was 10 to 12,000 dollars, and I paid almost 30 [thousand]. [Session 2 at 01:11:35]

After audible groans from the group, they explained:

¹⁴ Report at 27.

¹⁵ Report, Annex E, "Legal Financial Obligations Practices Survey Study, Subcommittee 1, 2019," Prosecutors, Q1, and Public Defense Q 14 (quote from Response #7).

¹⁶ See e.g., U.S. Bureau of Justice Assistance (BJA), United States Department of Justice, *Plea and Charge Bargaining: Research Summary*, January 24, 2011, at 1 and 3.

3. Sentencing (cont'd):

Role of Plea Bargaining in Imposition of LFOs

- 33% of prosecutors require LFOs as part of a plea bargain and **will withdraw the plea bargain if defense counsel asks to inquire about ability to pay.**
 - 66% said that they do not.
- "One defender noted that prosecutors will not ultimately dismiss cases settled by way of **deferred prosecutions** or stipulated orders of continuance [SOC] unless the defendant has paid all LFOs."
- "We frequently can't get a plea offer unless our clients agree that restitution includes insurance companies – even for damages that aren't directly related to the charged offense."
~ Public defender

Well, [I would have signed anything] because **they present it as a gift**, and they almost present it in the same way they present taking someone's parental rights away in my opinion. ... It's like, *do this*, or you know – **especially if you're a parent at the time, you'll sign anything to get done**. [Session 2 at 01:12:08]

Said another participant of their own experience with plea negotiations:

Yeah, you know, certainly **from my experience, it was extremely coercive**. You know, I had my first felony at 18, my last at 33. And it was all these, you know, 'you're looking at three to five years or five to eight years based upon your point system. Do you want to, you know, plead guilty?' I would, you know, and ... **I was a poor drug addict, homeless living on the streets**. So, you know, **of course I wanted to do the less time**. [Session 1 at 01:17:00]

Another participant agreed, noting that they also felt coerced¹⁷ by the prosecutors' practice of charging fewer counts up front, and then giving notice of the additional charges warranted by the facts that would be added, if a plea deal isn't reached:

They always threaten or coerce you into taking the plea bargains because they have their hold-back charges. So if you don't plead to this, this, or this, then they have all these other charges that they can get you with. **And then you'll be looking at like 10 years instead of just two years**. And then, you now, when you go into court in front of the judge and **they ask you if you've been threatened or coerced in any way, and of course you have to say no, when in fact you have**. And I think it, you know, it sucks – especially for somebody's first time ever getting in trouble and they don't know any different. It's pretty unfortunate. [Session 1 at 01:17:30]

Also, in relation to prosecutor practices, one participant expressed disbelief at the information contained in the first bullet – that prosecutors would use plea negotiations to stop impacted individuals from asking a judge to consider their ability to pay:

I think this is what I was most troubled by in the whole report, because it seems incredible – like, **really surprising that there's not some ethical standard** that doesn't let them do something like withdrawing a plea bargain just for asking about your ability to pay. [Session 2 at 01:12:37]

¹⁷ Here, participants are using the plain language definition of coercion, i.e., persuading someone to act in a certain way based on a threat. In so doing, they are challenging whether the legal standard surrounding a judge's acceptance of a plea – namely that it is made knowingly, voluntarily, and intelligently – is in fact met, given the coercive manner in which plea bargaining is experienced by justice-involved individuals.

As before, the team cautioned against drawing any firm conclusions about the overall practice of prosecutors in the state (recalling that only 18 prosecutors answered the survey) but concurred that the survey data included troubling signs that the law was not always being followed to the letter by the various system actors.

