

11-2013

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Recommended Citation

Stearns, Travis (2013) "Legal Financial Obligations: Fulfilling the Promise of Gideon by Reducing the Burden," *Seattle Journal for Social Justice*: Vol. 11 : Iss. 3 , Article 6.

Available at: <https://digitalcommons.law.seattleu.edu/sjsj/vol11/iss3/6>

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Legal Financial Obligations: Fulfilling the Promise of *Gideon* by Reducing the Burden

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I. INTRODUCTION

Gideon v. Wainwright established that no person charged with a crime would be denied counsel because they¹ could not afford to pay for an

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¹ "The use of they, their, them, and themselves as pronouns of indefinite gender and indefinite number is well established in speech and writing, even in literary and formal contexts." MERRIAM-WEBSTER COLLEGIATE DICTIONARY (11th ed. 2005).

English lacks a common-gender third person singular pronoun that can be used to refer to indefinite pronouns (as everyone, anyone, someone). Writers and speakers have supplied this lack by using the plural pronouns <and every one to rest themselves betake — Shakespeare> <I would have everybody marry if they can do it properly — Jane Austen> <it is too hideous for anyone in their senses to buy — W. H. Auden>.

Id. "The use of an ostensibly plural pronoun such as they, them, themselves, or their with a singular antecedent dates back at least to 1300, and over the years such constructions have been used by many admired writers, including William Makepeace Thackeray ("A person can't help their birth"), George Bernard Shaw ("To do a person in means to kill them"), and Anne Morrow Lindbergh ("When you love someone you do not love them all the time"). The practice is so widespread both in print and in speech that it generally passes unnoticed. Forms of they are useful as gender-neutral substitutes for generic he and for coordinate forms like his/her or his or her (which can sound clumsy, especially when repeated frequently)." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011).

attorney.² In *State v. ANJ*, the Washington State Supreme Court recognized that “[t]he right of effective counsel and the right to review are fundamental to, and implicit in, any meaningful modern concept of ordered liberty.”³ The guarantee of counsel helps ensure systemic integrity and that the wrongfully accused are not convicted of crimes that they did not commit. In Washington, this right comes at a price. It includes mandatory assessments that cannot be waived by a court, even where there is a finding of indigency.⁴ In fact, many jurisdictions assess mandatory fees in order to apply for an attorney and will charge a person with the cost of their public defender once the case has been completed.⁵ This article examines the disparity that the imposition of Legal Financial Obligations (LFOs)⁶ on persons unable to pay them has created and argues that these disparities

² *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

³ *State v. A.N.J.*, 225 P.3d 956, 959 (Wash. 2010).

⁴ See, e.g. WASH. REV. CODE Sec. 7.68.035 (2010) (Victim Penalty Assessment); WASH REV. Code Sec. 43.43.7541 (DNA Collection Fee).

⁵ King County assesses a twenty-five dollar fee for each application. See *How to Get an Attorney*, KING CNTY., <http://www.kingcounty.gov/courts/OPD/Services/ProvideAttorney.aspx> (last visited Feb. 10, 2013). King County’s policy guarantees that no person will be denied a public defender because they cannot pay the application fee. *Id.* Those who are unable to pay are asked to sign a promissory note for the debt. *Id.* Pierce County also assesses a twenty-five dollar fee. See *How to Obtain a Public Defender*, PIERCE CNTY., <http://www.co.pierce.wa.us/index.aspx?NID=754> (last visited Feb. 10, 2013).

⁶ WASH. REV. CODE § 9.94A.760 (2011). Whenever a person is convicted in Superior Court, the court may order the payment of a legal financial obligation (LFO) as part of the sentence. *Id.* The court must, on either the judgment and sentence or on a subsequent order to pay, designate the total amount of a LFO and segregate this amount among the separate assessments made for restitution, costs, fines, and other assessments required by law. *Id.* 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. *Id.* 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. *Id.* Upon receipt of an offender’s monthly payment, restitution shall be paid prior to any payments of other monetary obligations. *Id.* 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. *Id.*

impact the ability of the criminal justice system to impose fair and meaningful penalties that hold persons accountable and reduce recidivism.

Along with incarceration and supervision, the fines, fees, and restitution imposed in a sentence are some of the most significant and far reaching consequences of a conviction.⁷ Once imposed, LFOs are hard to avoid, as there are limited ways for the court to modify the amount a person owes, even when that person is unable to pay for reasons beyond their control. LFOs do not go away; they are not eligible for review in bankruptcy court, interest is imposed on any debt outstanding at 12 percent,⁸ and jurisdictions are able to impose collection fees.⁹

This article addresses why the LFO system is an unworkable system that punishes poor persons not because of the crime that they have committed, but because of their indigence. Section II examines what LFOs are and what the obligations are that flow from their imposition. This section will look at the disparities that arise because of the burdens placed on people unable to pay their LFOs. It also considers some of the ways that attorneys who represent poor persons can reduce the burden of LFOs on their clients. Section III will address specific advocacy points lawyers can use in court to ensure that LFOs are imposed only upon persons who have an ability to pay them. Section IV will look at some of the methods by which courts can reduce LFOs post-sentence, and how lawyers can help their clients avoid incarceration for failure to pay. Section V will examine some of the changes that must be made on a system-wide level, as the opportunities for advocacy on an individual case are limited. In Section VI, the article will conclude by

⁷ *Id.*

⁸ WASH. REV. CODE § 10.82.090 (2011); WASH. REV. CODE § 4.56.110 (2010); *see also* WASH. REV. CODE § 19.52.010 (2011).

