

Legislative Reforms for Washington State’s Criminal Monetary Penalties

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TABLE OF CONTENTS

I. INTRODUCTION	547
II. LEGAL FINANCIAL OBLIGATIONS AND THEIR ADVERSE IMPACTS.....	548
III. HISTORICAL RESPONSES TO LEGAL FINANCIAL OBLIGATIONS.....	554
A. <i>Litigation</i>	554
B. <i>Policy Recommendations</i>	557
C. <i>Legislation</i>	558
IV. LEGISLATIVE REFORMS FOR LEGAL FINANCIAL OBLIGATIONS.....	559
A. <i>Structured Amounts</i>	560
B. <i>Reduced Interest</i>	570
C. <i>Modification or Conversion</i>	571
D. <i>Fiscal Impact</i>	573
V. CONCLUSION.....	575
APPENDIX: DISCUSSION DRAFT OF PROPOSED LEGISLATION	576

I. INTRODUCTION

Balancing the present racial and ethnic disparities in Washington’s criminal justice system requires state legislators to carefully assess contributing factors and seriously consider sentencing reforms.¹ One contributing factor can be found in Washington’s laws governing criminal monetary penalties, known as legal financial obligations (“LFOs”).² Many have criticized LFOs as creating de facto debtors’ prisons that disproportionately impact racial and

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1. See MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 19 (2007), available at http://www.sentencingproject.org/doc/publications/rd_stateratesofincbyraceandethnicity.pdf (urging that policymakers’ efforts to reduce disproportionate incarceration rates “should include an assessment of the various factors contributing to disparity as well as an exploration of sentencing options”).

2. Task Force on Race & the Criminal Justice Sys., *Preliminary Report on Race and Washington’s Criminal Justice System*, 47 GONZ. L. REV. 251 (2012); see also KATHERINE A. BECKETT ET AL., WASH. STATE MINORITY & JUSTICE COMM’N, WASH. STATE SUPREME COURT, THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE 2 (2008), available at http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf.

ethnic minorities.³ These critics have also identified potential reforms but offered little practical guidance on how to implement them in Washington.⁴ As a complement to their work, this note offers a discussion draft of proposed legislation. Specifically, this note proposes that the Washington State Legislature alleviate the negative effects of LFOs by enacting legislation with four results: first, structuring the amount of nonrestitution LFOs to reflect the seriousness of the offense and the offender's ability to pay; second, repealing the interest accrual on nonrestitution LFOs; third, reducing the annual interest rate on restitution LFOs from twelve percent to six percent; and finally, empowering the sentencing court to modify or convert nonrestitution LFOs when the offender's financial circumstances change.

In Part II, this note explains the current law on LFOs and the challenges these standards present for criminal offenders and their families, especially racial and ethnic minorities. Part III explores the various historical responses to these problems, including the issues that have been litigated, the policy recommendations that have been made, and the legislative action that has resulted. Part IV proposes significant changes, explains their underlying policies, and considers how they would fit in with existing law. Part V concludes this note with a call for a comprehensive legislative response. The appendix sets forth a discussion draft of the proposed legislation.

II. LEGAL FINANCIAL OBLIGATIONS AND THEIR ADVERSE IMPACTS

An LFO is a debt arising from a superior court order to pay money in connection with a criminal case.⁵ Legal financial obligations include restitution, fines, fees, and costs.⁶ Restitution compensates crime victims for

3. E.g., AM. CIVIL LIBERTIES UNION, *IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS* 67-68, 81 (2010), available at http://www.aclu.org/files/assets/InForAPenny_web.pdf#page=80; ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, N.Y. UNIV. SCH. OF LAW, *CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY* 5 (2010), available at http://brennan.3cdn.net/c610802495d901dac3_76m6vqhpy.pdf; Ann K. Wagner, Comment, *The Conflict over Bearden v. Georgia in State Courts: Plea-Bargained Probation Terms and the Specter of Debtors' Prison*, 2010 U. CHI. LEGAL F. 383, 384; *WA Jails People for Court Debt; Experts Critical*, SEATTLE TIMES (May 24, 2009), http://seattletimes.nwsourc.com/html/localnews/2009257861_apwacourtfin.html. Even Governor Christine Gregoire expressed this criticism. David Postman & Andrew Garber, *Court: Felons Can't Vote Until Fines Paid*, SEATTLE TIMES (July 27, 2007), http://seattletimes.nwsourc.com/html/localnews/2003808209_felons27m.html.

4. See sources cited *supra* note 3; discussion *infra* Part III.B.

5. WASH. REV. CODE § 9.94A.030(30) (Supp. 2011).

6. *Id.*; Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL'Y 509, 509 (2011); R. Barry Ruback, *The Abolition of Fines and Fees: Not Proven and Not Compelling*, 10 CRIMINOLOGY & PUB. POL'Y 569, 570 (2011).

injury or damage, while fines penalize and deter criminal conduct.⁷ Fees and costs, on the other hand, reimburse the government's criminal justice expenditures.⁸ Additionally, restitution and fines are context-specific and vary to fit the particular wrongdoings or consequences involved.⁹ For example, Washington sentencing courts may, depending on the circumstances, order restitution up to double the amount of injury or damage.¹⁰ Courts may also impose fines up to \$1000 for misdemeanors, \$5000 for gross misdemeanors, \$10,000 for class C felonies, \$20,000 for class B felonies, and \$50,000 for class A felonies.¹¹ By contrast, fees and costs are more general in application and reflect an increasingly common policy determination that governments should privatize overheads by charging offenders for their involvement in the criminal justice system.¹²

To that end, Washington maintains one of the longest lists of fees and costs imposed on criminals in the United States.¹³ This list includes confinement costs, emergency response fees, bench warrant costs, extradition costs, crime lab analysis fees, public defender fees, deferred prosecution fees, jury fees, judgment and sentence fees, DNA database fees, local drug fund fees, and annual surcharges on unpaid LFOs.¹⁴ The future may bring even more fees and costs as Washington struggles to fund its judiciary.¹⁵ In addition to these fees

7. Beckett & Harris, *supra* note 6, at 510; Ruback, *supra* note 6.

8. Beckett & Harris, *supra* note 6, at 510; Ruback, *supra* note 6.

9. Beckett & Harris, *supra* note 6, at 510; Ruback, *supra* note 6.

10. WASH. REV. CODE § 9.94A.753(3), (5) (2010).

11. *Id.* § 9A.20.021(1)-(3) (Supp. 2011).

12. Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution*, 42 U. MICH. J.L. REFORM 323, 374 (2009); Traci R. Burch, *Fixing the Broken System of Financial Sanctions*, 10 CRIMINOLOGY & PUB. POL'Y 539, 539-40 (2011).

13. Adam Liptak, *Debt to Society Is Least of Costs for Ex-Convicts*, N.Y. TIMES (Feb. 23, 2006), <http://www.nytimes.com/2006/02/23/national/23fees.html>.

14. WASH. REV. CODE § 9.94A.030(30) (Supp. 2011) (including public defender fees in the definition of LFOs); *id.* § 9.94A.760(2) (setting a fifty dollar cost per day of confinement in state prisons and a \$100 cost per day in county jails); *id.* § 9.95.210(2) (providing for the actual cost of extradition); *id.* § 10.01.160(2) (2010) (providing a deferred prosecution fee of up to \$250, a pretrial supervision fee of up to \$150, and a bench warrant cost of up to \$100); *id.* § 36.18.016(3)(b) (setting a \$125 fee for six-person juries and a \$250 fee for twelve-person juries); *id.* § 36.18.016(29) (imposing a \$100 annual surcharge on unpaid LFOs); *id.* § 36.18.020(2)(h) (Supp. 2011) (setting a \$200 fee for each judgment and sentence); *id.* § 38.52.430 (2010) (providing an emergency response cost of up to \$1000); *id.* § 43.43.690(1) (setting a crime lab analysis fee of \$100 per offense); *id.* § 43.43.7541 (Supp. 2011) (setting a \$100 fee to collect biological samples for the state's DNA database); *id.* § 69.50.401 (2010) (including local drug funds in the definition of LFOs).

15. *See* Act of June 15, 2011, ch. 44, 2011 Wash. Sess. Laws 3708 (codified at WASH.

and costs, state law also mandates that offenders pay a victim penalty assessment of \$250 for misdemeanors and \$500 for gross misdemeanors and felonies.¹⁶ On top of what they pay the courts, offenders must also pay probationary and correctional departments for the costs of probation, parole, or community custody.¹⁷

Some LFOs may be ordered where the defendant is not actually convicted.¹⁸ However, most LFOs are ordered at sentencing along with other punishments, such as jail time, probation, community service, or treatment.¹⁹ Currently, sentencing courts may impose many LFOs without determining whether offenders are able to pay.²⁰ Once a court imposes LFOs, the offender must be set up on a monthly payment plan.²¹ Interest begins accruing on the date of conviction at an annual rate of twelve percent.²² Courts cannot defer this interest accrual during the period of incarceration.²³ Further, LFOs and their interest cannot be discharged in bankruptcy.²⁴ For offenses committed after June 30, 2000, the sentencing court may retain jurisdiction and enforce the

REV. CODE §§ 3.62.020, .060, 12.40.020, 36.18.018, .020, 43.79.505 (Supp. 2011)) (modifying the collection and allocation of court fees and costs to ensure the judiciary has adequate funding); H.R. 2081, 62d Leg., Reg. Sess. (Wash. 2011) (proposing to extend surcharges on court fees and costs to furnish the judiciary with additional funds).

16. WASH. REV. CODE § 7.68.035(1)(a) (Supp. 2011).

17. *Id.* § 9.94A.780(1)-(2) (Supp. 2011) (requiring offenders to pay the Department of Corrections the monthly fees it prescribes for supervision); *id.* § 9.95.214 (authorizing probation departments to assess monthly fees up to \$100); *id.* § 72.04A.120(1)-(2) (requiring offenders to pay the Department of Corrections the monthly fees it prescribes for parole).

18. WASH. REV. CODE § 10.01.160(1) (providing that, absent a conviction, courts may nonetheless impose deferred prosecution fees, pretrial supervision costs, and bench warrant costs, along with attendant clerk filing and court administration fees).

19. *Id.* §§ 9.92.010-.030, 9.94A.701-.703, .760(1), 9A.20.021 (2010 & Supp. 2011).

20. *See id.* § 9.94A.760(1) (Supp. 2011); *State v. Lyons*, No. 40369-2-II, 2011 WL 4374228, at *5 (Wash. Ct. App. Sept. 20, 2011). Generally, a sentencing court may impose costs only if it determines the offender has the means to pay them. *See* WASH. REV. CODE §§ 9.94A.760(2), 10.01.160(3). In practice, however, this standard is sometimes poorly applied so that indigent offenders still receive orders to pay costs they cannot afford. Interview with Breean Beggs, Att’y at Law, Paukert & Troppmann, PLLC, in Spokane, Wash. (Sept. 22, 2011); *e.g.*, *State v. Williams*, 828 P.2d 1158, 1160 & n.2 (Wash. Ct. App. 1992). As of recently, a sentencing court may not impose nonrestitution LFOs on an offender with a mental health condition without first evaluating the offender’s ability to pay. Act of Apr. 1, 2010, ch. 280, § 6(1), 2010 Wash. Sess. Laws 2229, 2231 (codified at WASH. REV. CODE § 9.94A.777(1) (2010)).

21. WASH. REV. CODE § 9.94A.760(1).

22. *Id.* §§ 4.56.110(4), 10.82.090(1), 19.52.020(1) (2010 & Supp. 2011).

23. *State v. Claypool*, 45 P.3d 609, 610 (Wash. Ct. App. 2002) (construing WASH. REV. CODE § 10.82.090 (2000)).

24. 11 U.S.C. § 523(a)(7) (Supp. IV 2010); *Kelly v. Robinson*, 479 U.S. 36, 50 (1986); *State v. Cunningham*, 69 P.3d 358, 358 (Wash. Ct. App. 2003).

judgment “until the obligation is completely satisfied, regardless of the statutory maximum for the crime.”²⁵

Once offenders get out of jail, they may apply for a waiver or reduction of the interest they have accrued on their LFOs.²⁶ In 2011, Washington enacted legislation to make it easier for offenders to obtain this form of relief.²⁷ Under the new standards, an offender must show a “hardship” to obtain a waiver of the interest that accrues during incarceration.²⁸ For the interest that accrues after release from confinement, the offender must show a “significant hardship.”²⁹ He or she must also have made at least fifteen payments during an eighteen-month period.³⁰ The interest on restitution, however, may not be waived, and may only be reduced if the offender pays the full principal.³¹

Under some circumstances, offenders may be jailed for failing to pay their LFOs.³² To impose that sanction, the sentencing court must find willful nonpayment or a lack of sufficient good faith efforts to pay, because it is unconstitutional to imprison individuals solely for their indigence.³³ In practice, however, this standard is poorly applied and courts often order offenders to serve jail time when they are, in fact, too poor to pay their LFOs.³⁴ This reality has led many to criticize criminal monetary penalties as creating de facto debtors’ prisons.³⁵ These criticisms are compounded by the high number of offenders who are bound by LFOs. In total, approximately 114,000 Washingtonians owe LFOs to the state.³⁶ Collectively, those individuals are

25. WASH. REV. CODE § 9.94A.760(4).

26. *Id.* § 10.82.090(2).

27. *See* Act of Apr. 18, 2011, ch. 106, § 2, 2011 Wash. Sess. Laws 942, 943 (codified at WASH. REV. CODE § 10.82.090 (Supp. 2011)).