Regarding defense attorneys, participants did not speak favorably about their public defenders. Said one participant:

The **public defenders don't help you!** They have a **vested interest in you pleading out** and being done [with your case] as well. [Session 2 at 01:13:23]

Another participant agreed, and shared her experience of trying to hold out and not plead guilty, because she didn't want to lose her voting rights:

I was holding out signing but ... my lawyer, **my public defender, figured out that voting was important to me** because I was saying 'I can't [plead]. I've voted in every election!' So he said, 'well, what if we don't take away your voting rights?' and talked to the prosecutor. But **of course they took away my voting rights. But they got me to sign it with that.** It was like the 12th-hour pressure. [Session 2 at 01:14:00]

Many participants expressed extreme dismay at this participants' highly individualized coercive experience with plea negotiations.

3.2.1 Poll about Plea Offers Conditioned Upon Agreement to Pay LFOs

A poll was conducted in the third session about pleas conditioned on agreement to pay LFOs. The answers were mixed, with three participants reporting that yes, the plea offers they received were indeed conditioned on an agreement to pay LFOs; three said no, plea offers were not conditioned on payment of LFOs; and one reported not knowing one way or the other.

3.2.2 Link between Pleas, Incarceration, Lack of Reentry Services, and Public Health

While discussing plea bargaining, LwC's facilitator brought up a study that found a higher death rate within the first two weeks of being released from incarceration than in other times – thereby linking incarceration (and the various causes and entry points leading to that incarceration, including pleas) to a public health crisis that needs to be addressed. In response, one participant said:

I know! A few of my close friends who actually did a couple years and got out, **ended up getting killed.** It's crazy! The difference between that and some of them ended up going back in [to prison] within a couple weeks

or months, or some of them would 'make' it, you know what I mean?
[Session 1 at 01:20:00]

He went on to say that in his mind, reentry posed a significant issue:

But I feel like **the rehabilitation or the reentry from prison is no reentry**. They don't prepare you for release. ... But reentry is really important. ... **When you get out, you go and have to go back on your street smarts**, and you know, what you've learned. ... [But] **stuff from prison is completely different from the streets**. ... That's how people end up being killed because they think that you know, you can punch somebody because they know that the guards are there and they're not going to really want to fight you. **But on the streets, they'll shoot you because they've got gun permits**. A lot of people have concealed carry permits.
[Session 1 at 01:20:15]

Another participant agreed:

Reentry is definitely not a big thing in the institution.¹⁸ ... **I don't think they really want reentry programs** because if it wasn't for inmates, then they wouldn't have jobs. ... They would be like 'Nah, this is how I keep my job.' And **I have heard them say that when I was incarcerated. 'You're the reason why I keep my job.'**

But how does that look? How would that go for me? ... I look at it like, well, you know what, that's fine and dandy. You can keep your job, but **I'm not going to be the reason why you keep your job because I'm not coming back**. ... But then there's other people that ... don't have that strength within themselves. [Session 1 at 01:23:17]

The same participant went on to suggest that the design of reentry services should include more impacted voices when decisions about monetary allocations are made. This point was picked up by another person, who agreed:

Absolutely. We need to disrupt that harmful narrative where, you know, **the system continues to pay itself**. [Session 1 at 01:25:18]

In sum, LwC participants felt strongly that plea negotiations as they experienced them amounted to a coercive process that resulted in their incarceration. That plea process could not be discussed separately from the real-world consequences of that plea, which meant serving time at a DOC facility. LwC participants reported not receiving help or preparation as they were being released. To the contrary, their experiences have led them to believe that the system itself is structured to keep impacted individuals tethered to it.

¹⁸ The participant is referring to the prisons run by the Department of Corrections (DOC).

For those without the money to pay their LFOs and receive the benefit of an alternative to prosecution, the length of time they are “tethered” to the system becomes far longer than those wealthy enough to simply meet those financial obligations at the outset. Thus, one’s income (or lack thereof) can determine the type and the length of involvement with the criminal justice system – with more potential for jail time for those unable to meet the LFO obligations of their sentence, and all the ensuing destabilizing stress and trauma involved with incarceration and threats thereof.