⁹ Clark County imposes a hundred dollars per year collection fee if the LFOs are paid in cash. *See Superior Court Clerk's Collections Unit*, CLARK CNTY., <http://www.clark.wa.gov/courts/clerk/lfo.html> (last visited Feb. 10, 2013). LFOs paid by credit are subject to at least a two-dollar collection fee. *Id.*

arguing that change is required in the way LFOs are imposed and collected. Requiring courts to impose LFOs in amounts that a person can actually pay improves confidence in our courts and increases the likelihood that the LFOs will actually be paid. To help fulfill the promise of *Gideon*—that all persons will be treated fairly by our criminal justice system—defense attorneys must provide effective advocacy, courts must impose evidence based sentences that take into consideration the ability of defendants to pay LFOs, and the legislature must reform laws that unfairly penalize persons because of their indigence.

II. LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON

Whenever a person is sentenced for a crime in Washington, the sentence will include LFOs.¹⁰ The court may impose over eighteen fees and fines on a person convicted of a felony, plus restitution.¹¹ Fines are penalties that may be assessed as part of the sentence. Those commonly imposed include the victim penalty assessment (VPA),¹² court costs,¹³ drug funds,¹⁴ emergency response expenses,¹⁵ DNA collection fees,¹⁶ court-appointed

¹⁰ WASH. REV. CODE § 9.94A.760 (2011).

¹¹ *Id.* § 9.94A.760(1).

¹² WASH. REV. CODE § 10.99.080 (2004).

When any person is found guilty in any superior court of having committed a crime, except as provided in subsection (2) of this section, there shall be imposed by the court upon such convicted person a penalty assessment. The assessment shall be in addition to any other penalty or fine imposed by law and shall be five hundred dollars for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor and two hundred fifty dollars for any case or cause of action that includes convictions of only one or more misdemeanors.

Id.

¹³ WASH. REV. CODE § 10.73.160 (1995).

¹⁴ WASH. REV. CODE § 69.50.401 (2012).

¹⁵ WASH. REV. CODE § 38.52.430 (2012).

¹⁶ WASH. REV. CODE § 43.43.7541 (2011).

attorney fees,¹⁷ and costs of defense.¹⁸ Two of the most common, the \$500 VPA and the \$100 DNA collection fee, must be imposed in every case.¹⁹ The maximum fine that can be imposed is dependent upon the classification of the crime and ranges from up to \$50,000 for a class A Felony to \$1,000 dollars for a misdemeanor.²⁰ While most crimes have a general fine that may be imposed, the court must impose specific fines for some offenses.²¹

From the time the court enters judgment, all LFOs begin accruing interest at a 12 percent rate applicable to civil judgments.²² Interest may be reduced or waived “only as an incentive for the offender to meet his or her legal financial obligations.”²³ Waiver requires a finding by the court that the defendant has made a “good faith effort” to pay, and that the interest accrual is causing a significant hardship.²⁴ In addition to the fees and fines imposed by the Court, the clerk may also charge a “collection fee” until LFOs are collected in full.²⁵

¹⁷ WASH. REV. CODE § 10.73.160 (1995).

¹⁸ *Id.*; see also WASH. REV. CODE § 43.43.7541 (2011); Wash. Ct. R.A.P. 14.2 (stating that “[i]n a criminal case involving an indigent juvenile or adult offender, an award of costs will apportion the money owed between the county and the State.”).

¹⁹ WASH. REV. CODE § 7.68.035 (2011); WASH. REV. CODE § 43.43.690 (1992).

²⁰ The fine for a class A felony is up to \$50,000, for a class B felony it is up to \$20,000, for a class C felony it is up to \$10,000, for a gross misdemeanor it is up to \$5,000, and for a misdemeanor it is up to \$1,000. WASH. REV. CODE § 9A.20.021 (2011).

²¹ See, e.g., WASH. REV. CODE § 9A.88.120 (2012). Fines for prostitution offenses are set from fifty dollars to \$10,000. *Id.* Where the court finds that the offender does not have the ability to pay the fee, the court may reduce the fee by up to two thirds of the maximum allowable fee. *Id.* See also WASH. REV. CODE § 46.61.5055 (2012) (basing fines for DUI offenses upon prior history, with a minimum for first offenders of no less than \$350).

²² WASH. REV. CODE § 10.82.090 (2011); WASH. REV. CODE § 4.56.110 (2010); see also WASH. REV. CODE § 19.52.010 (2011).

²³ WASH. REV. CODE § 10.82.090 (2011).

²⁴ *Id.*

²⁵ For example, Clark County imposes a hundred dollars a year collection fee if the LFOs are paid in cash. See CLARK CNTY., *supra* note 9. LFOs paid by credit are subject to at least a two dollar collection fee. *Id.*

Restitution is ordered for conduct which results in an injury to person or damage to property.²⁶ It is intended to make the victim of the crime whole and it is not imposed as punishment or as an attempt by the court to recoup expenses.²⁷ Restitution is based upon easily ascertainable damages for injury to or loss of property, actual expenses incurred for the treatment of injuries, lost wages resulting from any injuries, and the cost of counseling reasonably related to the offense.²⁸ Restitution may not be ordered for intangible losses, including mental anguish or pain and suffering.²⁹ While generally thought of as mandatory, courts have the ability to order no restitution where extraordinary circumstances make restitution inappropriate.³⁰ But unlike other LFOs, restitution may not be waived in a modification hearing (a hearing that provides the opportunity for reduction of payments or excusal of LFOs), even where there is evidence that the defendant lacks the ability to pay the restitution.³¹ The court may reduce, but not waive, the interest that accrues on restitution.³² Like all LFOs, restitution is not dischargeable by filing for bankruptcy.³³

The total amount of LFOs imposed on a person can be significant. The most recent study of LFOs in Washington found that the median (typical) value of fees and fines assessed per felony conviction in 2004 was \$1,110 and that the mean (average) fee and fine assessed was \$1,406.³⁴ Convictions involving nonviolent drug charges were associated with higher median fine

²⁶ WASH. REV. CODE § 9.94A.753 (2003).

