

# LEGAL FINANCIAL OBLIGATIONS IN WISCONSIN

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Policy options offered in this report are the recommendations of the Wisconsin Director of State Courts Office and do not necessarily reflect the policies and positions of the State Justice Institute or the National Center for State Courts.

## I. INTRODUCTION AND METHODOLOGY

In recent years, court leaders, policymakers, and the public have increasingly focused on the issue of legal financial obligations (LFOs) assessed in criminal and traffic cases, including fines, fees, surcharges, and restitution. These obligations can constitute a heavy burden for defendants and their families, and sanctions for failure to pay an LFO can result in a variety of collateral consequences or lead to further involvement in the criminal justice system. For example, a defendant whose driver's license is suspended for failure to pay an LFO may be unable to work, or may choose to risk arrest for driving on a suspended license in order to continue working and caring for family.

In the state of Wisconsin, the circuit courts are responsible for collecting fines, forfeitures,<sup>1</sup> and a variety of other LFOs—including costs, surcharges, assessments, fees, restitution, and reimbursements—imposed upon defendants convicted of criminal offenses, as well as noncriminal forfeitures such as traffic offenses. Examples of these charges include a clerk's fee, a penalty surcharge, a court support services surcharge, a justice information surcharge, a jail surcharge, a crime lab and drug law enforcement surcharge, a victim/witness surcharge, a DNA analysis surcharge, a crime prevention funding board surcharge, a driver improvement program surcharge, a drug abuse program improvement surcharge, a drug offender diversion surcharge, a domestic abuse surcharge, a natural resources surcharge, a weapons surcharge, and an environmental surcharge.<sup>2</sup> Revenue from many fees and surcharges is used to fund automated court information systems, jail operations, the state DNA database, and other programs directly or indirectly related to the justice system or to the specific charge in the case, such as alcohol and drug abuse treatment programs and the state Environmental Fund.

The Conference of State Court Administrators (COSCA) has identified a number of evidence-based practices that can improve compliance with LFOs, including simplifying and clarifying LFOs, reminding defendants to appear in court and to pay their LFOs, eliminating additional fees for collections-related supervision or probation, eliminating extensions of supervision or probation solely to achieve payment of LFOs, and expanding access to community service and other non-financial alternatives to satisfy LFOs.<sup>3</sup> COSCA also stresses that “[i]t is incumbent on court administrators to establish ways for courts to assess the ability to pay accurately rather than leaving judges to ... haphazard indications of means.”<sup>4</sup> Similarly, the recent revision of CourtTools Measure 7, a performance measure for courts developed by the National Center for State Courts (NCSC), identifies clear guidelines for assessing ability to pay, establishing payment plans and compliance assistance programs such as reminders, and providing alternatives to payment such as community service as fair and effective practices to enhance compliance with

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<sup>1</sup> In Wisconsin, forfeitures are monetary penalties assessed in non-criminal cases such as minor traffic offenses. The term “forfeiture” refers to the court action as well as to the penalty itself. *See* WIS. STAT. § 778.01.

<sup>2</sup> WISCONSIN CIRCUIT COURT FEE, FORFEITURE, FINE, AND SURCHARGE TABLES (2017), *available at* <https://www.wicourts.gov/courts/circuit/docs/fees.pdf>.

<sup>3</sup> CONFERENCE OF STATE COURT ADMINISTRATORS, THE END OF DEBTORS' PRISONS: EFFECTIVE COURT POLICIES FOR SUCCESSFUL COMPLIANCE WITH LEGAL FINANCIAL OBLIGATIONS (2016).

<sup>4</sup> *Id.* at 11.

LFOs.<sup>5</sup> There is currently little documentation of practices regarding LFOs in Wisconsin's circuit courts. Wisconsin case law encourages, but does not require, trial court judges to consider a defendant's ability to pay LFOs at the time of sentencing and to establish installment plans for indigent defendants.<sup>6</sup> Judicial practices regarding installment plans, waivers of LFOs, and driver's license suspensions vary widely. Practices for collecting delinquent payments also vary across the state, with some courts referring cases to private collections agencies and others relying on tax intercepts through the state Department of Revenue to collect LFOs.

Although Wisconsin courts do not routinely report LFO collection rates, previous research and published statistics show that collection rates for LFOs in other states are generally low. A 2014 Alabama study found collection rates of 28 percent for costs in circuit court criminal cases, 25 percent for costs in district court criminal cases, 8 percent for circuit court criminal fines, and 17 percent for district court criminal fines. In 2015, the overall rate of fine and fee collections in Virginia trial courts was 59 percent. For cases reaching a disposition in 2015, 23 percent of costs, fines, fees, and restitution ordered by Pennsylvania's general jurisdiction courts were paid. For fiscal year 2015, Florida reported LFO collection rates of 20 percent in circuit court criminal cases and 67 percent in county court criminal, non-criminal infraction, and ordinance violation cases.

This study represents the first attempt at systematically documenting LFO collections practices and rates in Wisconsin's circuit courts. In so doing, it seeks to answer the following questions:

1. What practices do Wisconsin trial courts and trial court judges use to facilitate, encourage, and enhance defendants' compliance with LFOs, and how do these practices vary across the state? How do these practices relate to best practices identified by COSCA and NCSC?
2. At what rate do Wisconsin circuit court criminal and forfeiture defendants repay LFOs?
3. What is the impact of charge type on the rate and timing of payment of LFOs?
4. How do enforcement practices such as the use of incarceration for nonpayment affect LFO repayment rates?