3.3 Community Service Instead of LFOs

The team presented a slide that included survey respondents’ quotes about imposing community service instead of LFOs.¹⁹

The team cautioned, as before, that these views cannot be ascribed to all judges, defense attorneys and prosecutors, but were nonetheless a starting point to generate a discussion about their own views of community service.

4. Community Service instead of LFOs

Judges:	Public defenders:	Prosecutors :
<ul style="list-style-type: none"> • “Nearly everyone has the ability to do some community restitution except for the disabled so that is what I give them and most everyone appreciates that approach too. If the amount is too <u>high</u> I usually cut the amount in half also.” 	<ul style="list-style-type: none"> • “A few defenders wrote that the courts where they appear impose community service in lieu of LFOs.” 	<ul style="list-style-type: none"> • 44% report office supports offer of community service as an alternative to LFOs • “Community service in lieu of LFOs was only effective in juvenile cases, and that ‘most adults would rather work and get paid and pay their [LFOs], than do community service instead of getting paid.’”

In response to the first quote, one person drew attention to what appeared to be a disconnect and/or lack of understanding on the part of the judge as to what community service entailed:

To assume that, you know, people who carry the burden of poverty also want to go and work for free or have the means to do so. And if they have children – **who’s watching the children? What about transportation?** You know, they’re more than likely homeless, sometimes indigent, and you know, from reading this, that **the judge thinks that he’s doing them a favor**, you know, by allowing them to do community restitution. [Session 2 at 01:19:06]

One participant detailed his extremely frustrating experience trying to do community service on a Driving While License Suspended (DWLS) 3 conviction:

¹⁹ See Report, Appendix E, Q 20 (Response #2); Report at 26 (subsection “Enforcement and Alternatives”) and at 28 (subsection “Perspectives on Court Practices”).

I've only had one opportunity to do community service. ... I ended up **getting locked up for it twice** because I couldn't find a place to do the community service hours. And then I finally asked them where I could do it. And they were like, 'contact the court clerk.' And then the court clerk gave me a list of places and I called all the places and none of the places did it.

... I walked down to the Salvation Army and that's where I actually did the community service for them, but it took me a while. ... I had to go in front of [the judge] like two times after that ... when he said 'Look, this is the last time. **If you can't do it, we're just going to convert it to jail time.**' And I'm like, dang, [because] it was a bunch of hours, like **20 days**. [Session 1 at 01:28:53]

Thus, a sentence that began supposedly lighter and easier turned dire with the prospect of 20 days in jail, all for an underlying DWLS charge. He was not alone in feeling the stress of facing jail time resulting from what began as a community service obligation.

Another participant described her experience with community service as follows:

I know, when I was sentenced to community service in lieu of paying LFOs – well, I still had LFOs because there's some that they just put on there. But the community service – **if you don't complete the community service, that's another entryway back into the justice system of probation violation**. And there wasn't one time through my multiple years of incarceration through parole and probation that I was ever able to complete probation successfully because of multiple violations because of issues such as this. [Session 2 at 01:20:41]

Another participant agreed it was difficult to complete community service, in addition to helping her son also complete his own community service hours:

For community service with my oldest, I had to drive him every Saturday, I think, for like four or five months, an hour away and go pick him up, just so he could get clear and start working again.

And on mine, **I was never ever able to successfully finish my community service**. ... I was doing the work of what the Parks Department was doing, and they were getting paid way more an hour. So **they don't give you comparable wages** if they do offer it. [Session 2 at 01:23:12]

The discussion of competitive wages for community service work turned to a discussion of the surprising lack of safety one participant encountered in her own community service work:

In taking down old Bremerton City Hall, **they wanted us to tear out asbestos without telling anyone, with no protection.** They would just tell everyone ‘go in this room, stay there, throw the stuff out the window.’ [Session 2 at 01:24:42]

Another followed up with her own experience in community service, witnessing a friend die while doing highway cleanup community service together. She went on to say:

They put people in extremely dangerous situations without care or caution for their health or their wellbeing, and they’re just expected to work and **it’s so dehumanizing.** [Session 2 at 01:25:17]

Finally, one participant shared how she asked the judge to convert her LFOs to jail time just so that she could put them behind her and move on:

I actually requested to do jail time for my LFO's. Like I asked them, ‘can I come in on a Friday and get released on a Sunday so I can make it back to work?’ [Session 1, 1:38:09]

The judge denied her request to convert LFOs to jailtime.