²⁷ WASH. REV. CODE § 9.94A.750 (2003).

²⁸ *Id.* § 9.94A.753 (3).

²⁹ *Id.*

³⁰ *Id.* § 9.94A.753 (5).

³¹ *Id.* § 9.94A.753 (2).

³² WASH. REV. CODE . § 10.82.090 (2011).

³³ *Id.* § 9.94A.753.

³⁴ KATHERINE A. BECKETT ET AL., WASH. STATE MINORITY AND JUSTICE COMM., THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE 19 (2008), available at http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf.

and fee amounts than violent felonies.³⁵ Three years post-sentencing, less than 20 percent of the fees, fines, and restitution had been paid on roughly three-quarters of the cases that were reviewed.³⁶ This study also describes the great difficulty that indigent persons have in paying back their LFOs, even when they are assessed the average fees.³⁷ Because of the high interest charged, a person who makes payments on their LFOs of twenty-five dollars a month, which is an amount many persons try to pay, will owe more to the state five years after they were convicted than when the LFOs were initially assessed.³⁸ Thirty years later, that person will still owe significant amounts to the state.³⁹

Table 1. Average Amount Owed by Monthly Payment in Five, Ten, Fifteen, and Thirty Years for Average LFO of \$2,540

	\$10 Payment	\$25 Payment	\$50 Payment	\$100 Payment
Debt: Five Years	3,798	2,073	531	Paid: Thirty Months
Debt: Ten Years	6,083	2,623	Paid: Seventy-Two Months	0
Debt: Fifteen Years	10,234	2,740	0	0
Debt: Thirty Years	56,362	3,938	0	0

Note: The average (mean) LFO amount assessed by the Washington Superior Courts in 2004 was \$2,540. The calculations in this table are based upon the current interest rate of 12 percent.⁴⁰

³⁵ *Id.*

³⁶ *Id.* at 20.

³⁷ *Id.* at 22.

³⁸ *Id.* at 22.

³⁹ *Id.* In reviewing imposed LFOs, Dr. Beckett found that 0 percent of the original LFOs had been paid in over half of the convictions that she studied three years after they had been imposed. *Id.*

⁴⁰ *Id.*

Once an offender is released from jail, they can apply for a waiver or reduction of the interest that accrued while they were incarcerated for that offense.⁴¹ In order to qualify for this waiver, the offender must show a “significant hardship” and must have made at least fifteen payments during an eighteen-month period.⁴² The interest on restitution may not be waived and may only be reduced if the restitution principle is paid in full.⁴³

The data in Washington shows that there are significant disparities across the state in the imposition of LFOs, even within particular offense categories.⁴⁴ Factors that contribute to higher fine and fee assessment include a person’s prior criminal history, whether the offense is drug related (which results in significantly higher fines and fees), and whether a person chooses to exercise their right to a trial (which also resulted in higher fines and fees).⁴⁵ The demographic makeup of the county also factors into the amount of the fine. Counties with less population, higher violent crime rates, and smaller fractions of their budgets spent on law and justice assessed higher fines and fees.⁴⁶ Latino and male defendants are assessed higher fines and fees than other demographic groups.⁴⁷ Scholars have found that “it is clear that convicted defendants with similar legal histories and conviction charges are assessed very different fees and fines depending upon defendant gender, ethnicity, charge type, adjudication method, and the county in which the case is adjudicated and sentenced.”⁴⁸

⁴¹ WASH. REV. CODE. § 10.82.090(2) (2011).

⁴² *Id.* § 10.82.090(2)(c).

⁴³ *Id.*

⁴⁴ The median fines and fees imposed in King County is \$600, while Clark and Whitman counties impose median fines and fees of \$2,170 and \$7,049 respectively. BECKETT ET AL., *supra* note 34, at 23.

⁴⁵ *Id.* at 28.

⁴⁶ *Id.* at 29.

⁴⁷ *Id.* at 28. Latinos are more likely to live in poverty than white residents, making it highly unlikely that this disparity reflects the fact that Latinos are in a better position to pay LFOs than white defendants. *Id.* at 31.

⁴⁸ *Id.* at 33.