28. *Id.* sec. 2, § 10.82.090(2)(a), 2011 Wash. Sess. Laws at 943.

29. *Id.* sec. 2, § 10.82.090(2)(c), 2011 Wash. Sess. Laws at 943.

30. *Id.*

31. *Id.* sec. 2, § 10.82.090(2)(b), 2011 Wash. Sess. Laws at 943.

32. *See* WASH. REV. CODE §§ 9.94A.633(1)(a), 10.82.030 (2010). Although one court has suggested this practice may be subject to the constraints of WASH. CONST. art I, § 17, *see* State v. Curry, 829 P.2d 166, 169 (Wash. 1992), that interpretation seems incorrect under prior case law and the history of the constitutional convention, *see* State v. Barklind, 557 P.2d 314, 318-19 (Wash. 1976); ROBERT F. UTTER & HUGH D. SPITZER, THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE 31 (2002).

33. State v. Nason, 233 P.3d 848, 851 (Wash. 2010).

34. Interview with Breean Beggs, *supra* note 20.

35. *E.g.*, AM. CIVIL LIBERTIES UNION, *supra* note 3, at 81; BANNON ET AL., *supra* note 3; Wagner, *supra* note 3; WA Jails People for Court Debt; Experts Critical, *supra* note 3; Postman & Garber, *supra* note 3.

36. Susan Kelleher, *Unpaid Court Costs Can Bring Cycle of Debt, Threat of Jail, ACLU Warns*, SEATTLE TIMES (Oct. 3, 2010), http://seattletimes.nwsourc.com/html/localnews/2013066985_debtor04m.html.

responsible for 450,792 LFO accounts.³⁷ King County alone holds 116,498 LFO accounts, whereas Pierce County holds 73,314 and Spokane County holds 33,331.³⁸ In dollar amounts, King County residents owe an estimated \$500 million compared to the \$125.5 million Spokane County residents owe.³⁹

Indeed, a vast percentage of offenders incarcerated in Washington have LFOs to pay.⁴⁰ For these individuals, the interest on LFOs is one of the biggest impediments to reentry because it can turn an otherwise modest obligation into a lifelong burden.⁴¹ Estimates show that, in Washington, the mean LFO assessment for a single conviction is \$2540 and the median is \$1347.⁴² Add the additional LFOs assessed by probationary or correctional departments and multiple convictions, and most offenders owe around \$7234.⁴³ At that level, and with the accumulation of interest, offenders who pay fifty dollars per month will still have debt thirty years later.⁴⁴ Offenders who can afford \$100 per month will pay off their LFOs in just over ten years.⁴⁵ But unfortunately, the majority of offenders are too poor to afford this amount.⁴⁶ As a result, most LFOs grow rather than shrink in the first few years after release from confinement.⁴⁷ Over time, LFOs and their interest exacerbate poverty by

37. JOEL MCALLISTER, WASH. ASS'N OF CNTY. OFFICIALS, FOR WASH. STATE ASS'N OF CNTY. CLERKS, 2010 REPORT TO THE WASHINGTON STATE LEGISLATURE ON THE FISCAL IMPACT OF ESSB 5990 app. tbl.14, at 23 (2010), available at http://www.wacounties.org/waco/Leg/2010-5990_Report.pdf.

38. *Id.* One source estimates that Spokane County's LFO cases increase by 2500 each year. See Jody Lawrence-Turner, *Debt to Society*, SPOKESMAN-REV., May 24, 2009, at A1, available at <http://www.spokesman.com/stories/2009/may/24/debt-to-society/>.

39. Kelleher, *supra* note 36; Lawrence-Turner, *supra* note 38.

40. See Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1773 tbl.4 (2010) [hereinafter Harris et al., *Drawing Blood from Stones*] (analyzing data sets provided in INTER-UNIV. CONSORTIUM FOR POLITICAL & SOC. RESEARCH, FOR BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, ICPSR STUDY NO. 4572, SURVEY OF INMATES IN STATE AND FEDERAL CORRECTIONAL FACILITIES, 2004 (2007), available at <http://dx.doi.org/10.3886/ICPSR04572.v1>).

41. AM. CIVIL LIBERTIES UNION, *supra* note 3, at 68; Kelleher, *supra* note 36.

42. BECKETT ET AL., *supra* note 2, at 19; Harris et al., *Drawing Blood from Stones*, *supra* note 40, at 1771. With the accumulation of interest, offenders who start with \$2540 in LFOs and pay twenty-five dollars per month will still have debt thirty years later. BECKETT ET AL., *supra* note 2, at 22.

43. Harris et al., *Drawing Blood from Stones*, *supra* note 40, at 1764, 1771, 1774.

44. *Id.* at 1776-77.

45. *Id.*

46. See AM. CIVIL LIBERTIES UNION, *supra* note 3, at 69; Kelleher, *supra* note 36; Liptak, *supra* note 13. Approximately eighty percent of persons charged with felonies are indigent. BECKETT ET AL., *supra* note 2, at 11; Beckett & Harris, *supra* note 6, at 516; Lawrence-Turner, *supra* note 38.

47. BECKETT ET AL., *supra* note 2, at 2, 20.

reducing available income and limiting access to employment, credit, transportation, and housing.⁴⁸ These effects, in turn, increase revocation and recidivism rates, keeping offenders embroiled in the criminal justice system.⁴⁹ As with other collateral consequences of crime, the adverse impacts of LFOs reverberate throughout family and social networks.⁵⁰ They also hit minority groups harder than other populations.⁵¹

It is now well recognized that Washington's criminal justice system suffers serious problems of racial and ethnic bias.⁵² In this context, LFOs have had a profoundly unfair impact on persons of color.⁵³ This may be due in part to the fact that racial and ethnic minorities are more likely to incur LFOs because they are disproportionately represented in Washington's criminal justice system.⁵⁴ Yet the issue is much more complicated than that. Even accounting for other pertinent legal factors, Hispanics receive significantly greater LFO assessments than whites.⁵⁵ This is especially true where Hispanics are convicted of drug crimes because, as data show, those crimes fit stereotypes regarding persons of color.⁵⁶ Thus, in these situations, the identity of the defendant and the type of the offense combine to produce higher LFO assessments.⁵⁷ But stereotypes about persons of color play a role in the sentencing of whites as well.⁵⁸ For example, whites convicted of drug crimes in counties with higher black or Hispanic populations receive higher LFO assessments than whites convicted of

48. *Id.* at 4-5; Harris et al., *Drawing Blood from Stones*, *supra* note 40, at 1756.

49. BECKETT ET AL., *supra* note 2, at 3; Harris et al., *Drawing Blood from Stones*, *supra* note 40, at 1756.

50. BECKETT ET AL., *supra* note 2, at 12, 44-45; Harris et al., *Drawing Blood from Stones*, *supra* note 40, at 1791.

51. Task Force on Race & the Criminal Justice Sys., *supra* note 2, at 275-77; *see also* BECKETT ET AL., *supra* note 2.

52. *See, e.g.*, *Farrakhan v. Gregoire*, 590 F.3d 989, 1012 (9th Cir. 2010) (finding sufficient evidence that "Washington's criminal justice system is infected with racial bias"), *rev'd en banc*, 623 F.3d 990.

53. *See* Task Force on Race & the Criminal Justice Sys., *supra* note 2, at 275-77; *see also* BECKETT ET AL., *supra* note 2; Alexes Harris et al., *Courtesy Stigma and Monetary Sanctions: Toward a Socio-Cultural Theory of Punishment*, 76 AM. SOC. REV. 234, 254-55 (2011) [hereinafter Harris et al., *Courtesy Stigma and Monetary Sanctions*].

54. *See* MAUER & KING, *supra* note 1, at 6 tbl.2; Harris et al., *Drawing Blood from Stones*, *supra* note 40, at 1760.

55. BECKETT ET AL., *supra* note 2; Harris et al., *Courtesy Stigma and Monetary Sanctions*, *supra* note 53.

56. Harris et al., *Courtesy Stigma and Monetary Sanctions*, *supra* note 53; *see also* BECKETT ET AL., *supra* note 2, at 29.

57. Harris et al., *Courtesy Stigma and Monetary Sanctions*, *supra* note 53; *see also* BECKETT ET AL., *supra* note 2, at 30, 33.

58. Harris et al., *Courtesy Stigma and Monetary Sanctions*, *supra* note 53.

other crimes.⁵⁹ Sociologists suggest these increased penalties result from the racially or ethnically charged stigmas that commonly accompany drug crimes—stigmas that “affect not only defendants whose ethnicity is consistent with the stereotype in question, but all defendants convicted of racially or ethnically stigmatized behavior.”⁶⁰

In response to these and other problems surrounding LFOs, some advocates, judges, and legislators have taken steps toward reform, with various results. The following section outlines these efforts and evaluates present prospects for reform.

III. HISTORICAL RESPONSES TO LEGAL FINANCIAL OBLIGATIONS

A. *Litigation*

To date, most constitutional challenges to Washington’s LFOs have failed. For example, in *State v. Curry*, a group of indigent offenders argued that the mandatory victim penalty assessment was unconstitutional, both on its face and as applied to them.⁶¹ Specifically, the offenders argued that the assessment impermissibly allowed sentencing courts to impose monetary penalties on offenders without first determining their ability to pay, and that it also impermissibly allowed the State to jail offenders solely for their indigence when they were, in fact, unable to pay.⁶² The Washington State Supreme Court upheld the assessment, reasoning two points in response: first, that under the Federal Constitution’s minimum standards, a sentencing court need not inquire into ability to pay until payment is actually sought; and second, that once payment is actually sought, there are enough procedural safeguards in place to ensure the State does not jail offenders solely for their indigence.⁶³

Further, in *State v. Barklind*, an offender contended that the sentencing court violated his constitutional right to counsel by requiring him to reimburse the state for his public defender’s fees.⁶⁴ The Washington State Supreme Court affirmed the order, concluding that it complied with all minimum safeguards required under the Federal Constitution, such as balancing the monetary obligation against the offender’s ability to pay.⁶⁵ In so holding, the supreme

59. *Id.*

60. *Id.* at 255.

61. *State v. Curry*, 829 P.2d 166, 168 (Wash. 1992).

62. *Id.* at 168-69.

63. *Id.* (relying on *Bearden v. Georgia*, 461 U.S. 660 (1983), *Williams v. Illinois*, 399 U.S. 235 (1970), and *United States v. Pagan*, 785 F.2d 378 (2d Cir. 1986)).

64. *State v. Barklind*, 557 P.2d 314, 316 (Wash. 1976).

65. *Id.* at 317-18 (relying on *Fuller v. Oregon*, 417 U.S. 40 (1974)).

court suggested that recoupment of attorney fees only chills the constitutional right to counsel when required as a precondition to initial appointment, or when imposed regardless of the offender's ability to pay.⁶⁶

Challenges to court findings of willful nonpayment have also proven unsuccessful. For example, in *State v. Bower*, the sentencing court ordered an offender to serve jail time after he failed to pay his LFOs and failed to demonstrate that his violation was not willful.⁶⁷ At his show-cause hearing, the offender claimed he lacked steady employment and had difficulty paying rent, but he did not present evidence of good faith efforts to meet his court-ordered obligations.⁶⁸ He also evaded the sentencing court's specific questions regarding his actual income.⁶⁹ The offender challenged the jail order, claiming the State could not imprison him for his indigence.⁷⁰ The Washington State Court of Appeals, Division I, clarified that when the State seeks sanctions for nonpayment, it initially must show noncompliance, but the offender must still show cause by presenting affirmative defenses as to why he or she should not be sanctioned.⁷¹ If, at that point, the sentencing court determines the offender's failure to pay was not willful, only then must it consider alternatives to jail, such as modifying the sentence to fit the offender's current ability to pay.⁷² But here, the sentencing court could order the offender to serve jail time because he failed to present affirmative defenses establishing why he should not have been sanctioned.⁷³ The court of appeals reasoned that "[p]overty does not automatically insulate a criminal defendant from punishment"—under the Federal Constitution's minimum standards, a finding of willfulness makes any person subject to incarceration for failing to pay his or her LFOs.⁷⁴

Litigation has also focused on the constitutionality of LFO collection practices. For example, in *State v. Nason*, the Washington State Supreme Court invalidated Spokane County's practice of issuing "auto-jail" orders, which required offenders to report to jail at a specified time and without a hearing if they failed to pay their LFOs.⁷⁵ There, the sentencing court ordered an

66. *Id.* at 316-18; *see also* *State v. Nickols*, No. 39508-8-II, 2010 WL 3064968, at *3 (Wash. Ct. App. Aug. 6, 2010) (applying *Barklind*, 557 P.2d at 316, 318).

67. *State v. Bower*, 823 P.2d 1171, 1173 (Wash. Ct. App. 1992).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 1174 (relying on *Bearden v. Georgia*, 461 U.S. 660 (1983)).