3.3.1 Poll about Community Service

A poll was conducted about whether LwC participants preferred the option of community service instead of paying LFOs as a monetary debt. A vast majority of the participants (8/9) said yes, they preferred having the option, while one said no. Although a limited sample size, from this, we can see that the option itself is appreciated, but as indicated by the discussion above, participants had many more nuanced thoughts on the topic. These ideas continued during the discussion about recommendations for reform.

4. Post-Conviction Stages

During the first two sessions, the team presented a summary of Consortium findings on the post-conviction phase, including: (1) reduction/remission of LFOs; (2) collection of LFO payments; and (3) failure to pay.

4.1 Reduction / Remission of LFOs

The surveys asked system actors several questions about post-conviction reduction/remission of LFOs. Although the surveys did not ask each group the same questions, the team collated related answers²⁰ and presented, as an example, this summary:

²⁰ Report, Annex E, State Judges Qs 19, 18, Defense Attorneys Qs 16, Q18, Prosecutors Q20; Report at 10.

Judges	Public Defense	Prosecutors
<ul style="list-style-type: none"> •20% inform defendants at sentencing about rights regarding remission •51% have formal v. 49% informal [remission] process 	<ul style="list-style-type: none"> •84% said no clear remission process; a few didn't know what remission was •79% said they do not represent their clients for remission 	<ul style="list-style-type: none"> •44% "always or usually" appear at remission hearings, 31% "never or rarely appear" •"Some" object to a request for a waiver of non-restitution interest

Several participants are well-versed in LFO law and procedure for requesting a reduction of their LFOs, because they have attended trainings on that law and procedure, gone through the process for their own LFOs, and/or have trained many peers on the same over the last year. They all agreed about the degree of inconsistency in remission procedures across counties. They also asserted that such inconsistency undermines their right to access justice for a waiver of non-restitution interest and to request a reduction based on a showing of manifest hardship.

There was agreement that this right, and the process for realizing this right, is an area where, "we [LwC] can put a lot of energy and awareness and education behind," including advocating for superior court websites to be updated to provide information about the right to request relief and that information be included on superior court invoices. This latter part is an activity under a current Legal Foundation of Washington grant to LwC.

Several participants commented on the degree to which the staff in clerk's offices were a help or hindrance to their efforts to relieve their LFO burden. For example,

I did all of my stuff [request waiver/reduction] in [XXX] County. . . . So I **didn't really have any issues with them. They were all very helpful.** One thing that I found interesting though, is when we went to buy our house and I had to pay off money that my husband or I still owed to the court, I went and got one of those bank checks and gave it to them. And then a couple months later, I actually got most of that money back. So I don't know what they did, or they may have miscalculated their stuff on how much we owed, but yeah, I actually ended up getting almost all of it back. It was over \$3,000. [Session 2 at 01:43:45]

Another participant shared a different experience in a county on the other side of the state:

I called [the clerk's office] for myself once a long time ago. And I also called recently for some family to county clerks. . . . I think **a lot of the people that work in the county clerk offices are really misinformed**

about what's required to get a waiver for [non-restitution] interest because all of them thought that you had to have the entire principal paid to get a waiver, you know? And then so then I was like, well, actually that's not true. [Session 2 at 01:41:58]

4.2 LFO Collection Practices

Participants had much to share about LFO collection practices and the impacts of those practices. There was overwhelming agreement that paying off LFOs, particularly immediately following release from prison, was difficult, if not impossible. For example, said one participant about her financial situation upon release: “When I was first out, I could barely survive.” [Session 3, chat at 13:26:55] “Money is hard to come by,” said another. [Session 3, chat at 13:28:00]

Yet even for those who manage to secure decent employment and begin building wealth following incarceration, those owing LFOs are met with a system of disincentives and barriers to stability.