III. SENTENCE HEARING ADVOCACY: LIMITING THE IMPOSITION OF LFOs

Collecting LFOs from a convicted person is only constitutional if the state provides a mechanism by which an indigent defendant can obtain relief from the debt.⁴⁹ In *Fuller v. Oregon*, the court held as constitutional a recoupment scheme that required an indigent defendant to repay the cost of representation following conviction⁵⁰ where the court made the obligation “conditional” and based its finding upon the belief that there was a future likelihood that the defendant would be able to make the payments.⁵¹ The court made clear that “the obligation to repay the state accrues only to those who later acquire the means to do so without hardship”⁵² and that “[t]hose who remain indigent or for whom repayment would work ‘manifest hardship’ are forever exempt from any obligation to repay.”⁵³ A repayment obligation may not be imposed if it appears that there is no likelihood that the defendant’s indigence will end.⁵⁴ These rules are especially important when the court is considering imposing fees for recoupment of defense costs since both Due Process and right to counsel issues are implicated.⁵⁵

In preparing a strategy to advocate for lower LFOs, especially fines and fees, courts should be educated on the ethnic and geographic disparities that exist in the imposition of LFOs. The data is clear that these disparities exist,

⁴⁹ *Fuller v. Oregon*, 417 U.S. 40, 53–54 (1974); *State v. Barklind*, 557 P.2d 314, 317 (Wash. 1977).

⁵⁰ *Fuller*, 417 U.S. at 54.

⁵¹ *Id.* at 46.

⁵² *Id.* at 46; *Barklind*, P.2d at 317 (noting that the recoupment order in that case incorporated all of *Fuller*’s safeguards, including the ability to petition for remission and to seek relief from the duty to make payments when the defendant lacked the present financial ability to pay without causing undue hardships to himself or his dependents).

⁵³ *Fuller*, 417 U.S. at 53.

⁵⁴ *See State v. Curry*, 814 P.2d 1252, 1254 (Wash. Ct. App. 1991); *aff’d*, 829 P.2d 166 (Wash. 1992).

⁵⁵ *State v. Blank*, 930 P.2d 1213, 1221 (Wash. 1997) (“A statute which imposes an obligation to pay the costs of court appointed counsel ... which lacks any procedure to request a court for remission of payment violates due process.”).

and courts in counties that impose higher fees should be informed of this fact.⁵⁶ It simply is not fair that a similarly situated defendant in one county is assessed fines and fees that are more than seven times what a defendant in another county is assessed,⁵⁷ and courts should be brought to understand these disparities.

Focusing on the impact that LFOs have on reentry into society may also help persuade both the prosecutor and the court to agree that lower LFOs are appropriate. In a study conducted to examine the impact on offenders who had been released from prison but still owed LFOs, the data showed that only 48 percent of the persons interviewed were employed at the time of the interview, 26 percent had only a high school diploma or GED, 26 percent were living in unstable housing, and 58 percent were supporting children.⁵⁸ Research has consistently found that most people convicted of felony crimes experience multiple forms of disadvantages that pre-date their criminal conviction, including comparatively low levels of educational attainment, high rates of unemployment, and limited incomes.⁵⁹ Nationally, nearly 60 percent of all jail inmates report pre-arrest incomes of under \$1,000 a month.⁶⁰ Nearly four out of five people charged with a crime are eligible for a public defender.⁶¹ With all indigent clients, there is no

⁵⁶ BECKETT ET AL., *supra* note 34 at 29.

⁵⁷ *Id.*, at 23 (“At the low end, the median fee and fine amount assessed was \$600 in King County. By contrast, in Clark and Whitman counties, the median fee and fine amounts assessed were \$2,170 and \$7,049.”).

⁵⁸ *Id.* at 36.

⁵⁹ *Id.* at 38 (citing Becky Petit and Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOC. REV. 151 (2004); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006)).

⁶⁰ *Id.* (citing BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006)).

⁶¹ KATE TAYLOR, JUSTICE POLICY INST., SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENDERS (2011), available at http://www.justicepolicy.org/research/2756/system_overload_final.pdf (citing Scott Wallace & David Carroll, *Implementation and Impact of Indigent Defense Standards*, 31 S.U.L. REV.245 (2004)).

question that a criminal conviction and incarceration makes a challenging life even more difficult.⁶²

Table 2. LFO Interview Sample: Social and Financial Characteristics (Percent of Persons Interviewed)⁶³

Employed (full or part time)	48
Less than a high school education	26
High School or GED only	40
Unstable housing/homeless	26
Supporting children	58
On community supervision	60
Formerly incarcerated	100

For many persons returning from incarceration, re-entry comes with many challenges beyond LFOs. Between 15 and 27 percent of those who leave prison or jail are released to a homeless shelter.⁶⁴ Many will need drug or alcohol treatment upon their release as well.⁶⁵ In fact, up to 60 percent of those released from prison will be unemployed a year later.⁶⁶ Because correctional facilities end rehabilitative programs while a person is still

⁶² ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 12 (2009), available at [http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/\\$FILE/Report.pdf](http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf).

⁶³ BECKETT ET AL., *supra* note 34, at 37.

⁶⁴ 42 U.S.C. § 17501(b)(9) (2012).

⁶⁵ *Id.* § 17501(b)(10), (12).