75. *State v. Nason*, 233 P.3d 848, 853 (Wash. 2010). In addition to what the *Nason* court described, other sources report that Spokane County procured offenders' consent to the auto-jail

offender to pay twenty-five dollars a month and to report to jail in five months if he failed to comply with that payment schedule.⁷⁶ The supreme court noted that, under the minimum safeguards of the Federal Constitution, due process precludes jailing offenders for nonpayment due to indigence, but permits doing so for willful refusal to pay or failure to make sufficient good faith efforts.⁷⁷ But in any case, the trial judge must inquire into the offender's financial status before imposing sanctions for nonpayment.⁷⁸ The court therefore struck down the auto-jail policy to the extent it omitted this inquiry.⁷⁹ Finally, the court rejected the argument that the time offenders serve in jail for nonpayment must be automatically credited toward their LFO balances.⁸⁰ *Nason* sparked subsequent litigation to compensate the class of offenders who were incarcerated under Spokane County's auto-jail policy.⁸¹

Together, these decisions indicate that when it comes to LFOs, Washington courts resist interpreting the state constitution as affording offenders any greater protections than does the Federal Constitution. Thus, solutions regarding LFOs must be legislative, not judicial.⁸²

orders by sending collections officers to visit them in jail and gather their signatures. *See* Meghann M. Cuniff, *Collection Method Triggers Lawsuit*, SPOKESMAN-REV., Dec. 15, 2010, at A5, available at <http://www.spokesman.com/stories/2010/dec/15/collection-method-triggers-lawsuit/>; Jody Lawrence-Turner, *Court Debtors Win with Ruling*, SPOKESMAN-REV., June 25, 2010, at A1, available at <http://www.spokesman.com/stories/2010/jun/25/court-debtors-win-with-ruling/>.

76. *Nason*, 233 P.3d at 850.

77. *Id.* at 851 (relying on *Bearden*, 461 U.S. at 668, 672-73).

78. *Id.* at 853 ("Before sanctions are imposed on an offender for failure to pay an LFO, a trial court must inquire into the offender's ability to pay. That inquiry must be at the 'the [sic] point of collection and when sanctions are sought for nonpayment.'" (citation omitted) (quoting *State v. Blank*, 930 P.2d 1213, 1220 (Wash. 1997))).

79. *Id.*

80. *Id.* at 852.

81. *See* Complaint for Violations of Civil Rights at 1-2, 8-9, *Orvis v. Spokane County*, No. 2:10-cv-00424-RMP (E.D. Wash. Dec. 3, 2010), ECF No. 1, available at http://media.spokesman.com/documents/2010/12/lawsuit_001.pdf.

82. Compare the foregoing case descriptions to litigation focusing on the collateral consequences of LFOs, such as long-term disenfranchisement of felons' voting rights. *E.g.*, *Madison v. State*, 163 P.3d 757 (Wash. 2007) (holding that it did not violate privileges and immunities to require felons to pay their LFOs as a condition to restoring their voting rights). These latter attempts at reform have been unsuccessful because, as one court noted, the solution ultimately lies with the legislature, not the judiciary. *Id.* at 773 ("It is the province of the legislature to determine the best policy approach for re-enfranchising Washington's felons."). Nonetheless, negative results in the courts may have helped garner enough political will to make some important recent changes in that area. *See* Act of May 4, 2009, ch. 325, § 5, 2009 Wash. Sess. Laws 1649, 1653 (codified at WASH. REV. CODE § 10.64.140(1)(c)-(e) (2010)) (provisionally restoring voting rights to felons upon release from confinement, but leaving room for later revocation if they fail to comply with their LFO payment schedules). Whether these

B. Policy Recommendations

In 2008, the Washington State Minority and Justice Commission proposed that Washington respond to the disparities in its criminal justice system by temporarily discontinuing all LFOs other than restitution and victim penalty assessments, canceling all interest accrual on these remaining LFOs, and providing options to convert these remaining LFOs to victim or community service obligations.⁸³ In 2010, the American Civil Liberties Union added the additional recommendations of discharging all nonrestitution LFOs once offenders make sufficient good faith efforts over a number of years, clarifying what evidence the State must present at show-cause hearings to demonstrate offenders' willful nonpayment, requiring sentencing courts to consider enumerated factors and evaluate offenders' ability to pay before imposing LFOs, and prescribing prophylactic rules that counties must employ when assessing and collecting LFOs.⁸⁴ Finally, academics have recently renewed their long-held support for replacing current monetary penalties with those that are structured to fit the seriousness of the offense and the offender's daily earnings.⁸⁵

These recommendations are bolstered by general calls for reform from national groups like the Brennan Center for Justice and the Council of State Governments Justice Center.⁸⁶ Nonetheless, proposals of this kind have historically made only limited impact, as the legislature and the electorate generally considered them too "soft on crime."⁸⁷ But the legislature recently took action that may mark the slow beginnings of change.⁸⁸

reforms are enough remains open to question, but they still yield inspiring prospects for the future. See Nicolas L. Martinez, Legislative Note, *Debt to Society? The Washington State Legislature's Efforts to Restore Voting Rights to Persons with Felony Convictions*, 22 STAN. L. & POL'Y REV. 329, 340-41 (2011).

83. BECKETT ET AL., *supra* note 2, at 6-7. The Commission also recommended that Washington restore felons' voting rights automatically upon release from confinement, and create a central database tracking LFOs issued from every source. *Id.* at 7-8.

84. AM. CIVIL LIBERTIES UNION, *supra* note 3, at 79. The organization also recommended that counties compile LFO data and that the State ensure, after it provisionally restores felons' voting rights, that those rights are not later revoked for inability to pay LFOs. *Id.* at 80.

85. *E.g.*, Burch, *supra* note 12, at 543-44; Martin H. Pritikin, *Fine-Labor: The Symbiosis Between Monetary and Work Sanctions*, 81 U. COLO. L. REV. 343, 348, 370-71 (2010). *But see* Ruback, *supra* note 6, at 576-77.

86. See BANNON ET AL., *supra* note 3, at 32-33; RACHEL L. MCLEAN & MICHAEL D. THOMPSON, COUNCIL OF STATE GOV'TS JUSTICE CTR., REPAYING DEBTS 22-23, 34, 37-39 (2007), available at http://reentrypolicy.org/jc_publications/repaying_debts_full_report/RepayingDebts_Guide_v13.pdf.

87. Interview with Katherine Beckett, Professor of Sociology, Univ. of Wash., in Spokane, Wash. (Sept. 24, 2011); *see also* Pritikin, *supra* note 85, at 358; Michael Tonry,

C. Legislation

In 2011, the Washington State Legislature indicated some willingness to reevaluate LFOs when it enacted Substitute Senate Bill 5423.⁸⁹ This bill was designed in part to make it less onerous for offenders to obtain reductions or waivers of LFO interest.⁹⁰ Specifically, the bill requires the court to waive the interest that accrued on fines, fees, and costs while the offender was incarcerated for the underlying offense, if the offender shows that the interest poses a “hardship.”⁹¹ To show a hardship, the offender can point to his or her own circumstances, or to the circumstances of his or her immediate family.⁹² Further, the court may waive or reduce all other interest on fines, fees, and costs if the offender shows that he or she made a “good faith effort” to pay and that the interest poses a “significant hardship.”⁹³ This bill amended the definition of “good faith effort,” replacing the requirement of twenty-four consecutive monthly payments with a requirement of just fifteen payments during an eighteen-month period.⁹⁴ The bill also removed the requirement that the offender show how adjusting the interest would likely enable him or her to pay the LFO in full.⁹⁵

In the bill’s statement of findings and purpose, the legislature carefully articulated its concerns regarding LFOs:

[I]t is in the interest of the public to promote the reintegration into society of individuals convicted of crimes. Research indicates that legal financial obligations may constitute a significant barrier to successful reintegration. . . . [T]he accrual of interest on nonrestitution debt during the term of incarceration results in many individuals leaving prison with insurmountable debt. These circumstances make it less likely that restitution will be paid in full and more likely that former offenders and their families will remain in poverty. In order to foster reintegration, this act creates a mechanism for courts to eliminate interest accrued on

Intermediate Sanctions in Sentencing Reform, 2 U. CHI. L. SCH. ROUNDTABLE 391, 403 (1995).

88. See E-mail from Katherine Beckett, Professor of Sociology, Univ. of Wash., to author (Sept. 26, 2011, 10:28 PST) (on file with *Gonzaga Law Review*).

89. Act of Apr. 18, 2011, ch. 106, 2011 Wash. Sess. Laws 942 (codified at WASH. REV. CODE §§ 4.56.190, 9.94A.760, .7606-.7609, 10.82.090 & note (Supp. 2011)).

90. See *id.* § 1(1), 2011 Wash. Sess. Laws at 942-43.

91. *Id.* sec. 2, § 10.82.090(2)(a), 2011 Wash. Sess. Laws at 943. One unsuccessful bill amendment would have made the court’s waiver discretionary under these circumstances. S. 5423, 62d Leg., Reg. Sess. (Wash. 2011) (failed amendment, Apr. 7, 2011)

92. Act of Apr. 18, 2011 sec. 2, § 10.82.090(2)(a), 2011 Wash. Sess. Laws at 943.

93. *Id.* sec. 2, § 10.82.090(2)(c), 2011 Wash. Sess. Laws at 943.

94. *Id.*

95. *Id.*

nonrestitution debt during incarceration and improves incentives for payment of legal financial obligations.⁹⁶

As progressive as these statements may be, the legislature tempered them somewhat in the very next sentence, where it reaffirmed its long-term commitment to maintaining the current LFO system.⁹⁷ Further, although some applaud this bill for “strik[ing] a fair balance between offender accountability and successful reentry,”⁹⁸ it simply does not reach the broader problems associated with current LFOs.⁹⁹ In short, these reforms are not enough to alleviate the adverse impacts that LFOs have on Washington’s criminal populations, especially racial and ethnic minorities.¹⁰⁰

IV. LEGISLATIVE REFORMS FOR LEGAL FINANCIAL OBLIGATIONS

The most promising way to restore equity in Washington’s LFO assessments is to establish systematic, means-based methods for determining nonrestitution LFO amounts at sentencing.¹⁰¹ Additionally, reducing the

96. *Id.* § 1(1), 2011 Wash. Sess. Laws at 942-43.

97. *See id.* § 1(2), 2011 Wash. Sess. Laws at 943 (“At the same time, the legislature believes that payment of legal financial obligations is an important part of taking personal responsibility for one’s actions. The legislature therefore, supports the efforts of county clerks in taking collection action against those who do not make a good faith effort to pay.”). This language was not included in the bill’s original draft, but was added to the substitute version. *Compare* S. 5423, 62d Leg., Reg. Sess. § 1 (Wash. 2011) (as referred to S. Comm. on Human Servs. & Corr., Jan. 25, 2011), *with id.* (as recommended by S. Comm. on Human Servs. & Corr., Feb. 21, 2011). The Committee may have added this language as a political gesture to the bill’s skeptics.

98. H.R. 62-5423, Reg. Sess., at 4 (Wash. 2011) (B. Rep. by the H.R. Comm. on the Judiciary, Mar. 17, 2011).

99. *See* discussion *supra* Part II.

100. *See* discussion *supra* Part II.

101. *See* BARRY MAHONEY ET AL., JUSTICE MGMT. INST. & VERA INST. OF JUSTICE, HOW TO USE STRUCTURED FINES (DAY FINES) AS AN INTERMEDIATE SANCTION 2 (Bureau of Justice Assistance, U.S. Dep’t of Justice Ser. No. NCJ 156242, 1996), *available at* <https://www.ncjrs.gov/pdffiles/156242.pdf> (stating that sentences of structured criminal monetary penalties embody “essential equity”); Sally T. Hillsman, *Day Fines* [hereinafter Hillsman, *Day Fines*] (suggesting that means-based monetary penalties promote equity in criminal sentencing because they provide “systematic and principled” mechanisms for determining assessment amounts), *in* INTERMEDIATE SANCTIONS IN OVERCROWDED TIMES 19, 19-20 (Michael Tonry & Kate Hamilton eds., 1995); Sally T. Hillsman, *Fines and Day Fines*, 12 CRIME & JUST. 49, 93 (1990) [hereinafter Hillsman, *Fines and Day Fines*] (arguing that, in criminal sentencing, means-based monetary penalties “encompass[] essential justice and basic practicality”); George F. Cole, *Fines Can Be Fine—and Collected*, JUDGE’S J., Winter 1989, at 5, 7 (proposing that sentencing courts use means-based fines to produce “equity among offenders”).

interest that accrues on LFOs after sentencing is essential to ensuring LFOs do not keep offenders tethered to Washington's criminal justice system indefinitely.¹⁰² Finally, ensuring that Washington superior courts have enough latitude to modify or convert nonrestitution LFOs when offenders' financial circumstances change is necessary to fulfilling individual sentencing objectives.¹⁰³ The following section proposes how the Washington State Legislature can make these reforms.¹⁰⁴

A. *Structured Amounts*

The most fundamental aspect of these proposed reforms is to overhaul the way Washington sentencing courts determine the amount of criminal fines, fees, and costs. This involves implementing structured monetary penalties ("structured LFOs"), or variable-rate assessments that courts can structure to fit the seriousness of the offense and the offender's ability to pay.¹⁰⁵ Structured monetary penalties differ from current fixed-rate assessments in this respect: as between offenders of different economic means who commit similar crimes, structured monetary penalties impose equal burdens but unequal dollar amounts, whereas current fixed-rate assessments impose equal dollar amounts but unequal burdens.¹⁰⁶

Structured monetary penalties are not a new phenomenon.¹⁰⁷ To the contrary, other countries have used them extensively for many decades.¹⁰⁸ The

102. See AM. CIVIL LIBERTIES UNION, *supra* note 3, at 68; BECKETT ET AL., *supra* note 2, at 3; Harris et al., *Drawing Blood from Stones*, *supra* note 40, at 1756; Kelleher, *supra* note 36.