Holding bank accounts with money in them opens the door to wages being garnished. For someone living check-to-check, deciding whether to pay rent or buy food, learning their bank account was garnished – after the fact – is devastating.

Another participant shared the kindness she experienced from a teller at her bank, who held back the direct deposit of her paycheck until after the garnishment happened:

I only had \$200 in the bank and it was payday. [The teller] didn't post the deposit until they garnished me. So they only took \$200. It was beautiful. ... The reason I mentioned that is just that **regular layman people who aren't dealing with this, they get how messed up it is**. She [the teller] didn't have to do that. [Session 3 at 01:59:07]

Another offered the following advice (notably *not* conducive to job growth or stability):

What you do [to avoid garnishment] is you **job hop**, you take some job, and you try to get through a couple of paydays and then you try to go somewhere else ... because it takes them a minute. Yeah, yeah. [Session 3 at 02:01:12]

This advice did not sit well with another participant, who said that she understood this point of view, but that she is at a point where she wants to keep the job she has, observing:

I'm at the point where I just don't want to do that [quit]. No, especially when I'm making good money, [so] I just have to suffer [being garnished]. [Session 3 at 02:02:04]

People with LFOs also are disincentivized to own their own homes because the state will put liens on any real property they try to purchase.

I can't put my house in my name, period. I have to have it in my dad's name ... It's like, do I give the state control of my home? Or do I just keep it in my parent's name? I just keep it in my parents' names. That's just not cool. It's like, I'm not gaining anything for me. It's like, I'm consistently going backwards. It's like sometimes, honestly **I just feel like they're ripping my soul out**, because I get so angry. ... I always tell my children consistently, ... like, do not let these people have control of your life. Like how they have control of mine. [Session 3 at 02:11:00]

And because few people have the means to pay off their LFOs – thereby allowing them to qualify for a mortgage – the most common means of building generational wealth in this country is not available to the vast majority of this population.

Participants also expressed their frustration in that trying to pay down LFO debt in one county exposes them to other counties' more aggressive collections. They assert that it is detrimental to start paying because they are now on all clerks' radars:

For people who have never made a payment there, they're not even on the radar of the county clerks. **It's once you make a payment and so you intend to pay, then they come after you relentlessly.** I've known people that have never made a payment on over a \$100,000 in LFOs that are skirting by. But now they want to get their rights back, they want to get their records expunged and stuff. But they're afraid if they start, if they ask for a summary of their LFOs, to ask for a waiver that people are, you know, 'Hey, it's been 15 years, you haven't made a payment,' so **it's a double-edged sword.** [Session 1 at 00:52:00]

Another person who attended a LFO Reconsideration Day had this to share:

But when I was filling out the paperwork, I told the attorney, I don't even want to give you guys my address. She said why? I said, because **if I open up this door, do you understand how many other counties is getting ready to know where I live at and start contacting me?** So [they] said, if you want the help, you have to do this. This is you starting to close your background. I was like, but damn, you don't understand how many counties I have, they gonna start coming for me. And so gradually, but willingly, I did do it because I wanted to have ... County taken care of. I'm trying to get that taken care of, but there's so many other counties, so I can just imagine what's getting ready to happen. But you are right. People don't pay them because for that reason right there. [Session 1 at 00:52:13]

Other participants nodded in agreement with this experience.

The issue of trying to pay off one county and then another county learns of your address and starts garnishing your wages is a disincentive to come forward and pay. A unified payment system accessible to all counties would be useful. A person trying to pay down debt in one county should not be penalized by another county at the same time.