⁶⁶ *Id.* § 17501(b)(18).

incarcerated, the disadvantages a person experiences upon release are even more acute.⁶⁷

Providing courts with this information may help them understand why they should limit which LFOs they impose. In preparing their study on LFOs for Washington Court's Minority and Justice Commission, Drs. Beckett and Harris interviewed a great number of persons who had outstanding LFO debt. These interviews indicated that "LFOs exacerbate the many difficulties with the re-entry process."⁶⁸ Dr. Harris further found that the burden of legal debt drains income from families who are already indigent and creates financial stress.⁶⁹ It restricts opportunities and limits access to status affirming institutions such as housing, education, and economic markets and forces families "to choose between food, medicine, rent, child support, and legal debt."⁷⁰ When a person is unable to pay their debt, it can result in criminal sanctions, which may include warrants, arrests, and incarceration.⁷¹ As a result, the burden of economic punishment constrains "daily lives and future life chances" and can lead to increased recidivism.⁷²

Attorneys should be aware of opportunities for persons suffering from mental illness. A person who is mentally ill may be able to seek waiver of all LFOs other than restitution and the VPA.⁷³ Before imposing any LFOs upon a defendant who suffers from a mental health condition, the court

⁶⁷ Stacey Mulick, *Budget Proposal Would Trim Prison, Supervision Time For Many Offenders*, The Olympian, Dec. 6, 2011, <http://www.theolympian.com/2011/12/06/1902912/corrections-braces-for-more-cuts.html>. "I have nothing to refer [parolees] to," [Community Corrections Officer Robin] McLaughlin said. "They just keep getting whittled down and whittled down." *Id.*

⁶⁸ BECKETT, *supra* note 34, at 73.

⁶⁹ Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1777 (2010).

⁷⁰ *Id.* at 1785.

⁷¹ *Id.* at 1777.

⁷² *Id.*

⁷³ See WASH. REV. CODE § 9.94A.777 (2010).

must first determine that the defendant has the means to pay such additional sums.⁷⁴ Where the court finds the person suffers from a mental health condition that prevents that person from participating in gainful employment—as evidenced by a determination of mental disability based upon enrollment in a public assistance program, a record of involuntary hospitalization, or a competent expert evaluation—the court should not impose additional LFOs.⁷⁵ Attorneys representing clients who have such conditions should document this in their pre-sentence reports and prevent the imposition of additional LFO's at sentencing.

Absent the clear exceptions for those who suffer from mental illness,⁷⁶ it may be very difficult to meet the standard for exemption articulated in *Fuller*—that the imposition of LFOs will create a “manifest hardship.”⁷⁷ Still, showing a court that a client is unlikely to be able to pay significant LFOs, and that poor persons generally are unable to pay significant LFOs, is a good strategy to reduce what LFOs are imposed on a client. Demonstrating that a person would be able to pay their fines and fees if they are set at a rate that person could afford and within a reasonable timeframe may actually increase the likelihood these payments would be collected.⁷⁸ Ensuring that a person could pay off their debt at some future point makes it more likely that they will be able to pay their debt and may even increase the likelihood that they will not reoffend.

IV. POST SENTENCING ADVOCACY: REMISSION AND INCARCERATION FOR FAILURE TO PAY

The ability to seek relief from LFOs because of the inability to pay has been extremely limited by the courts. Washington's statutorily defined debt-

⁷⁴ *Id.* § 9.94A.777(1).

⁷⁵ *See id.* § 9.94A.777(2).

⁷⁶ *See id.*

⁷⁷ *Fuller v. Oregon*, 417 U.S. 40, 46 (1977).

⁷⁸ BECKETT ET AL., *supra* note 34, at 73.

relief mechanism promises a person who owes LFOs that a reduction or waiver is possible upon a showing of proof that the debt is causing a “manifest hardship.”⁷⁹ A remission petition to reduce LFO payments may be filed “at any time.”⁸⁰ Despite these promises, Washington courts have denied requests for remission until “sanctions are sought for non-payment.”⁸¹ Although other divisions have not followed this approach, Division One of the Washington Court of Appeals has denied modification requests on ripeness grounds in the two most recent unpublished cases that have addressed this issue.⁸² Advocates should continue to challenge the failure of sentencing courts to make findings of future ability to pay until it is addressed by the Supreme Court.

Failure to pay LFOs can result in imprisonment, but courts have held it is fundamentally unfair to imprison a person solely because that person lacks the resources to pay their LFOs.⁸³ Instead, Due Process requires that the court determine whether the defendant has made all efforts to pay the fine and yet cannot do so through no fault of that person.⁸⁴ If a person is capable of paying, but willfully refuses to do so, or does not “make sufficient bona fide efforts to seek employment or borrow money in order pay,” the court

⁷⁹ WASH. REV. CODE § 10.01.160(4) (2010).

⁸⁰ *Id.*, *But see* State v. Nash, No. 38514-7-II, 2011 WL 198695, at 4 (Wash. Ct. App. Jan. 6, 2011) (holding that defendant’s motion to remit LFOs was not ripe for review because he had not shown that the Department of Corrections had required him to make payments on his outstanding LFOs).

⁸¹ State v. Blank, 930 P.2d 1213, 1219–20 (Wash. 1997).

⁸² *See* State v. Manson not reported in P.3d (2012) (trial court is not required to enter findings regarding a defendant’s ability to pay before it orders the defendant to pay financial obligations); Nash, 2011 WL 198695, at 4 (remission not ripe for review until sanctions are sought for non-payment); *see also* State v. Ziegenfuss, 74 P.3d 1205 (Wash. Ct. App. 2003); *cf.* State v. Bertrand, 267 P.3d 511, 516–17 (Wash. Ct. App. 2011).

⁸³ *Bearden v. Georgia*, 461 U.S. 660, 672–73 (1983); *see also* *Williams v. Illinois*, 399 U.S. 235, 242 (1970).