103. AM. CIVIL LIBERTIES UNION, *supra* note 3, at 79; Interview with Breean Beggs, *supra* note 20.

104. The author agrees with the position that "[k]eeping restitution in place is vitally important" for Washington to advance its sentencing objectives. S. 62-5423, Reg. Sess., at 2 (Wash. 2011) (Initial B. Rep. by S. Comm. on Human Servs. & Corr., Feb. 15, 2011); see also Interview with Katherine Beckett, *supra* note 87 (noting the political inexpedience of even attempting substantial changes to restitution). Therefore, this note focuses primarily on Washington's criminal fines, fees, and costs, and proposes only one relatively small change to restitution: reducing the interest rate.

105. See EDWIN W. ZEDLEWSKI, ALTERNATIVES TO CUSTODIAL SUPERVISION: THE DAY FINE 1, 6-7, 10 (Nat'l Inst. of Justice, U.S. Dep't of Justice Ser. No. NCJ 230401, 2010), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/230401.pdf>; *Developments in the Law—Alternatives to Incarceration*, 111 HARV. L. REV. 1863, 1948 n.29 (1998); Hillsman, *Fines and Day Fines*, *supra* note 101, at 76; Pritikin, *supra* note 85, at 348.

106. See MAHONEY ET AL., *supra* note 101; SUSAN TURNER & JOAN PETERSILIA, RAND CORP., DAY FINES IN FOUR U.S. JURISDICTIONS 4-6 (Nat'l Inst. of Justice, U.S. Dep't of Justice Ser. No. NCJ 163409, 1996), available at <https://www.ncjrs.gov/pdffiles1/pr/163409.pdf>; Hillsman, *Fines and Day Fines*, *supra* note 101, at 51; Pritikin, *supra* note 85, at 354-55.

107. Gary M. Friedman, Comment, *The West German Day-Fine System: A Possibility for*

policy justifications behind them have likewise stood through time.¹⁰⁹ Although structured monetary penalties have gained little ground in the United States so far, they have been tested.¹¹⁰ At least three states have used “day fines,” or fines based on offenders’ daily earnings.¹¹¹ One of those states also determines some of its fees and costs based on offenders’ ability to pay.¹¹² Additionally, at least nine sentencing courts have launched day fine pilot projects in different parts of the country.¹¹³ Six of those sentencing courts applied the day fine model to fees and costs as well.¹¹⁴

the United States?, 50 U. CHI. L. REV. 281, 281 n.4 (1983); Note, *Fines and Fining—An Evaluation*, 101 U. PA. L. REV. 1013, 1024 & n.86 (1953). According to these sources, means-based monetary penalties date back to the thirteenth century, when England fixed the amount of amercements according to an offender’s wealth. Friedman, *supra*; Note, *supra*.

108. ZEDLEWSKI, *supra* note 105, at 3-5; Hillsman, *Fines and Day Fines*, *supra* note 101, at 19; Friedman, *supra* note 107, at 282 n.6; Note, *supra* note 107, at 1024-25.

109. See, e.g., 2 JEREMY BENTHAM, THEORY OF LEGISLATION 133 (Richard Hildreth trans., Boston, Weeks, Jordon, & Co. 1840) (1802) (“Pecuniary punishments should always be regulated by the fortune of the offender. The relative amount of the fine should be fixed, not its absolute amount; for such an offence, such a part of the offender’s fortune . . .”); CESARE LOMBROSO, CRIME: ITS CAUSES AND REMEDIES § 213, at 389 (Henry P. Horton trans., Little, Brown, & Co. 1911) (1899) (praising criminal fines as a “most efficacious” form of punishment when “[a]ppplied in proportion to the wealth of the culprit”); 1 BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 133 (Thomas Nugent trans., London, J. Nourse & P. Vaillant 1750) (1748) (suggesting that “pecuniary punishments be proportioned to people’s fortunes”); see also Friedman, *supra* note 107; Note, *supra* note 107.

110. See ZEDLEWSKI, *supra* note 105, at 3-5; Susan Turner, *Day-Fine Projects Launched in Four Jurisdictions*, in INTERMEDIATE SANCTIONS IN OVERCROWDED TIMES, *supra* note 101, at 26, 26.

111. See ALA. CODE § 12-25-32(2)(b)(8) (LexisNexis Supp. 2010); ALASKA STAT. § 12.55.036 (2008), <http://www.legis.state.ak.us/basis/folio.asp>, repealed by Act of June 16, 2009, ch. 33, § 4, 2009 Alaska Sess. Laws, http://www.legis.state.ak.us/basis/pdf_viewer.asp?session=26&type=Bills&name=HB0170Z; OKLA. STAT. ANN. tit. 22, § 991a(A)(1)(y) (West Supp. 2012); see also ZEDLEWSKI, *supra* note 105, at 6. Alaska’s statutory day fine provisions were the most comprehensive. For further discussion of those provisions and why they were repealed, see *infra* note 232.

112. See OKLA. STAT. ANN. tit. 22, § 991a(A)(1)(r).

113. See ZEDLEWSKI, *supra* note 105, at 5-6; Hillsman, *Day Fines*, *supra* note 101, at 20-21; Turner, *supra* note 110. These pilot projects were funded by the Bureau of Justice Assistance, U.S. Department of Justice, and carried out by courts in Maricopa County, Arizona; Bridgeport, Connecticut; Polk County, Iowa; Richmond County, New York; Milwaukee, Wisconsin; and four counties in Oregon, including Coos County, Josephine County, Malheur County, and Marion County. ZEDLEWSKI, *supra* note 105, at 5-6; Hillsman, *Day Fines*, *supra* note 101, at 20-21; Turner, *supra* note 110.

114. TURNER & PETERSILIA, *supra* note 106, at 76-77. Courts in Maricopa County, Arizona; Polk County Iowa; and the four counties in Oregon bundled fines with some fees and costs in a single structured monetary penalty. *Id.* at 21, 43, 68, 76-77.

Structured monetary penalties offer several advantages.¹¹⁵ First, they achieve equity in sentencing without sacrificing proportionality or punitive effect.¹¹⁶ Since they are based equally on the seriousness of the offense and the offender's ability to pay, structured monetary penalties produce sentences that are fair but not lenient.¹¹⁷ Second, structured monetary penalties may help reduce the size of jail populations.¹¹⁸ If offenders are able to afford their monetary penalties, more are likely to pay without coercion and less may end up in jail for nonpayment.¹¹⁹ Finally, structured monetary penalties may help raise revenue and reduce criminal justice costs.¹²⁰ Increased payment rates may enable counties to spend less on collections and even less on processing and jailing offenders for nonpayment.¹²¹

Under a structured monetary penalty system, determining the amount of the sanction is a two-step process.¹²² In the first step, the court decides the number of penalty units to assess.¹²³ For fines, the court determines the number of penalty units based on the severity of the crime, as adjusted for aggravating or mitigating circumstances.¹²⁴ For fees and costs, the court can apply a similar rationale¹²⁵ to determine the number of penalty units based on

115. ZEDLEWSKI, *supra* note 105, at 1; Hillsman, *Day Fines*, *supra* note 101, at 19.

116. MAHONEY ET AL., *supra* note 101; TURNER & PETERSILIA, *supra* note 106, at 6; ZEDLEWSKI, *supra* note 105, at 6-7; Hillsman, *Day Fines*, *supra* note 101, at 19; Hillsman, *Fines and Day Fines*, *supra* note 101, at 51, 76, 82.

117. See MAHONEY ET AL., *supra* note 101; TURNER & PETERSILIA, *supra* note 106, at 6; ZEDLEWSKI, *supra* note 105, at 6-7; Hillsman, *Day Fines*, *supra* note 101, at 19; Hillsman, *Fines and Day Fines*, *supra* note 101, at 51, 76, 82.

118. See MAHONEY ET AL., *supra* note 101; ZEDLEWSKI, *supra* note 105, at 7.

119. See ROBERT W. TOBIN, NAT'L CTR. FOR STATE COURTS, PUB. NO. R-184, FUNDING THE STATE COURTS: ISSUES AND APPROACHES 56 (1996), available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/financial&CISOPTR=5>; Pritikin, *supra* note 85, at 357; Note, *supra* note 107, at 1026; Cole, *supra* note 101; Lawrence-Turner, *supra* note 38.

120. MAHONEY ET AL., *supra* note 101, at 2-3; TURNER & PETERSILIA, *supra* note 106, at 6; ZEDLEWSKI, *supra* note 105, at 7; Hillsman, *Day Fines*, *supra* note 101, at 19; Cole, *supra* note 101.

121. ZEDLEWSKI, *supra* note 105, at 7; Hillsman, *Day Fines*, *supra* note 101, at 19; Note, *supra* note 107, at 1026-27; Cole, *supra* note 101; Lawrence-Turner, *supra* note 38; Editorial, *Our View: Jailing Debtors Often Puts Undue Strain on Taxpayers*, SPOKESMAN-REV., May 27, 2009, at A13, available at <http://www.spokesman.com/stories/2009/may/27/our-view-jailing-debtors-often-puts-undue-strain/>.

122. Friedman, *supra* note 107, at 287.

123. Hillsman, *Day Fines*, *supra* note 101, at 20; Hillsman, *Fines and Day Fines*, *supra* note 101, at 76; Pritikin, *supra* note 85, at 353; Friedman, *supra* note 107, at 287.

124. TURNER & PETERSILIA, *supra* note 106, at 6-7; Hillsman, *Day Fines*, *supra* note 101, at 20; Hillsman, *Fines and Day Fines*, *supra* note 101, at 76; Pritikin, *supra* note 85, at 353; Friedman, *supra* note 107, at 287.

125. A few jurisdictions have applied the day fine model to fees and costs in this manner.

the relative burden the assessment is intended to have.¹²⁶ In the second step, the court places a monetary value on each penalty unit based on the offender's net daily income, as determined by his or her personal and financial circumstances.¹²⁷ The court expresses this unit value as a fraction of the offender's gross daily income.¹²⁸ Gross daily income is the total amount of money the offender receives in a given payment period divided by the number of days in that payment period.¹²⁹ When calculating the offender's income, the court may in all cases consider support from family or household income and government welfare assistance programs.¹³⁰ For an offender who reports little or no income in order to conceal financial gain derived from illegal activities, the court may use an estimate of the offender's actual financial means.¹³¹ For an offender who is able to work but reports no income because he or she is currently unemployed or is a student, the court may use an estimate of what the offender would potentially earn in the job market.¹³² For an offender who

TURNER & PETERSILIA, *supra* note 106, at 21, 43, 68, 76-77. Those that have not done so may have faced statutory restrictions. *See id.* at 77. Otherwise, they may have thought it unnecessary to do so because fees and costs serve only to reimburse criminal justice expenditures, not to penalize or deter offenders. *See* Beckett & Harris, *supra* note 6, at 510; Ruback, *supra* note 6. Under this argument, adjusting fees and costs to fit offenders' financial means may at first seem superfluous to achieving an equitable sentence. However, this reasoning ignores the realities offenders face. To offenders, there is no difference between fines, fees, and costs because they all impose financial burdens as part of the same sentence—they are all components of the same "debt to society." *See* WASH. REV. CODE § 9.94A.760(1) (Supp. 2011). From this perspective, applying the day fine model to fees and costs is necessary to ensuring no offender pays any more or less than his or her fair share of criminal justice expenditures. *See* TURNER & PETERSILIA, *supra* note 106, at 76.

126. This approach involves converting the current dollar amount of each fee and cost into a number of penalty units. *See infra* Appendix § 1(1)(c). The number of penalty units is determined by the burden the fee or cost currently bears in relation to other fees and costs of that kind. *See infra* Appendix § 1(1)(c). For example, within a certain category, all fees and costs of \$100 might convert to 9 penalty units, all fees and costs of \$50 might convert to 4.5 penalty units, and all fees and costs of \$25 might convert to 2.25 penalty units. *See infra* text accompanying notes 142-145.

127. Hillsman, *Day Fines*, *supra* note 101, at 20; Hillsman, *Fines and Day Fines*, *supra* note 101, at 76-77; Pritikin, *supra* note 85, at 353; Friedman, *supra* note 107, at 287-88.

128. Friedman, *supra* note 107, at 287-88.

129. MAHONEY ET AL., *supra* note 101, at 18.

130. *Id.* at 18, 20; TURNER & PETERSILIA, *supra* note 106, at 8.

131. MAHONEY ET AL., *supra* note 101, at 21 ("Experienced judges and court officials can draw some rough conclusions about an offender's income from observation of personal appearance and dress; criminal history; and questions about living situation, possessions (such as automobiles, televisions, and stereo equipment), and personal habits (such as smoking and recreation)."); TURNER & PETERSILIA, *supra* note 106, at 8.