Summing it up, one participant put it this way:

So my theory and how I think about is that, okay, I went to prison ... Yes, I know what I did wrong. I acknowledged that, I went to prison. I did everything I needed to do. ... When do you take us being – we got out, and we’re being productive citizens in the community. We’re not committing crimes anymore. We’re doing what we need to do. We’re paying taxes, we’re doing everything right. **When is it, ... where’s the end? Where does it end?** [Session 3 at 02:05:03].

Finally, the mental health consequences of trying to pay off LFOs, with the threat of reincarceration hanging over them is profound. Explained one participant:

Don't, don't forget to add the cost of your mental health. Cause it **definitely disturbs any type of peace that you have**. Like if you have, if you have peace knowing that you did something good, like got a good job. Once they take that, **once they garnish that first check, they take all that peace of, of knowing that you got a good job. It’s out the window. Now you're in survival mode**. And then that's when everything else kicks in, like how can I, how can I beat the system? ... **The price comes with your mental health, your mental peace**, ... It's crazy. [Session 3 at 02:09:33]

For more on the personal impacts of LFO collections, see www.LivingwithConviction.org.

4.3 Failure to Pay

The team presented survey results from prosecutors to the question: “Under what circumstances will you request that the court impose jail time when a defendant repeatedly (or willfully) fails to pay or refuses to pay?”²¹ One participant immediately responded that many of us “are certainly familiar” with the issue of failure to pay.

Regarding the first bullet point on the slide, where 41% of prosecutors say that they make this request [for jail time] when the defendant repeatedly or willfully fails to pay or refuses to pay:²²

²¹ Report, Annex E, Prosecutors Q23.

²² Report at 11.

5. Post-Conviction: Failure to Pay



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Survey question: “Under what circumstances will you request that the court impose jail time for a defendant who has failed to pay their LFOs?”

- “41% of prosecutors say they make this request [for jailtime] when the defendant repeatedly (or willfully) fails to pay, or refuses to pay.”
- “12% answered that they never make a request for jail time, and instead simply charge criminal contempt charges which may result in jail time.”
- “59% reported that they work with the clerk’s office regarding LFOs, and explained that the clerk’s office monitors and assesses payments and provides notification when defendants are delinquent on their payments.”



“[T]here's just so much concern in that terminology there – ‘repeatedly or willfully’ – nobody is willfully or repeatedly failing to pay their bills and stuff. **Most people want to pay, right?** It's just, if you are living in poverty, how do you, sometimes **you don't know if you're buying food or paying your rent some months.**” [Session 1 at 01:40:00]

The team’s concern with that survey question was that “repeatedly” failing to pay does not have the

same legal significance as “willfully” failing to pay. Equating them in this way suggests an incorrect understanding of the law.

In response to the third bullet about being delinquent on payments,²³ a participant shared,

[W]e know that in some counties, when those delinquent notices go out, we often are forced back into court or told if we don't make a payment, we're going to go to jail. And so, there's a **sense of urgency and fear** around that. [Session 2 at 01:40:40]

Once the group started talking about the clerk’s offices, many participants had comments:

- “It's like, they [the clerks] run it. I feel like **the clerks do a lot more than people know or understand**, so it's always wise to be nice to the clerk [laughing] because they're . . . , they can be ruthless. I feel like they could be ruthless. Like I wouldn't, I wouldn't doubt if they had the ability to put out a warrant on you.” [Session 1 at 01:41:19]
- “When it comes down to **the clerk**, I feel like they definitely make the decision, [like] the judge. So the clerk's for me, it's **ultimately the judge without the gavel and the robe**, ... because one time, I was late for court and it was the court clerk who decided to say, ‘oh no, we're going to uphold this warrant and still detain her.’ And we're going to feel the pain. And on top of that, I had both my kids with me. So yeah. I mean, the judge said not one word, and I looked at him and ... I came, you know? It would be different if I didn't come to court, but I did show up still. And she was like, nope, you know, and he agreed with her, and I was just like, yeah. [Session 1 at 01:43:00]

²³ Report at 11.