⁸⁴ *See Bearden*, 461 U.S. at 672; *see also* *Smith v. Whatcom County*, Dist. Court, 52 P.3d 485, 493 (Wash. 2002) (holding that the court must find that “a defendant’s failure to pay a fine is intentional before remedial sanctions can be imposed”).

may imprison the offender for failing to pay their LFO.⁸⁵ While the burden is upon the state to demonstrate that the defendant has not paid his or her LFOs, the defendant must demonstrate that the failure to pay was not willful once that burden has been met.⁸⁶

Demonstrating the failure to pay was not willful may be a challenge that requires strong advocacy. In *State v. Nason*, the defendant was ordered to pay \$735, which consisted of the VPA (\$500), court costs (\$110), and attorney fees (\$125).⁸⁷ In the hearing on appeal, Mr. Nason asserted that he was “homeless, unemployed and could not pay his LFO.”⁸⁸ The court rejected his arguments and agreed with the state that these facts did not excuse his failure to pay his fines and fees. The court found that Mr. Nason was willful in failing to pay his LFOs and ultimately sanctioned him to 120 days in jail.⁸⁹ While the Supreme Court found that Spokane’s procedure prior to imposing this incarceration violated Due Process, the Court of Appeals did not find this procedure problematic, demonstrating the difficulty attorneys will have making arguments for relief.⁹⁰ Many of the arguments that can be made when arguing LFOs should not be imposed are appropriate to make when the state is seeking to sanction a person for failure to pay. Unfortunately, Washington trial courts have not been sympathetic to these arguments and have been hesitant to find that failure to pay is not willful.⁹¹ The reluctance of courts to even address the issue until

⁸⁵ *State v. Nason*, 233 P.3d 848, 851 (Wash. 2010) (quoting *Bearden*, 461 U.S. at 668).

⁸⁶ See WASH. REV. CODE § 9.94B.040(3)(b)-(c) (2002); see also *Smith*, 52 P.3d at 492; *State v. Bower*, 823 P.2d 1171, 1173–74 (Wash. Ct. App. 1992) (“Poverty does not automatically insulate a criminal defendant from punishment.”).

⁸⁷ *Nason*, 233 P.3d at 849.

⁸⁸ *Id.* at 849–50. Nason was living in his car and had demonstrated that he had spent time making job applications to try to find employment. *Id.* He explained that it was extremely difficult for him to find work with his criminal convictions. *Id.*

⁸⁹ *Id.* at 850.

⁹⁰ *Nason*, 192 P.3d 386, 392 (Wash. App. Ct. 2008), *rev’d*, 233 P.3d 848 (Wash. 2010).

⁹¹ See, e.g., *State v. Stone*, 268 P.3d 226 (Wash. Ct. App. 2012) (finding that the trial court violated due process by imposing jail time without inquiring into defendant’s ability

the state is seeking sanctions demonstrates why it is so important to make a strong record when LFOs are initially imposed.

V. SYSTEMIC ADVOCACY: THE NEED FOR LEGISLATIVE CHANGE

Along with advocacy for individual cases, reducing the impact of LFOs on indigent persons requires systemic reform—some of the changes that are necessary to improve reentry and to reduce disparity and disproportionality can come only through individual casework. Studies have found that “in the rush to collect fines and fees, made all the more intense by the fiscal crises in many states, no one is considering the ways in which the resulting debt can undermine reentry prospects, pave the way back to prison or jail, and result in yet more costs to the public.”⁹² Examining the impact of LFOs on indigent persons can improve the criminal justice system, potentially increase the ability of jurisdictions to collect the fees that are imposed, and reduce the likelihood a person will return to custody.

Specifically, lawmakers should evaluate the total debt burden of existing fees before adding new fees or increasing fee amounts.⁹³ In 2011, Washington imposed a new LFO for offenders who were convicted of prostitution related offenses.⁹⁴ While this new fine provided the ability of indigent persons to waive two-thirds of the fine upon a finding of indigence, one-third of the fine may not be waived regardless of whether there is a current or future ability to pay.⁹⁵ Likewise, the minimum fine a person

to pay and without making of finding of his willful failure to pay); *see also Nason*, 233 P.3d at 850–51 (holding that Spokane’s “auto-jail” policy violated defendant’s due process right to hearing on whether failure to pay was willful).

⁹² ALICIA BANNON, ET AL., BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 1 (2010), available at http://brennan.3cdn.net/c610802495d901dac3_76m6vqhpy.pdf.

⁹³ *Id.* at 11.

⁹⁴ WASH. REV. CODE § 9A.88.120 (2012).

⁹⁵ *Id.*

convicted of a felony in Washington must pay upon conviction is \$600, none of which may be waived.⁹⁶

Instead, Washington should consider adopting a model like Massachusetts. Before the imposition of fees, Massachusetts requires an initial investigation of the revenue that could be generated, the cost of administering and collecting the fee, and the impact of the fee on affected persons.⁹⁷ An alternative to financial penalties would be to require community service for able-bodied persons who are unemployed and not able to pay fines and fees.

Reforming the way that LFOs are imposed and collected also requires examining the way that collection fees and other collection efforts are imposed. In addition to the LFOs imposed by the court, counties are able to charge collection fees for outstanding LFOs.⁹⁸ No standards are provided in RCW 9.94A.760, which authorizes the imposition of LFOs, to measure the impact of the debt on the former offenders, their families, or their communities.⁹⁹ In fact, no system exists to track LFOs and other outstanding legal debt in Washington, meaning that if a person owes LFOs on more than one case, they likely will be under an enormous burden with no real way to mitigate its effect. Indigent defendants should be exempt from user fees and payment plan fees, and other debt collection efforts should be tailored to an individual's ability to pay.¹⁰⁰

⁹⁶ WASH. REV. CODE § 9.94A.760 (2011). While it is beyond the scope of this article to address, this statute and the statute regarding a minimum fine for a prostitution offense raise substantial constitutional questions when applied to indigent persons as mandatory fines that have no way of being excused ignores *Fuller's* requirements that an order to pay be "conditional" upon a finding that there is a future likelihood that the defendant would be able to make the payments. *See id, see also, Fuller*, 417 U.S. at 53-54.