132. MAHONEY ET AL., *supra* note 101, at 20.

reports no income because he or she is unable to work, the court may use the portion of the family or household income that goes to the offender's support.¹³³ Lastly, for an offender who otherwise has no apparent means of support, the court may use an estimate of what the offender would potentially derive from government welfare assistance programs.¹³⁴

Once the court determines the number of penalty units and the value of each penalty unit, the court then multiplies them.¹³⁵ The product of these two elements determines the amount of the monetary sanction.¹³⁶ For example, if an offender commits a crime that merits a sentence of thirty penalty units, the offender's circumstances merit valuing those penalty units at one-third of the offender's gross daily income, and the offender's gross daily income is \$72.32,¹³⁷ then the offender will be ordered to pay a total of \$723.20 because $30 \times 1/3 \times \$72.32 = \723.20 .¹³⁸

In order to implement structured LFOs, Washington must first develop comprehensive guidelines for assigning penalty units.¹³⁹ The proposed discussion draft provides for this in section 1.¹⁴⁰ These provisions direct the Washington State Caseload Forecast Council¹⁴¹ to set a presumptive number of

133. *Id.*

134. TURNER & PETERSILIA, *supra* note 106, at 8; *see also* MAHONEY ET AL., *supra* note 101, at 18 ("Although it does not make sense to fine totally destitute persons, it is reasonable to assume that most low-income offenders are capable of some financial payment, provided that their fines can be scaled appropriately to their resources and that careful attention is given to devising reasonable installment payment schedules . . ." (citation omitted)).

135. Hillsman, *Day Fines*, *supra* note 101, at 20; Pritikin, *supra* note 85, at 353; Friedman, *supra* note 107, at 288.

136. Hillsman, *Day Fines*, *supra* note 101, at 20; Pritikin, *supra* note 85, at 353; Friedman, *supra* note 107, at 288.

137. This figure assumes eight hours of work at Washington's minimum wage rate, which is \$9.04 per hour beginning in 2012. Press Release, Wash. State Dep't of Labor & Indus., Washington's Minimum Wage to Increase to \$9.04 Next Year (Sept. 30, 2011), <http://www.lni.wa.gov/news/2011/pr110930a.asp>.

138. Friedman, *supra* note 107, at 288.

139. *See* Hillsman, *Fines and Day Fines*, *supra* note 101, at 76, 84; Pritikin, *supra* note 85, at 370; Friedman, *supra* note 107, at 287. The process for developing these guidelines would be similar to that used for developing the existing sentencing guidelines. *See* TURNER & PETERSILIA, *supra* note 106, at 7.

140. *See infra* Appendix § 1.

141. In 2011, the Washington State Legislature transferred responsibility for the sentencing guidelines from the Washington State Sentencing Guidelines Commission to the Washington State Caseload Forecast Council. Act of June 15, 2011, ch. 40, §§ 27-30, 32, 2011 Wash. Sess. Laws 3462, 3491-96 (codified at WASH. REV. CODE §§ 9.94A.480, 10.98.140, 13.50.010, 43.88C.040-.050 (Supp. 2011)). To remain consistent with that change, this note proposes that the duty of developing guidelines for assigning penalty units be delegated to the Caseload Forecast Council.

penalty units for each fine, fee, and cost that sentencing courts may order.¹⁴² For fines, this benchmark is based on the seriousness of the offense, whereas for fees and costs, it is based on the relative burden the assessment is intended to have.¹⁴³ For example, a misdemeanor that would incur a \$1000 fine under the current LFO system could instead incur ninety presumptive penalty units under a structured LFO system.¹⁴⁴ Likewise, a \$500 fee or cost under the current LFO system could instead incur forty-five penalty units under a structured LFO system.¹⁴⁵ As to fines, these provisions also permit sentencing courts to account for aggravating or mitigating circumstances by adjusting the number of penalty units within a range of fifteen percent above or below the benchmark.¹⁴⁶ For example, a misdemeanor incurring ninety presumptive penalty units could be enhanced for aggravating circumstances up to 103.5 penalty units or reduced for mitigating circumstances down to 76.5 penalty units.¹⁴⁷ Altogether, these provisions would cause offenders who commit similar crimes under similar circumstances to incur the same number of penalty units as punishment.¹⁴⁸

The Caseload Forecast Council would have some limitations in the range of presumptive penalty units it could set for fines.¹⁴⁹ For each misdemeanor, it could set between five and ninety presumptive penalty units worth of fines.¹⁵⁰ For each gross misdemeanor and felony, it could assess between 5 and 364 presumptive penalty units worth of fines.¹⁵¹ The theory behind these limitations is that each penalty unit should function as the punitive equivalent of one day in jail.¹⁵² Thus, setting the lowermost threshold at five penalty units

142. See *infra* Appendix § 1(1)(a), (c); see also ALASKA STAT. § 12.55.036(b)(1)-(2) (2008), <http://www.legis.state.ak.us/basis/folio.asp> (repealed 2009); Hillsman, *Fines and Day Fines*, *supra* note 101, at 84.

143. See *infra* Appendix § 1(1)(a), (c); see also ALASKA STAT. § 12.55.036(b)(1)-(2); Hillsman, *Fines and Day Fines*, *supra* note 101, at 84.

144. Compare *supra* note 11 and accompanying text, with *infra* Appendix § 1(1)(a)(ii).

145. Compare *supra* note 16 and accompanying text, with *infra* Appendix § 1(1)(c).

146. See *infra* Appendix § 1(1)(b); see also ALASKA STAT. § 12.55.036(b)(3); Hillsman, *Fines and Day Fines*, *supra* note 101, at 84.

147. See *infra* Appendix § 1(1)(b); see also Hillsman, *Fines and Day Fines*, *supra* note 101, at 84.

148. See Friedman, *supra* note 107, at 287.

149. See *infra* Appendix § 1(1)(a); see also ALASKA STAT. § 12.55.036(b)(1)-(2); Hillsman, *Fines and Day Fines*, *supra* note 101, at 84; Friedman, *supra* note 107, at 288.

150. See *infra* Appendix § 1(1)(a)(ii); see also ALASKA STAT. § 12.55.036(b)(1)(B); Hillsman, *Fines and Day Fines*, *supra* note 101, at 84; Friedman, *supra* note 107, at 288.

151. See *infra* Appendix § 1(1)(a)(i); see also ALASKA STAT. § 12.55.036(b)(1)(A); Hillsman, *Fines and Day Fines*, *supra* note 101, at 84; Friedman, *supra* note 107, at 288.

152. See NORVAL MORRIS & MICHAEL TONRY, BETWEEN PRISON AND PROBATION:

avoids trivializing less serious crimes with nominal fines.¹⁵³ Likewise, setting the uppermost threshold for felonies at 364 penalty units avoids relying too heavily on fines to punish more serious crimes that are better addressed by incarceration.¹⁵⁴ Further, because sentencing courts may eventually convert fines to jail time, presumptive penalty units should not exceed the statutory maximum number of days in jail.¹⁵⁵ Since sentencing courts may order no more than ninety days in jail for misdemeanors, misdemeanors may incur no more than ninety presumptive penalty units.¹⁵⁶ Similarly, since sentencing courts may order no more than 364 days in jail for gross misdemeanors, gross misdemeanors may incur no more than 364 presumptive penalty units.¹⁵⁷

Washington's second step in implementing structured LFOs is to establish guidelines for calculating net daily income and procedures for collecting financial information.¹⁵⁸ The proposed discussion draft provides for this second step in section 1.¹⁵⁹ Under these provisions, a sentencing court would calculate an offender's net daily income as follows: first, the court would determine the offender's gross daily income based on his or her "actual, potential, or estimated" financial means;¹⁶⁰ second, the court would subtract two figures from that gross amount.¹⁶¹ The first figure is an amount the court may determine to account for the number of dependents the offender supports, if any.¹⁶² The second figure is a standard rate of one-third for those with financial means above the federal poverty line and one-half for those with financial means below it.¹⁶³

INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM 143-44 (1990); Pritikin, *supra* note 85, at 354; Friedman, *supra* note 107, at 290.

153. See Hillsman, *Fines and Day Fines*, *supra* note 101, at 84.

154. See *id.*

155. See WASH. REV. CODE §§ 9.92.010-.030, 9.94A.6333(2)(c)-(d) (2010 & Supp. 2011).

156. See *id.* § 9.92.030 (2010); *infra* Appendix § 1(1)(a)(ii).

157. See WASH. REV. CODE § 9.92.020 (Supp. 2011); *infra* Appendix § 1(1)(a)(i).

158. See Hillsman, *Fines and Day Fines*, *supra* note 101, at 77, 85, 88; Pritikin, *supra* note 85, at 370-71; Friedman, *supra* note 107, at 287-88.

159. See *infra* Appendix § 1.

160. *Infra* Appendix § 1(1)(d); accord ALASKA STAT. § 12.55.036(b)(4) (2008), <http://www.legis.state.ak.us/basis/folio.asp> (repealed 2009).

161. See *infra* Appendix § 1(1)(d)(i)-(ii); accord ALASKA STAT. § 12.55.036(b)(4); Sally T. Hillsman, *Day Fines in New York* [hereinafter Hillsman, *Day Fines in New York*], in INTERMEDIATE SANCTIONS IN OVERCROWDED TIMES, *supra* note 101, at 21, 22; Hillsman, *Fines and Day Fines*, *supra* note 101, at 85.

162. See *infra* Appendix § 1(1)(d)(i); accord ALASKA STAT. § 12.55.036(b)(4); Hillsman, *Day Fines in New York*, *supra* note 161; Hillsman, *Fines and Day Fines*, *supra* note 101, at 85.

163. See *infra* Appendix § 1(1)(d)(ii); accord ALASKA STAT. § 12.55.036(b)(4); Hillsman, *Day Fines in New York*, *supra* note 161; Hillsman, *Fines and Day Fines*, *supra* note 101, at 85, 88.

Although these provisions may seem complicated at first, they are really quite simple.¹⁶⁴ Further, these provisions do not leave courts without guidance, but instead direct the Caseload Forecast Council to develop materials that will ease application of the new rules.¹⁶⁵ Under this authority, the Council could develop standard forms that trial judges could utilize on the bench to make the necessary calculations quickly and easily.¹⁶⁶ Additionally, the Council could help sentencing courts adapt practices generally used for determining child support payments.¹⁶⁷ One approach could be to discount a certain percentage of income for each dependent, including a spouse or registered domestic partner.¹⁶⁸ However, matters of this sort must be resolved only upon further discourse in the legislative process.

In sentencing schemes that account for offenders' individual circumstances, it is vitally important for sentencing courts to have a thorough record of relevant information.¹⁶⁹ For this reason, difficulties in collecting offenders' financial information present potential obstacles to implementing a structured LFO system.¹⁷⁰ In anticipation of this problem, section 1 of the proposed discussion draft directs the Washington State Supreme Court to adopt new procedures for sentencing courts to follow in collecting offenders' financial information.¹⁷¹ The purpose of this provision is especially to ensure that, as to offenders' financial information, sentencing courts have the broadest range of access permitted by law.¹⁷² These changes will likely be insubstantial because, under current Washington criminal procedure, sentencing courts already have extensive access to offenders' financial information through pre-sentence investigation reports prepared by the Washington State Department of Corrections.¹⁷³ The changes should, however, clarify the scope of sentencing

164. See TURNER & PETERSILIA, *supra* note 106, at 10; Hillsman, *Day Fines in New York*, *supra* note 161, at 23.

165. See *infra* Appendix § 1(1)(d).

166. See Hillsman, *Day Fines in New York*, *supra* note 161, at 23.

167. See Hillsman, *Fines and Day Fines*, *supra* note 101, at 85.

168. See MAHONEY ET AL., *supra* note 101, at 18; Hillsman, *Fines and Day Fines*, *supra* note 101, at 85 & n.23.

169. See U.S. SENTENCING GUIDELINES MANUAL § 6A1.1 cmt. (2011).

170. See ZEDLEWSKI, *supra* note 105, at 9; Hillsman, *Fines and Day Fines*, *supra* note 101, at 82; Pritikin, *supra* note 85, at 357-58.

171. See *infra* Appendix § 1(2); accord ALASKA STAT. § 12.55.036(b)(5) (2008), <http://www.legis.state.ak.us/basis/folio.asp> (repealed 2009).

172. See *infra* Appendix § 1(2).

173. WASH. SUPER. CT. CRIM. R. 7.1(a)-(b); see also WASH. REV. CODE § 9.94A.760(5) (Supp. 2011) ("In order to assist the court in setting a monthly sum that the offender must pay during the period of supervision, the offender is required to report to the department for purposes of preparing a recommendation to the court. When reporting, the offender is required, under oath,

courts' power to compel offenders to disclose their financial information.¹⁷⁴ Of particular interest is whether sentencing courts can require offenders to file declarations fully describing their financial circumstances under penalty of perjury.¹⁷⁵

To be sure, even under these new procedures, sentencing courts will not be able to reach all information in every case.¹⁷⁶ For example, some offenders may simply refuse to disclose their financial information.¹⁷⁷ Additionally, the Internal Revenue Service may not disclose federal tax returns to state officials except as necessary to administer state tax laws.¹⁷⁸ Despite these limitations, case files routinely accumulate enough information enabling a sentencing court to adequately assess the offender's ability to pay.¹⁷⁹ Indeed, "[i]n practice, it

to respond truthfully and honestly to all questions concerning present, past, and future earning capabilities and the location and nature of all property or financial assets. The offender is further required to bring all documents requested by the department."); Friedman, *supra* note 107, at 299-300 (explaining why jurisdictions with standards analogous to FED. R. CRIM. P. 32(c)-(d) should have a relatively easy time obtaining the information necessary to calculate day fines).