The possibility of reincarceration hangs over the head of each person who cannot afford to pay off their LFOs, despite it being considered a “civil” debt. This threat feels much more immediate among people who have low-paying jobs and limited incomes, no matter how much progress they have made upon release. In this way, poverty is criminalized.

The overarching takeaway from this issue, from the perspective of those who have lived with or continue to live with LFOs, is that Washington State runs a perverse system of LFOs. The system disproportionately punishes the poor, keeping them under lifetime court supervision; and disincentivizes people from trying to be productive members of society and building wealth for themselves and their families.

We can do better.

5. Recommendations of LwC Storytellers and Trainers

Below are LwC storyteller and trainer recommendations categorized as follows: (1) reduce barriers to LFO remission; (2) reduce barriers to paying off LFOs; (3) reduce amount of LFOs imposed; and (4) conduct additional research. Serving merely in a supporting role, LwC’s attorneys did not contribute to the generation of this list but did provide context or justification for these recommendations.

1. REDUCE BARRIERS TO LFO REMISSION

1.1 Educate people with LFOs about their rights to relief and the process. Although the 2018 LFO reforms were a step in the right direction, there was no budget allocation for public education and no entity tasked with monitoring implementation and reporting back to the legislature.

To that end,

- **Leverage the Department of Corrections and court communication channels currently in place**, such as including information about the right to relief during community custody, in LFO invoices, on superior court websites, and in emails that clerks’ offices send to people with LFOs (a few counties send email LFO payment reminders), to name a few.
- **Support expansion of LwC’s Legal Empowerment Program to all counties in Washington State**, including promoting the use of LwC’s Justice in Motion app by people with LFOs. Like TurboTax, LwC’s LFO app is an online guided interview that helps an impacted individual to: (1) generate the required court documents for requesting LFO relief based on the 2018 reforms; and (2) understand the process for filing and defending the motion in different counties across the state.

- 1.2 Encourage system actors to grant LFO relief made possible by the law.** To that end, educate them on existing laws of mandatory interest waivers and discretionary remission made available in 2018, as well as LFO law that has existed but not always been followed, i.e., that a court must find ‘means to pay’ before imposing discretionary LFOs on a defendant who suffers from a diagnosed mental health condition that prevents them from being employed. RCW 9.94A.777.
- 1.3 Advocate for court promotion of LwC’s Justice in Motion LFO app.** Because some counties have not even set up a process for LFO remission, there is a ripe opportunity to advocate that courts make the process as easy as possible, like in King and Whitman counties, where completed motions can be submitted by email.
- 1.4 Advocate for creation of an AOC-approved form for reduction of LFOs.** Newly adopted General Rule 39(d) on Remission of LFOs mandates the use of AOC forms for requests of LFO remission, and yet the one AOC-approved form related to LFOs contains only a request for a waiver of non-restitution interest. Notably, it does *not* include what would be required to properly file a reduction of discretionary LFOs (based on an argument of “manifest hardship” following the legally required findings that the person is no longer in custody and not in contumacious default).

2. REDUCE BARRIERS TO PAYING OFF LFOS

- 2.1 Treat LFOs like student loan debt.** Use income-driven repayment plans and offer forbearance and deferment options, such as while in college. The system calls it a “civil debt” (notably not triggering an individual’s constitutional right to an attorney), so it should be treated as such.

Participant 1: “I think it should be like student loan collecting. You shouldn't have to pay until you're capable of paying.”

Participant 2: “Like a percentage of your income or something like that.”

Participant 1: “Correct. Like income-driven repayment plans, like student loans have. ... Deferment and forbearance.” [Session 3 at 00:31:00]

- 2.2 Change penalties, including prohibiting incarceration for nonpayment.** Stop the use of bench warrants to compel appearance at noncompliance hearings when the only violation is failure to pay LFOs. Again, it is considered a civil debt. Said one participant, “And it’s stupid, too. It costs them money to incarcerate people that it doesn’t bring back.” [Session 3 at 00:38:03].