⁹⁷ BANNON ET AL., *supra* note 92, at 32.

⁹⁸ WASH. REV. CODE § 9.94A.760.

⁹⁹ *Id.*

¹⁰⁰ BANNON ET AL., *supra* note 92, at 7 & 32.

Table 3

Common Collection Practices	Hidden Costs
Probation or parole officers monitor payments.	Salary and overtime. Officers distracted from role in supporting reentry and rehabilitation.
Debtor must attend regular meetings before a judge, clerk, or other collection official.	Salary and overtime. Burdened court dockets.
Incarceration for failure to pay.	Salary and overtime for judges, prosecutors, and public defenders. Cost of incarceration. Jail overcrowding. Lost jobs and housing. Difficulty paying child support.
Refer debt to private collection agencies.	Onerous collection fees, leading to spiraling debt. Damaged credit, which hurts housing and employment prospects.
Probation terms extended for failure to pay.	Probation officer salary and overtime. Increased risk of re-incarceration for violating probation requirements.
Driver's license suspended for failure to pay.	Challenges in finding and maintaining employment. Increased risk of re-incarceration for driving with a suspended license.
Debt converted to a civil judgment.	Damaged credit, which hurts housing and employment prospects.
Wage garnishment and tax rebate interception.	Individuals discouraged from seeking legitimate employment. Financial hardship and inability to meet child support commitments.

Source: Bannon, Criminal Justice Debt: A Barrier to Reentry, 11.

Eliminating these fees and plans could also eliminate the variation associated with their imposition, including “defendant ethnicity, adjudication method, conviction type, and county characteristics.”¹⁰¹ In fact, it is possible that if LFO payments were made more manageable and achievable, jurisdictions might realize increased revenues. Public defender

¹⁰¹ BECKETT ET AL., *supra* note 34 at 76.

fees should be eliminated to reduce pressures that can lead to the conviction of the innocent, over-incarceration, and violations of the Constitution.¹⁰²

The American Bar Association recommends individuals should not be ordered to pay fees they are unable to afford, and that states should abolish reimbursement fees that require defendants to reimburse the state for all or part of the defender's services.¹⁰³ The ABA recommends that no such fees should be imposed without the procedural safeguards established by *Fuller*, which would require that a court inquire into a "defendant's financial resources and the burden that will be imposed in determining the amount and method of payment."¹⁰⁴ Washington does not follow this model and, in some counties, defendants may be assessed this fee twice: once by the courts and once by the Office of Assigned Counsel.¹⁰⁵ Instead, Washington courts have affirmed the imposition of attorney fees, finding that it only discourages the constitutional right to counsel where the fee was required as a precondition to initial appointment or when imposed regardless of the offender's ability to pay.¹⁰⁶ More than any other fee, these fees have the potential to chill the right to counsel—defendants may be dissuaded from applying for counsel because they know that they will be liable for the cost of counsel when their cases are resolved. This is especially acute in prosecution of minor crimes that are not likely to result in incarceration, but where a lawyer can properly advise the client regarding the impact of the conviction.¹⁰⁷ In many of these courts, accused persons are not represented

¹⁰² BANNON ET AL., *supra* note 92, at 32.

¹⁰³ AM. BAR ASS'N, ABA GUIDELINES ON CONTRIBUTION FEES FOR COSTS OF COUNSEL IN CRIMINAL CASES 1 (2004), available at <http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/rec110.authcheckdam.pdf>.

¹⁰⁴ *Id.* at 8 (citing *Fuller v. Oregon*, 417 U.S. 40, 45–46 (1974)).

¹⁰⁵ BECKETT ET AL., *supra* note 34, at 74.

¹⁰⁶ *State v. Barklind*, 557 P.2d 314, 316 (Wash. 1976).

¹⁰⁷ *Lafler v. Cooper*, --- U.S. ---, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012); *Missouri v. Frye*, --- U.S. ---, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012).

by counsel during preliminary hearings where pleas may take place.¹⁰⁸ This makes the assessment of fees without a proper hearing even more troubling.

Washington and other states should immediately cease incarcerating and jailing individuals for failure to pay criminal justice debt, particularly before a court has made an ability to pay determination.¹⁰⁹ In their study on the impact of LFOs in Washington, Beckett and Harris stated that “it is unclear [whether] the goals of the legislation that regulates LFOs are being met.”¹¹⁰ In examining this issue, they determined that the goals of uniformity, accountability, and recoupment were not being achieved.¹¹¹ The fact that Latino defendants, defendants charged with drug crimes, and defendants whose cases move forward to trial are assessed significantly higher fees should be a concern for any policy maker or court when considering whether to impose non-mandatory fees.¹¹² While Spokane County’s “auto-jail” policy was perhaps the worst example of disregarding the Due Process rules laid out in *Fuller*, it is not the only example of persons being incarcerated in Washington for failing to pay LFOs.¹¹³ Instead, courts should make true inquiries into a person’s ability to pay, taking into account their current circumstances and other obligations. Developing an integrated system that can balance which debts are owed, and prioritize the ability of a

¹⁰⁸ BORUCHOWITZ ET AL., *supra* note 62, at 14.