174. See *infra* Appendix § 1(2).

175. Research suggests they can. See *State v. Russell*, 644 P.2d 704, 706 (Wash. Ct. App. 1982) ("In determining the proper sentence, a trial court is vested with broad discretion and 'can make whatever investigation [it] deems necessary or desirable.'" (alteration in original) (quoting *State v. Dainard*, 537 P.2d 760, 761 (1975)); see also WASH. REV. CODE § 9.94A.760(5), (7) (requiring offenders to report to the court clerk or the Department of Corrections for purposes of establishing a payment schedule, and to answer all questions under oath and supply all requested documents); cf. U.S. Court Clerk's Office et al., U.S. Dist. Court for the Middle Dist. of Ala., Memorandum of Understanding for the Collection and Processing of Criminal Fines, Restitution, Special Assessments and Pretrial Diversion Orders 9 (2002), available at [http://www.almd.uscourts.gov/rulesproc/docs/\(15\)Memo_of_Understanding_re_Collection_of_Cr_Fines.pdf](http://www.almd.uscourts.gov/rulesproc/docs/(15)Memo_of_Understanding_re_Collection_of_Cr_Fines.pdf) (requiring offenders, under the authority of federal law, to file affidavits describing their assets, financial needs, earning ability, dependents, and other relevant information); Friedman, *supra* note 107, at 301 & nn.117-19 (explaining the scope of federal courts' power to compel disclosure of financial records and suggesting that, at sentencing, courts may likely require offenders to produce this information without violating the Fifth Amendment's privilege against self-incrimination).

176. ZEDLEWSKI, *supra* note 105, at 9.

177. Pritikin, *supra* note 85, at 370. In these situations, sentencing courts can usually obtain offenders' financial information elsewhere. Hillsman, *Fines and Day Fines*, *supra* note 101, at 77; Friedman, *supra* note 107, at 301. Otherwise, they can rely on presumptions about offenders' economic means based on relevant information already available in the record. Pritikin, *supra* note 85, at 370.

178. I.R.C. § 6103(d) (Supp. IV 2010); Friedman, *supra* note 107, at 301 n.116.

179. MAHONEY ET AL., *supra* note 101, at 24 (stating that in some jurisdictions, "virtually all of the information needed for valuing fine units is routinely collected by a pretrial services agency before the defendant's first court appearance," and in other jurisdictions, "information about a defendant's financial circumstances is included on a form used to determine eligibility for the public defender"); ZEDLEWSKI, *supra* note 105, at 9 ("[C]ourts already have access to

has not been difficult to obtain adequate information about an offender's financial circumstances."¹⁸⁰

Once Washington establishes the necessary guidelines and procedures, sentencing courts may begin assessing structured LFOs in accordance with section 2 of the proposed discussion draft.¹⁸¹ These provisions require sentencing courts to consider a number of factors before imposing a fine, fee, or cost.¹⁸² Those factors include, among others things, "the offender's income, earning capacity, and financial resources"; "the burden that the fine will impose" on the offender, the offender's dependents, or others responsible for the offender's dependents; and "any collateral consequences of conviction."¹⁸³

If a sentencing court elects to impose a nonrestitution LFO, these provisions would require the court to determine the amount of the nonrestitution LFO by following the materials provided by the Caseload Forecast Council.¹⁸⁴ Using those materials, the sentencing court would decide the number of penalty units, calculate the offender's net daily income, and multiply those two figures together.¹⁸⁵ The court would then include two brief notes of its reasoning in the judgment and sentence.¹⁸⁶ First, the sentencing court would identify the presumptive number of penalty units that apply, the adjustments the court made for aggravating or mitigating circumstances, the facts the court relied on in finding those circumstances exist, and the value the court placed on those circumstances.¹⁸⁷ Second, the sentencing court would

considerable information about the offender's income through information disclosed to police during interrogations and initial investigations of the case, pretrial services, and other contacts with the offender."); Hillsman, *Fines and Day Fines*, *supra* note 101, at 77 ("Jurisdictions using day-fine systems have developed uniform but flexible methods of calculating what is an equitable share of the offender's daily income, typically using information that is routinely available from the police, the court, the probation office, or (most often) the defendant and his or her counsel.").

180. MAHONEY ET AL., *supra* note 101, at 23; *see also* TURNER & PETERSILIA, *supra* note 106, at 76; ZEDLEWSKI, *supra* note 105, at 10.

181. *See infra* Appendix § 2.

182. *See infra* Appendix sec. 2, § 9.94A.760(2); *accord* 18 U.S.C. § 3572(a)(1)-(6) (2006); U.S. SENTENCING GUIDELINES MANUAL § 5E1.2(d) (2011); *see also* AM. CIVIL LIBERTIES UNION, *supra* note 3, at 79.

183. *Infra* Appendix sec. 2, § 9.94A.760(2)(a)-(b), (d); *accord* 18 U.S.C. § 3572(a)(1)-(2); U.S. SENTENCING GUIDELINES MANUAL § 5E1.2(d)(5); *see also* AM. CIVIL LIBERTIES UNION, *supra* note 3, at 79.

184. *See infra* Appendix sec. 2, § 9.94A.760(3).

185. *See infra* Appendix sec. 2, § 9.94A.760(3); *accord* ALASKA STAT. § 12.55.036(c) (2008), <http://www.legis.state.ak.us/basis/folio.asp> (repealed 2009).

186. *See infra* Appendix sec. 2, § 9.94A.760(3); *accord* ALASKA STAT. § 12.55.036(c).

187. *See infra* Appendix sec. 2, § 9.94A.760(3)(a)-(b); *accord* ALASKA STAT. § 12.55.036(c)(1)(A), (2)(A). Sentencing courts are already required to describe on each felony judgment and sentence the "reasons for going either above or below the presumptive sentence

identify the offender's gross daily income, the facts the court relied on in finding that amount, the adjustments the court made to determine the offender's net daily income, and the facts the court relied on in making those adjustments.¹⁸⁸

Together, all the foregoing provisions construct a rational, transparent sentencing scheme that Washington can use to combat the disparities, especially racial and ethnic disparities, that afflict its criminal justice system.¹⁸⁹ But to have their full intended effect, these provisions require two additional reforms.

B. *Reduced Interest*

In addition to implementing structured LFOs, Washington should decrease the interest that accrues on those LFOs.¹⁹⁰ The need for this change is evidenced by the fact that Washington's two neighboring states, Idaho and Oregon, each have more lenient statutory provisions than Washington with respect to interest on criminal monetary penalties.¹⁹¹ Specifically, Idaho charges interest only when the sentencing court elects to impose additional fines for certain felony violent offenses.¹⁹² Idaho's annual interest rate on judgments is currently just 5.25%, which is the sum of a fixed rate of 5% plus an annually calculated base rate of 0.25%.¹⁹³ Further, Oregon does not begin charging interest until one month after the offender is released from jail, and that interest may accrue for no more than twenty years.¹⁹⁴ On judgments, Oregon charges interest at an annual fixed rate of just nine percent.¹⁹⁵

In light of the approaches that Idaho and Oregon take, it is reasonable for Washington to reduce the amount of interest its offenders accrue on their LFOs

range." WASH. REV. CODE § 9.94A.480(1) (Supp. 2011).

188. See *infra* Appendix sec. 2, § 9.94A.760(3)(c)-(d); accord ALASKA STAT. § 12.55.036(c)(1)(B), (2)(B).

189. See *supra* note 101 and accompanying text; discussion *supra* Part II; see also Hillsman, *Fines and Day Fines*, *supra* note 101, at 76; Friedman, *supra* note 107, at 281-82.

190. See *supra* note 102 and accompanying text.

191. See IDAHO CODE ANN. §§ 18-100 to 19-5804 (2004 & Supp. 2011); OR. REV. STAT. ANN. §§ 131.005-169.810 (West 2003 & Supp. 2011); Lawrence-Turner, *supra* note 38; *WA Jails People for Court Debt; Experts Critical*, *supra* note 3.

192. IDAHO CODE ANN. § 19-5307 (Supp. 2011); *State v. Hillman*, 141 P.3d 1164, 1165-66 (Idaho Ct. App. 2006).

193. IDAHO CODE ANN. § 28-22-104(2) (2005); Ron G. Crane, *Legal Rate of Interest*, IDAHO ST. TREASURER (July 1, 2011), <http://sto.idaho.gov/Resources/Docs/LegalRateOfInterestFY2012.pdf>.

194. OR. REV. STAT. ANN. § 137.183(1) (West Supp. 2011).

195. *Id.* § 82.010(2).

each year. Indeed, there already seems to be considerable support for doing so.¹⁹⁶ Thus, section 4 of the proposed discussion draft includes provisions to repeal the interest accrual on nonrestitution LFOs and reduce the annual interest rate on restitution LFOs from twelve percent to six percent.¹⁹⁷ This would bring Washington closer in line with Idaho's approach in that the new provisions would not charge interest on ordinary fines, fees, and costs.¹⁹⁸ These provisions would also bring Washington closer in line with Oregon's approach in that they would use an annual fixed rate for the interest charged.¹⁹⁹ As to the level of the interest itself, cutting Washington's annual interest rate from twelve percent to six percent is rational because it strikes a fair balance between Idaho's rate and Oregon's rate.²⁰⁰

C. Modification or Conversion

Another important aspect of a means-based LFO system is ensuring that sentencing courts have sufficient latitude to modify or convert nonrestitution LFOs if an offender's financial circumstances change after sentencing.²⁰¹ Under current Washington law, offenders cannot usually petition sentencing courts to modify or convert their nonrestitution LFOs unless they fail to pay.²⁰² Only an offender's failure to pay triggers a show-cause hearing, at which the offender may invoke the sentencing court's discretion.²⁰³ This poses a dilemma for offenders whose financial circumstances change after sentencing because defaulting on payment is the only way to get a hearing to modify or convert

196. See S. 62-5423, Reg. Sess., at 2 (Wash. 2011) (Initial B. Rep. by S. Comm. on Human Servs. & Corr., Feb. 15, 2011); Lawrence-Turner, *supra* note 38; Editorial, *supra* note 121; Interview with Breean Beggs, *supra* note 20.

197. See *infra* Appendix sec. 4, § 10.82.090(1).

198. Compare *infra* Appendix sec. 4, § 10.82.090(1), with IDAHO CODE ANN. § 19-5307 (Supp. 2011), and *State v. Hillman*, 141 P.3d 1164, 1165-66 (Idaho Ct. App. 2006).

199. Compare *infra* Appendix sec. 4, § 10.82.090(1), with OR. REV. STAT. ANN. § 82.010(2).

200. See IDAHO CODE ANN. § 28-22-104(2) (2005); OR. REV. STAT. ANN. § 82.010(2); Crane, *supra* note 193.

201. See *supra* note 103 and accompanying text.

202. See WASH. REV. CODE § 9.94A.6333(2)(c)(iii), (d) (2010); BECKETT ET AL., *supra* note 2, at 57-58. When offenders' financial circumstances change, Washington statutes prefer that offenders negotiate directly with the court clerk or the Department of Corrections, which may either change the payment schedule itself or recommend that the sentencing court do so. See WASH. REV. CODE § 9.94A.760(7) (Supp. 2011). However, this change in payment schedule does not effect any modification or conversion of a nonrestitution LFO itself. See *id.* Further, many offenders experience great difficulty negotiating these matters with the court clerk or the Department of Corrections. See BECKETT ET AL., *supra* note 2, at 57-58.

203. See WASH. REV. CODE § 9.94A.6333(2)(a), (c)-(d).

nonrestitution LFOs.²⁰⁴ Section 3 of the proposed discussion draft addresses this dilemma by allowing offenders to request hearings regarding their ability to pay.²⁰⁵

Under these provisions, the sentencing court may grant a hearing if the offender meets two conditions.²⁰⁶ First, the offender must not be under the supervision of the Washington State Department of Corrections.²⁰⁷ This condition is carried forward from Washington's current rules on modifying and converting sentences.²⁰⁸ Second, the offender must allege that his or her financial circumstances have changed since the last time the sentencing court considered his or her ability to pay.²⁰⁹ If the sentencing court grants the hearing, the offender bears the burden of proving by a preponderance of the evidence that he or she is unable to pay the structured LFOs through good faith efforts.²¹⁰ If the offender meets this standard of proof, the sentencing court may, in its discretion either modify or convert the structured LFOs.²¹¹

These provisions would allow the sentencing court to modify structured LFOs by reducing the balance, altering the payment schedule, or taking other measures that would enable the offender to pay through good faith efforts.²¹² These provisions would also allow sentencing courts to convert the structured LFOs to community service hours at the rate of eight hours for each penalty

204. *See id.* § 9.94A.6333(2)(a); BECKETT ET AL., *supra* note 2, at 57-58. As an illustration of this problem, consider the following account of one offender:

I've been trying to get it changed from \$100 to anything a month, you know, to anything less than \$100 would be reasonable. You know, and the only way I can go change that, I mean I went to the desk, where you go set up your restitution, and they said well we need a \$300 deposit. How are you going to pay a deposit on restitution? I said well I can't pay this deposit. I can't even pay \$100 a month, how can I change it? Well you gotta talk to the judge. How do I talk to the judge? You got to go to court. How do I go to court? You got to not pay your fines to go to court. So I got to risk going to jail to talk to the judge and tell him that I can't afford to pay this much a month? And what if I go to court and he says you didn't pay your fines this month, you're going to jail . . . ?

Id. at 58.

205. *See infra* Appendix § 3; *accord* ALASKA STAT. § 12.55.051(c) (2010).

206. *See infra* Appendix sec. 3, § 9.94A.6333(1); *accord* ALASKA STAT. § 12.55.051(c).

207. *See infra* Appendix sec. 3, § 9.94A.6333(1); *accord* ALASKA STAT. § 12.55.051(c).

208. *Compare* WASH. REV. CODE § 9.94A.6333(1), *with infra* Appendix sec. 3, § 9.94A.6333(1).