- 2.3 Offer alternatives to financial payments or community service** that meet the goals of the justice system / payment alternatives, but do so with an awareness that treatment, EHM, UAs and other common alternative conditions of a sentence cost money that a poor person will be unable to pay. After one participant stated this recommendation, another said,

“I was going to say something like that, ... like payment alternatives, right? Because it's like, you take so much money from, from folks that already did their time and then it kind of puts them in a bind to possibly do some more sketchy stuff. You know what I mean? Yeah. It's hard. It's like a continuing hardship. ... So if there were other ways to, to satisfy the court, but still not, not killing us to make the payment or stressing us or putting us in more potential to get in trouble for it, you know? [Session 3 at 00:42:58]

- 2.4 Consolidate payment systems across the state**, so that there is only one central billing system, thus reducing the number of jurisdictions simultaneously billing, processing payments, and garnishing. Once operationalized, this system will reduce collection costs. In addition, when a person makes payments toward LFOs in one county, other counties can see that, and the system should favorably consider that person paying toward their LFOs.
- 2.5 Regulate and reduce excessive collection agency fees**, particularly given that by contract with the state, collection agencies can charge an additional 19% to 50% interest without undertaking an ability-to-pay inquiry.²⁴
- 2.6 Increase flexibility as to community service, protect the workers, and credit a fair wage.** Broaden the scope of what is considered community service to include work study and other activities that build a person’s capacity for being a productive member of society. Protect people doing community service by requiring that safety standards be followed. Credit a fair market wage for the community service work being done.

3. REDUCE AMOUNT OF LFOS IMPOSED

- 3.1 Advocate for a sliding scale VPA and other mandatory LFOs so that indigent people aren’t ever ordered to pay more than \$100.** For someone who is indigent, paying \$100 already is crippling, and the money likely won’t be collected anyway – resulting instead in jail time or other sanctions for violating the terms of a sentence. Wealthier individuals

²⁴ Report, Annex H, Adamson, B.H., *Debt Bondage: How Private Collection Agencies Keep the Formerly Incarcerated Tethered to the Criminal Justice System* (2019).

could pay as much as \$1,000 to make up some of the difference on the clerk's balance sheets. In this way, more money will likely make it into the state's coffers as a result.

Participants know that something similar has already been passed by the legislature, as in RCW 9.68A.105.²⁵ Notably, section (1)(b) authorizes lowering a mandatory assessment by 2/3 for some sex crimes following a court's finding that the person lacks the ability to pay.

- 3.2 Advocate for an end to plea offers and alternatives to prosecution conditioned upon payment of LFOs.** By conditioning offers of deferred prosecutions and other procedural delays of the proceedings that allow time for the completion of conditions toward dismissal of charges, the promise of a clean record is only available to those who can buy it by paying their LFOs. Participants shared heart wrenching stories about the pain and coercion they felt at the time of their pleas. The fact that roughly 95 percent of criminal cases resolve by plea adds tremendous urgency to this recommendation.

4. CONDUCT MORE RESEARCH

- 4.1 Survey people with LFOs to understand their LFO-related experiences in the criminal justice system.**
- 4.2 Research the relationship between racial bias and LFO imposition at sentencing and/or post-conviction hearings.** The absence of such data is a significant omission of the Consortium's work. In addition to gathering and analyzing historical court data, another effective way of doing this would be through a participatory LFO court-monitoring program.²⁶
- 4.3 Research whether LFOs are serving their legislative purpose.** Determine if this system is doing what it is intended to do.
- 4.4 Research the issues surrounding LFOs through the field of economics.** Employing economic methods of analysis could shed much-needed light on the issues surrounding LFOs.

Finally, several participants requested the opportunity to meet with the Commission to directly share their lived experiences related to these recommendations.

²⁵ See Report, fn. 9.

²⁶ See e.g., Espinosa, D., *Feasibility Study: A Court Monitoring Program on Legal Financial Obligations in Washington State* (2017).