¹⁰⁹ BANNON ET AL., *supra* note 92, at 32.

¹¹⁰ BECKETT ET AL., *supra* note 34, at 72.

¹¹¹ See WASH. REV. CODE § 9.94A.760. The purpose of this act is to create a system that: (1) assists the courts in sentencing felony offenders regarding the offenders’ LFOs; (2) holds offenders accountable to victims, counties, cities, the state, municipalities, and society for the assessed costs associated with their crimes; and (3) provides remedies for an individual or other entities to recoup or at least defray a portion of the loss associated with the costs of felonious behavior. *Id.* See generally BECKETT ET AL., *supra* note 34, at 69–74.

¹¹² BECKETT ET AL., *supra* note 34, at 70.

¹¹³ See AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA’S NEW DEBTORS’ PRISONS 69–70 (2010), available at http://www.aclu.org/files/assets/InForAPenny_web.pdf.

person to pay, should result in reduced court time and time spent in jail, which may also have an impact on recidivism.¹¹⁴

Recognizing that in many cases poor persons are unable to pay LFOs may lead jurisdictions to create alternatives, and these programs should be encouraged by the state. For example, the city of Spokane has created a relicensing program for drivers who have not paid their traffic infractions.¹¹⁵ Designed to remove a large segment of low-level crimes from criminal dockets, this program has reduced the caseload of public defenders, expedited time to disposition, and eliminated jail stays by DWLS 3 offenders.¹¹⁶ This method of restorative justice has resulted in reduced caseloads for public defenders and prosecutors, increased city revenues, and increased relicensing.¹¹⁷ Continuing to enable programs like this, and other options that allow for alternatives to incarceration, are a proactive way to eliminate the poverty penalty associated with debt repayment. Washington should adopt a statewide model that mirrors the city of Spokane's policies, which, in the end, can realize improved efficiencies for the system and reduce the burden of debt upon the poor.

VI. CONCLUSION

Creating a criminal justice system that does not discriminate against a person because they are too poor to defend themselves helps ensure justice and increases respect for the courts. Although the promise that a person

¹¹⁴ BECKETT ET AL., *supra* note 34, at 75.

¹¹⁵ See *The Relicensing Program*, CITY OF SPOKANE, <http://www.spokanecity.org/government/legal/prosecuting/relicensing/> (last visited Feb. 8, 2013).

¹¹⁶ MARY MURAMATSU, SPOKANE CITY PROSECUTOR'S OFFICE, *THE CITY OF SPOKANE'S THIRD DEGREE STRATEGY: AN APPROACH TO CASE PRIORITIZATION 2*, available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_spokane_diversion_program.authcheckdam.pdf (last visited Feb. 8, 2013).

¹¹⁷ *Id.*

would not be denied counsel because they could not pay for that lawyer was made by the Supreme Court fifty years ago,¹¹⁸ the criminal justice system is still trying to fulfill that promise.

One of the ways in which the system has not yet achieved the promise of *Gideon* is in the imposition of fines and fees. While LFOs may seem minor to persons who have an ability to pay them and insignificant compared to some of the other consequences that can be imposed on a person who commits a crime, the impact of LFOs can be just as serious as incarceration and the loss of other rights.

Building a system that fulfills the promise of *Gideon* requires that a court make a meaningful inquiry into a person's ability to pay the LFOs imposed in a case. A court must assess whether a person actually has a future ability to pay, and when that person comes before the court for failing to pay the LFOs, the court must make a true assessment into whether that failure to pay is actually willful. In many cases, courts are not conducting that inquiry in a meaningful way. Courts must be educated on the impact of LFOs and why their blanket imposition is not improving judicial integrity and may, in fact, result in increased disenfranchisement and recidivism. Attorneys should make every effort to dissuade sentencing judges and revocation hearing judges from ordering indigent clients to pay fines and fees that these clients simply are not able to pay because of their poverty.

Because courts have limited the ways in which attorneys can ensure that their clients will not be incarcerated because they are poor, it is necessary that the legislature reexamine the wisdom of the current system of LFO imposition. A workable system requires that the legislature examine the impact that current and future LFOs will have on a person ordered to pay the fines. The legislature must also determine whether the system is likely to ever recover the fines imposed and whether there are better alternatives to

¹¹⁸ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

imposed LFOs. Eliminating fees and fines directly related to the right to counsel would improve the integrity of the system by ensuring more people are represented by counsel. It may also improve efficiency by ensuring a judge sees persons quickly, and that a judge imposes proper punishment, taking into consideration whether a person can actually pay the fees and fines imposed. Systemic change should also encourage the creation of programs like those in Spokane, which have realized enormous cost savings for the city and have also seen an increase in law abiding activity by ensuring that all persons who participate successfully in the program will again be able to drive lawfully.

The principle underlying *Gideon*, and all other due process principles, is that a person who is charged with an offense will be treated fairly. Imposing fees and fines that a person will never be able to pay does not improve judicial integrity. Instead, it increases the likelihood a person who found themselves in the criminal justice system for a minor crime will continue to remain there, unable to discharge the LFOs that were imposed in their case. Advocating for reduced LFOs where a client cannot pay them, helping to ensure that only persons who willfully fail to pay are punished for not paying, and reforming the way that LFOs are imposed in the first place need to be priorities for all of those involved in criminal justice.