209. *See infra* Appendix sec. 3, § 9.94A.6333(1); *accord* ALASKA STAT. § 12.55.051(c).

210. *See infra* Appendix sec. 3, § 9.94A.6333(1); *accord* ALASKA STAT. § 12.55.051(c).

211. *See infra* Appendix sec. 3, § 9.94A.6333(1)(a)-(b); *accord* ALASKA STAT. § 12.55.051(c).

212. *See infra* Appendix sec. 3, § 9.94A.6333(1)(a); *accord* ALASKA STAT. § 12.55.051(c).

unit.²¹³ Under this conversion rate, thirty penalty units would equate to 240 hours of community service.²¹⁴ Washington currently uses a similar conversion rate for initial sentencing of some nonviolent offenses.²¹⁵ However, upon a show-cause hearing, sentencing courts currently convert nonrestitution LFOs to community service hours according to Washington's minimum wage rate.²¹⁶ This latter conversion rate is incompatible with a structured LFO system because it would raise equal protection concerns by requiring offenders of greater economic means to work more community service hours than offenders of lesser economic means, even where the respective penalty unit assessments are the same.²¹⁷ For example, a superior court may sentence two offenders to thirty penalty units worth of structured LFOs. The first offender's financial circumstances may warrant a \$2000 assessment whereas the second offender's financial circumstances may warrant a \$1000 assessment. If the sentencing court later converts both LFO assessments to community service hours, using Washington's minimum wage rate,²¹⁸ the first offender would have to work 221 hours whereas the second offender would have to work 110.5 hours. However, using the conversion rate contained in section 3 of the proposed discussion draft,²¹⁹ each offender would have to work 240 hours.

D. Fiscal Impact

The reforms this note proposes, while themselves significant, should nonetheless make no impact on the state budget. In the short term, no additional appropriations of funds would be required for the Washington State Caseload Forecast Council or the Washington State Supreme Court to begin implementing the proposed changes.²²⁰ In the long term, superior courts could

213. See *infra* Appendix sec. 3, § 9.94A.6333(1)(b); accord WASH. REV. CODE § 9.94A.680(2) (2010).

214. See *infra* Appendix sec. 3, § 9.94A.6333(1)(b); accord WASH. REV. CODE § 9.94A.680(2).

215. WASH. REV. CODE § 9.94A.680(2).

216. *Id.* § 9.94A.6333(2)(c)(iii).

217. See Peter G. Farrell, Comment, *The Day-Fine Comes to America*, 38 BUFF. L. REV. 591, 612 & n.139 (1990); *supra* note 106 and accompanying text.

218. See *supra* note 137.

219. See *infra* Appendix sec. 3, § 9.94A.6333(1)(b).

220. These institutions are already responsible for the particular subject matters embodied in the proposed reforms. See WASH. REV. CODE § 2.04.190 (2010) (granting the supreme court power to prescribe rules governing the kind and character of practice and procedure in the superior courts); *id.* § 43.88C.040(2)(b)-(3) (Supp. 2011) (requiring the Caseload Forecast Council to publish and maintain sentencing guidelines that help practitioners determine the appropriate sentencing ranges). Further, both institutions already have a good head start on carrying out the

carry out the proposed changes without significant disruption to the current flow of business.²²¹

As to revenue, there are two reasons to believe the proposed LFO system would generate at least as many funds as the current one does.²²² First, the proposed changes are designed primarily to weave equity into *how* superior courts calculate and manage LFOs—they are not necessarily designed to *reduce* the average principal amount of those assessments.²²³ Second, even if a reduction of this sort does result, the proposed changes will likely offset that effect by increasing LFO collection rates.²²⁴ Under the current LFO system, statewide collection rates have declined several years in a row.²²⁵ Court clerks' total LFO collections dropped by 1.71% since 2007,²²⁶ while the portion that goes toward state revenue dropped by 10.38% during that same period.²²⁷ There is also wide variability between the collection rates in each county.²²⁸ For example, in 2010, King County collected an average of \$41.47 per LFO account receivable, Pierce County collected an average of \$28.73, and Spokane County collected an average of \$73.14.²²⁹ The proposed reforms, by contrast, could likely increase LFO collection rates, close the achievement gaps, and properly serve state budgetary objectives.²³⁰

duties the proposed reforms would delegate to them. Specifically, the Caseload Forecast Council could build off parts of the existing sentencing guidelines that rank the severity of offenses, while the supreme court could build off parts of the existing court rules that address collecting offenders' financial information. *See* TURNER & PETERSILIA, *supra* note 106, at 863; *see also* discussion *supra* Part IV.A.

221. *See* TURNER & PETERSILIA, *supra* note 106, at 11, 22-23, 33, 35.

222. MAHONEY ET AL., *supra* note 101, at 11.

223. *See supra* notes 116-117 and accompanying text. While individual assessment amounts will change under a structured LFO system, the average assessment amounts may remain the same or may even increase, as they did in some prior day fine experiments. *See, e.g.*, TURNER & PETERSILIA, *supra* note 106, at 10, 28.

224. *See supra* notes 118-121 and accompanying text. Data from prior day fine experiments suggests collection rates will increase if structured monetary penalties are combined with a well-organized payment system like the kind Washington already has. *See, e.g.*, MAHONEY ET AL., *supra* note 101, at 4.

225. MCALLISTER, *supra* note 37, at 12 tbl.2.

226. *Id.* This is a change of \$522,215, from \$30,642,271 in 2007 to \$30,119,756 in 2010. *Id.*

227. MCALLISTER, *supra* note 37, at 12 tbl.2. This is a change of \$420,440, from \$4,049,176 in 2007 to \$3,628,736 in 2010. *Id.*

228. *See* MCALLISTER, *supra* note 37.

229. *Id.*

230. *See supra* notes 118-121 and accompanying text.

V. CONCLUSION

The Washington State Legislature should address the racial and ethnic disparities in the State's LFO assessments by enacting legislation that structures the amount of nonrestitution portions to fit the seriousness of the offense and the offender's ability to pay. In addition, the legislature should enact corresponding changes that restore equity and fairness to LFO sentences by eliminating the interest accrual on nonrestitution LFOs, reducing the annual interest rate on restitution LFOs from twelve percent to six percent, and empowering the sentencing court to modify or convert nonrestitution LFOs when the offender's financial circumstances change. These proposed reforms will serve to exclude extralegal factors contributing to the disparities, but they will also alleviate the myriad other adverse impacts that LFOs currently have on Washington's criminal populations. In this way, these proposed reforms may reach beyond the narrow scope of their provisions to improve the character of Washington's criminal justice system overall.

APPENDIX: DISCUSSION DRAFT OF PROPOSED LEGISLATION

AN ACT Structuring the amount of nonrestitution legal financial obligations to reflect the seriousness of the offense and the offender's ability to pay; creating a new section and amending RCW 9.94A.760, 9.94A.6333, and 10.82.090.²³¹

Be it enacted by the Legislature of the State of Washington²³²:

231. This Act would undoubtedly require more amendments to bring it in harmony with Washington's existing laws. For the sake of brevity, however, this discussion draft covers only the most fundamental revisions.

232. This discussion draft draws some of its text from 18 U.S.C. § 3572 (2006), and from U.S. SENTENCING GUIDELINES MANUAL § 5E1.2 (2011). Although federal law does not provide for structured monetary penalties, it gives greater consideration to offenders' financial circumstances than does Washington law. *Compare* 18 U.S.C. § 3572, *and* U.S. SENTENCING GUIDELINES MANUAL § 5E1.2, *with* WASH. REV. CODE § 9.94A.760 (Supp. 2011), *and* WASH. STATE CASELOAD FORECAST COUNCIL, 2011 WASHINGTON STATE ADULT SENTENCING GUIDELINES MANUAL (2011), *available at* http://www.cfc.wa.gov/PublicationSentencing/SentencingManual/Adult_Sentencing_Manual_2011.pdf.

More notably, this discussion draft also draws some of its text from ALASKA STAT. § 12.55.036 (2008), <http://www.legis.state.ak.us/basis/folio.asp>, *repealed by* Act of June 16, 2009, ch. 33, § 4, 2009 Alaska Sess. Laws, http://www.legis.state.ak.us/basis/pdf_viewer.asp?session=26&type=Bills&name=HB0170Z, and from ALASKA STAT. § 12.55.051(c) (2010). Alaska adopted a day fine sentencing option in 1994. *See* Act of June 6, 1994, ch. 79, 1994 Alaska Sess. Laws, http://www.legis.state.ak.us/basis/get_bill_text.asp?hsid=HB0119D&session=18. Under that system, sentencing courts could not impose day fines in conjunction with jail time or probation. *See* ALASKA STAT. § 12.55.036(a). The day fine system was further limited in that it did not replace the fixed-rate system as the sole method of assessing fines. *See id.* §§ 12.55.035, .036(a). These and other technical problems caused confusion on how to implement the day fine statutes. *See* MIKE CHENAULT, SPONSOR STATEMENT: HOUSE BILL 170—REPEAL AUTHORITY FOR DAY FINES, H.R. 26-170, 1st Sess., at 1 (Alaska 2009), *available at* <http://www.housemajority.org/print.php?id=122&t=spon26>. As a result, Alaska sentencing courts seldom used day fines, instead relying on more traditional sentencing methods. *See id.* Early attempts to amend the day fine system failed without follow-up. *See id.* These factors were primary motivators in the Alaska State Legislature's 2009 repeal of that system. *See id.* ("Since these statutes are not in use and will not be used by the courts, I propose that we repeal the statutes that impose a day fine plan rather than keeping these statutes in the books.")

There are two reasons, based on this history, that the structured LFOs this note proposes would not suffer the same fate as the Alaska day fine system. First, a structured LFO system would not substitute Washington's other sentencing forms, but would complement them. The changes would affect only nonrestitution LFOs and would not interfere with the overall sentencing scheme, so courts could still order structured LFOs in combination with jail time, probation, community service, or treatment. Second, a structured LFO system would achieve its intended effect by fully replacing the current method for assessing fines, fees, and costs. This system would mandate that all nonrestitution LFO orders follow a graduated scale reflecting the seriousness of the offense and the offender's ability to pay, so courts could not elect to use the old fixed-rate system.

NEW SECTION. Sec. 1. A new section is added to chapter 9.94A RCW to read as follows:

(1) The caseload forecast council shall promulgate guidelines for structured legal financial obligations that include

(a) a fine schedule establishing, for each felony, gross misdemeanor, and misdemeanor, a presumptive penalty unit reflecting the seriousness of the offense and falling within the following ranges:

(i) for felonies and gross misdemeanors, no less than five penalty units and no greater than three hundred and sixty-four penalty units; and

(ii) for misdemeanors, no less than five penalty units and no greater than ninety penalty units;

(b) procedures for the court to increase or decrease the presumptive penalty units established under subsection (1)(a) of this section by no greater than fifteen percent if the court finds the existence of an aggravating or mitigating circumstance under RCW 9.94A.535;

(c) a schedule establishing, for each fee, cost, or other assessment, a presumptive penalty unit reflecting the weight that the assessment bears in relation to other assessments of that kind; and

(d) a table for determining the offender's net daily income based on his or her actual, potential, or estimated gross daily income less the following:

(i) an amount as the court may determine for the number of dependents the offender supports, if any; and

(ii) a standard rate of either

(A) one-third for an offender with financial means above the federal poverty guideline as determined by the United States department of health and human services; or

(B) one-half for an offender with financial means below the federal poverty guideline as determined by the United States department of health and human services.

(2) The supreme court shall promulgate procedures by which the superior court may gather information about an offender's occupation, actual, estimated, and potential income, number of dependents, and other facts necessary or relevant to imposing a structured legal financial obligation. To the extent permitted by law, the procedures shall empower the superior court to order the production of the financial or other records of any person necessary or relevant to a determination under this section or RCW 9.94A.760. The procedures must include a requirement that the facts be disclosed under penalty of perjury.

Sec. 2. RCW 9.94A.760 is amended to read as follows:

(1) Whenever a person is convicted in superior court, the court may, subject to the requirements of subsections (2) and (3) of this section, order the

payment of a legal financial obligation as part of the sentence. The court must on either the judgment and sentence or on a subsequent order to pay, designate the total amount of a legal financial obligation and segregate this amount among the separate assessments made for restitution, costs, fines, and other assessments required by law. On the same order, the court is also to set a sum that the offender is required to pay on a monthly basis towards satisfying the legal financial obligation. If the court fails to set the offender monthly payment amount, the department shall set the amount if the department has active supervision of the offender, otherwise the county clerk shall set the amount. Upon receipt of an offender's monthly payment, restitution shall be paid prior to any payments of other monetary obligations. After restitution is satisfied, the county clerk shall distribute the payment proportionally among all other fines, costs, and assessments imposed, unless otherwise ordered by the court.

(2) In determining whether to impose a legal financial obligation other than restitution, the court shall consider the following factors:

(a) the offender's income, earning capacity, and financial resources;

(b) the burden that the fine will impose upon the offender, any person who is financially dependent on the offender, or any other person that would be responsible for the welfare of any person financially dependent on the offender, relative to the burden that alternative punishments would impose;

(c) whether restitution is ordered or made and the amount of such restitution;

(d) any collateral consequences of conviction, including civil obligations arising from the offender's conduct;

(e) the need to deprive the offender of illegally obtained gains from the offense; and

(f) the expected costs to the state of any incarceration, supervision, parole, or probation component of the sentence.

(3) The court shall set the total amount of a legal financial obligation other than restitution in accordance with the guidelines promulgated by the caseload forecast council under section 1 of this act. The total amount of the nonrestitution legal financial obligation must be the product of the penalty unit multiplied by the offender's net daily income. When imposing a legal financial obligation other than restitution, the court shall, in addition to the requirements of subsection (1) of this section, include the following in the judgment and sentence:

(a) the offense's presumptive penalty unit, and whether the court adjusted the presumptive penalty unit based on the existence of an aggravating or mitigating circumstance;

(b) findings of fact considered in determining the existence of an aggravating or mitigating circumstance, and in assigning value to that circumstance;

(c) the offender's net daily income, as adjusted for the number of dependents the offender supports and by the applicable standard rate; and

(d) findings of fact considered in determining the defendant's gross and net daily incomes.

~~((2))~~(4) If the court determines that the offender, at the time of sentencing, has the means to pay for the cost of incarceration, the court may require the offender to pay for the cost of incarceration at a rate of fifty dollars per day of incarceration, if incarcerated in a prison, or the court may require the offender to pay the actual cost of incarceration per day of incarceration, if incarcerated in a county jail. In no case may the court require the offender to pay more than one hundred dollars per day for the cost of incarceration. Payment of other court-ordered financial obligations, including all legal financial obligations and costs of supervision shall take precedence over the payment of the cost of incarceration ordered by the court. All funds recovered from offenders for the cost of incarceration in the county jail shall be remitted to the county and the costs of incarceration in a prison shall be remitted to the department.

~~((3))~~(5) The court may add to the judgment and sentence or subsequent order to pay a statement that a notice of payroll deduction is to be issued immediately. If the court chooses not to order the immediate issuance of a notice of payroll deduction at sentencing, the court shall add to the judgment and sentence or subsequent order to pay a statement that a notice of payroll deduction may be issued or other income-withholding action may be taken, without further notice to the offender if a monthly court-ordered legal financial obligation payment is not paid when due, and an amount equal to or greater than the amount payable for one month is owed.

If a judgment and sentence or subsequent order to pay does not include the statement that a notice of payroll deduction may be issued or other income-withholding action may be taken if a monthly legal financial obligation payment is past due, the department or the county clerk may serve a notice on the offender stating such requirements and authorizations. Service shall be by personal service or any form of mail requiring a return receipt.

~~((4))~~(6) Independent of the department or the county clerk, the party or entity to whom the legal financial obligation is owed shall have the authority to use any other remedies available to the party or entity to collect the legal financial obligation. These remedies include enforcement in the same manner as a judgment in a civil action by the party or entity to whom the legal financial obligation is owed. Restitution collected through civil enforcement must be

paid through the registry of the court and must be distributed proportionately according to each victim's loss when there is more than one victim. The judgment and sentence shall identify the party or entity to whom restitution is owed so that the state, party, or entity may enforce the judgment. If restitution is ordered pursuant to RCW 9.94A.750(6) or 9.94A.753(6) to a victim of rape of a child or a victim's child born from the rape, the Washington state child support registry shall be identified as the party to whom payments must be made. Restitution obligations arising from the rape of a child in the first, second, or third degree that result in the pregnancy of the victim may be enforced for the time periods provided under RCW 9.94A.750(6) and 9.94A.753(6). All other legal financial obligations for an offense committed prior to July 1, 2000, may be enforced at any time during the ten-year period following the offender's release from total confinement or within ten years of entry of the judgment and sentence, whichever period ends later. Prior to the expiration of the initial ten-year period, the superior court may extend the criminal judgment an additional ten years for payment of legal financial obligations including crime victims' assessments. All other legal financial obligations for an offense committed on or after July 1, 2000, may be enforced at any time the offender remains under the court's jurisdiction. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for purposes of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. The department may only supervise the offender's compliance with payment of the legal financial obligations during any period in which the department is authorized to supervise the offender in the community under RCW 9.94A.728, 9.94A.501, or in which the offender is confined in a state correctional institution or a correctional facility pursuant to a transfer agreement with the department, and the department shall supervise the offender's compliance during any such period. The department is not responsible for supervision of the offender during any subsequent period of time the offender remains under the court's jurisdiction. The county clerk is authorized to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations.

~~((5))~~(7) In order to assist the court in setting a monthly sum that the offender must pay during the period of supervision, the offender is required to report to the department for purposes of preparing a recommendation to the court. When reporting, the offender is required, under oath, to respond truthfully and honestly to all questions concerning present, past, and future earning capabilities and the location and nature of all property or financial

assets. The offender is further required to bring all documents requested by the department.

~~((6))~~(8) After completing the investigation, the department shall make a report to the court on the amount of the monthly payment that the offender should be required to make towards a satisfied legal financial obligation.

~~((7))~~(9)(a) During the period of supervision, the department may make a recommendation to the court that the offender's monthly payment schedule be modified so as to reflect a change in financial circumstances. If the department sets the monthly payment amount, the department may modify the monthly payment amount without the matter being returned to the court. During the period of supervision, the department may require the offender to report to the department for the purposes of reviewing the appropriateness of the collection schedule for the legal financial obligation. During this reporting, the offender is required under oath to respond truthfully and honestly to all questions concerning earning capabilities and the location and nature of all property or financial assets. The offender shall bring all documents requested by the department in order to prepare the collection schedule.

(b) Subsequent to any period of supervision, or if the department is not authorized to supervise the offender in the community, the county clerk may make a recommendation to the court that the offender's monthly payment schedule be modified so as to reflect a change in financial circumstances. If the county clerk sets the monthly payment amount, or if the department set the monthly payment amount and the department has subsequently turned the collection of the legal financial obligation over to the county clerk, the clerk may modify the monthly payment amount without the matter being returned to the court. During the period of repayment, the county clerk may require the offender to report to the clerk for the purpose of reviewing the appropriateness of the collection schedule for the legal financial obligation. During this reporting, the offender is required under oath to respond truthfully and honestly to all questions concerning earning capabilities and the location and nature of all property or financial assets. The offender shall bring all documents requested by the county clerk in order to prepare the collection schedule.

~~((8))~~(10) After the judgment and sentence or payment order is entered, the department is authorized, for any period of supervision, to collect the legal financial obligation from the offender. Subsequent to any period of supervision or, if the department is not authorized to supervise the offender in the community, the county clerk is authorized to collect unpaid legal financial obligations from the offender. Any amount collected by the department shall be remitted daily to the county clerk for the purpose of disbursements. The department and the county clerks are authorized, but not required, to accept credit cards as payment for a legal financial obligation, and any costs incurred

related to accepting credit card payments shall be the responsibility of the offender.

~~((9))~~(11) The department or any obligee of the legal financial obligation may seek a mandatory wage assignment for the purposes of obtaining satisfaction for the legal financial obligation pursuant to RCW 9.94A.7701. Any party obtaining a wage assignment shall notify the county clerk. The county clerks shall notify the department, or the administrative office of the courts, whichever is providing the monthly billing for the offender.

~~((10))~~(12) The requirement that the offender pay a monthly sum towards a legal financial obligation constitutes a condition or requirement of a sentence and the offender is subject to the penalties for noncompliance as provided in RCW 9.94B.040, 9.94A.737, or 9.94A.740.

~~((11))~~(13)(a) The administrative office of the courts shall mail individualized periodic billings to the address known by the office for each offender with an unsatisfied legal financial obligation.

(b) The billing shall direct payments, other than outstanding cost of supervision assessments under RCW 9.94A.780, parole assessments under RCW 72.04A.120, and cost of probation assessments under RCW 9.95.214, to the county clerk, and cost of supervision, parole, or probation assessments to the department.

(c) The county clerk shall provide the administrative office of the courts with notice of payments by such offenders no less frequently than weekly.

(d) The county clerks, the administrative office of the courts, and the department shall maintain agreements to implement this subsection.

~~((12))~~(14) The department shall arrange for the collection of unpaid legal financial obligations during any period of supervision in the community through the county clerk. The department shall either collect unpaid legal financial obligations or arrange for collections through another entity if the clerk does not assume responsibility or is unable to continue to assume responsibility for collection pursuant to subsection (4) of this section. The costs for collection services shall be paid by the offender.

~~((13))~~(15) The county clerk may access the records of the employment security department for the purposes of verifying employment or income, seeking any assignment of wages, or performing other duties necessary to the collection of an offender's legal financial obligations.

~~((14))~~(16) Nothing in this chapter makes the department, the state, the counties, or any state or county employees, agents, or other persons acting on their behalf liable under any circumstances for the payment of these legal financial obligations or for the acts of any offender who is no longer, or was not, subject to supervision by the department for a term of community custody,

and who remains under the jurisdiction of the court for payment of legal financial obligations.

Sec. 3. RCW 9.94A.6333 is amended to read as follows:

(1) An offender who has been sentenced to pay a legal financial obligation, and who is not being supervised by the department, may request a hearing regarding his or her ability to pay the obligation. The court may deny the request if it has previously considered the offender's ability to pay and the offender's request does not allege changed circumstances. If, at a hearing under this subsection, the offender proves by a preponderance of the evidence that he or she is unable through good faith efforts to pay the legal financial obligation, the court shall modify its order of judgment and sentence in one of the following ways:

(a) for a legal financial obligation other than restitution, reducing the obligation, changing the payment schedule, or otherwise modifying the order so that the offender can pay the obligation through good faith efforts;

(b) for a legal financial obligation other than restitution, converting the obligation to community restitution hours at the rate of eight hours for each penalty unit; or

(c) for a legal financial obligation of restitution, changing the payment schedule so that the offender can pay the obligation through good faith efforts.

~~((4))~~(2) If an offender violates any condition or requirement of a sentence, and the offender is not being supervised by the department, the court may modify its order of judgment and sentence and impose further punishment in accordance with this section.

~~((2))~~(3) If an offender fails to comply with any of the conditions or requirements of a sentence the following provisions apply:

(a) The court, upon the motion of the state, or upon its own motion, shall require the offender to show cause why the offender should not be punished for the noncompliance. The court may issue a summons or a warrant of arrest for the offender's appearance;

(b) The state has the burden of showing noncompliance by a preponderance of the evidence;

(c) If the court finds that a violation has been proved, it may impose the sanctions specified in RCW 9.94A.633(1). Alternatively, the court may:

(i) Convert a term of partial confinement to total confinement;

(ii) Convert community restitution obligation to total or partial confinement; or

(iii) Convert ~~((monetary obligations, except restitution and the crime victim penalty assessment,))~~ legal financial obligations other than restitution to community restitution hours at the rate of ~~((the state minimum wage as~~

established in RCW 49.46.020 for each hour of community restitution)) eight hours for each penalty unit;

(d) If the court finds that the violation was not willful, the court may modify its previous order regarding payment of legal financial obligations and regarding community restitution obligations; and

(e) If the violation involves a failure to undergo or comply with a mental health status evaluation and/or outpatient mental health treatment, the court shall seek a recommendation from the treatment provider or proposed treatment provider. Enforcement of orders concerning outpatient mental health treatment must reflect the availability of treatment and must pursue the least restrictive means of promoting participation in treatment. If the offender's failure to receive care essential for health and safety presents a risk of serious physical harm or probable harmful consequences, the civil detention and commitment procedures of chapter 71.05 RCW shall be considered in preference to incarceration in a local or state correctional facility.

~~((3))~~(4) Any time served in confinement awaiting a hearing on noncompliance shall be credited against any confinement ordered by the court.

~~((4))~~(5) Nothing in this section prohibits the filing of escape charges if appropriate.

Sec. 4. RCW 10.82.090 is amended to read as follows:

(1) ~~((Except as provided in subsection (2) of this section))~~ The restitution portion of legal financial obligations imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate ((applicable to civil judgments)) of six percent per annum. The portions of the legal financial obligations that are not restitution shall not bear interest. ((All nonrestitution interest retained by the court shall be split twenty five percent to the state treasurer for deposit in the state general fund, twenty five percent to the state treasurer for deposit in the judicial information system account as provided in RCW 2.68.020, twenty five percent to the county current expense fund, and twenty five percent to the county current expense fund to fund local courts.

~~(2) The court may, on motion by the offender, following the offender's release from total confinement, reduce or waive the interest on legal financial obligations levied as a result of a criminal conviction as follows:~~

~~(a) The court shall waive all interest on the portions of the legal financial obligations that are not restitution that accrued during the term of total confinement for the conviction giving rise to the financial obligations, provided the offender shows that the interest creates a hardship for the offender or his or her immediate family;~~

~~(b) The court may reduce interest on the restitution portion of the legal financial obligations only if the principal has been paid in full;~~

~~(c) The court may otherwise reduce or waive the interest on the portions of the legal financial obligations that are not restitution if the offender shows that he or she has personally made a good faith effort to pay and that the interest accrual is causing a significant hardship. For purposes of this section, "good faith effort" means that the offender has either (i) paid the principal amount in full; or (ii) made at least fifteen monthly payments within an eighteen month period, excluding any payments mandatorily deducted by the department of corrections;~~

~~(d) For purposes of (a) through (c) of this subsection, the court may reduce or waive interest on legal financial obligations only as an incentive for the offender to meet his or her legal financial obligations. The court may grant the motion, establish a payment schedule, and retain jurisdiction over the offender for purposes of reviewing and revising the reduction or waiver of interest.)~~

~~((3))~~ (2) This section applies to persons convicted as adults or adjudicated in juvenile court.