With support from the State Justice Institute, the Wisconsin Director of State Courts Office (DSCO) partnered with NCSC to answer these questions. The project relied upon three separate sources of data:

1. A web-based implementation of the CourTools Measure 7c (Fair Practices for Legal Financial Obligations), which asked Wisconsin circuit and municipal court judges, court clerks, and clerk's office staff to rate the importance and implementation of specific practices for encouraging compliance with legal financial obligations.
2. A series of 21 semi-structured qualitative interviews with judges, judicial officers, and court staff regarding LFO collection practices.

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<sup>5</sup> NATIONAL CENTER FOR STATE COURTS, COURTOOLS MEASURE 7 (2016), *available at*

<http://www.courtools.org/~media/Microsites/Files/CourTools/M7%20Clarification%20v4.ashx>.

<sup>6</sup> *State ex rel. Pedersen v. Blessinger*, 201 N.W.2d 778 (Wis. 1972); *Will v. State*, 267 N.W.2d 357 (Wis. 1978).

3. Case-level data on LFO receipts in criminal and forfeiture cases disposed in circuit court in all 72 Wisconsin counties from 2010 through 2016.

## II. OVERVIEW OF LEGAL FINANCIAL OBLIGATIONS IN WISCONSIN

As in most states, Wisconsin statutes impose monetary penalties for violation of state and local laws. The term “fine” is used to refer to the monetary penalty for a crime; the term “forfeiture” refers to the monetary penalty for violation of non-criminal state laws, local ordinances, and state regulations. The amount of the fine or forfeiture is sometimes referred to as the “base amount” or “deposit amount”.

The maximum and minimum monetary penalties are set by the legislature. The exact amount imposed in each case is determined by the court. For the most common offenses, there is a table of presumptive penalties approved by the Wisconsin Judicial Conference.<sup>7</sup>

The money collected from criminal fines and state forfeitures is deposited in the state school fund. The Wisconsin Constitution, art. X, sec. 2, requires that the “clear proceeds” of all fines and forfeitures collected for any breach of state penal laws must be deposited in the state’s common school fund and cannot be used for any other purpose.<sup>8</sup>

### A. Surcharges

On top of the fine or forfeiture, the legislature has added a number of surcharges to generate revenue for state and local programs. These surcharges may take the form of a percentage of the fine or forfeiture or may be a fixed amount, to be assessed against a defendant upon conviction. The first statutory surcharge, a 10% penalty surcharge, was enacted by the 1977 Legislature to fund state programs for training law enforcement officers.<sup>9</sup>

The number of surcharges grew over the next 20 years. In 1999, the court Planning and Policy Advisory Committee (PPAC) formed a subcommittee to study the number of surcharges and the effort required by the courts to collect them. The subcommittee found that the number of surcharges increased from 9 in 1987 to 25 in 2001, while the revenue collected by the circuit courts rose from \$10.8 million to \$67.9 million.<sup>10</sup> Today, a total of 35 surcharges have been

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<sup>7</sup> See STATE OF WISCONSIN REVISED UNIFORM STATE TRAFFIC DEPOSIT SCHEDULE (2018), *available at* <https://www.wicourts.gov/publications/fees/docs/bondsched18.pdf>, and STATE OF WISCONSIN REVISED UNIFORM DEPOSIT AND BAIL SCHEDULE FOR CONSERVATION VIOLATIONS (2018), *available at* <https://www.wicourts.gov/publications/fees/docs/dnrbondsched18.pdf>

<sup>8</sup> For violations of municipal ordinances, the base amount goes to the municipality (county, city, town, or special district). Traffic laws and municipal ordinances may be enforced in a municipal court if the municipality has one, or in the circuit court. Forfeitures collected by municipal courts are subject to some but not all of the state surcharges. This discussion focuses on collection of revenues by the state circuit courts; the revenues raised by municipal courts are not included in these figures.

<sup>9</sup> WISCONSIN LEGISLATIVE COUNCIL, LEGISLATION ON SURCHARGES ON FINES AND FORFEITURES, Report No. 7 (1989), *available at* <https://www.ncjrs.gov/pdffiles1/Digitization/117836NCJRS.pdf>.

<sup>10</sup> PLANNING AND POLICY ADVISORY COMMITTEE (PPAC), FINES, FORFEITURES AND SURCHARGES: FACTS AND FINDINGS (Nov. 2001), *available at* <https://www.wicourts.gov/courts/committees/docs/ppacfeesrpt.pdf>.

enacted, with a total of \$93.2 million collected by the circuit courts in CY2017.<sup>11</sup> Many surcharges have increased in percentage or dollar amount since they were first created.<sup>12</sup>

The surcharges are variable in nature. Some apply to criminal fines, some to forfeitures, and some to both. A few of the surcharges apply to almost every offense (for instance, the penalty, jail, and crime lab and drug enforcement surcharges), while others apply only to a limited range of prohibited conduct (for instance, the domestic abuse and environmental surcharges).<sup>13</sup> Some of the surcharges raise millions of dollars each year, while some raise no money at all.

Surcharge revenues are shared by the state, counties, and court system. The counties receive the proceeds of the crime prevention funding board, ignition interlock, jail, and restitution surcharges. The circuit courts receive a portion of the justice information surcharge to support the court automation program. The share received by the counties and the court system for each offense has remained fairly static for many years, while most of the growth in revenues has gone to the state general fund and to specific funds for the benefit of state agencies.

## **B. Fees and Costs**

The clerks of circuit courts charge statutory fees for processing forfeiture and criminal cases. The clerk's fee for forfeiture cases has risen from \$15 in 1983 to \$25 today, with proceeds divided between the state general fund, the county, and the state court Circuit Court Automation Program (CCAP). The fee for criminal cases has risen from \$20 in 1983 to \$163 today, with the clerk's share remaining at \$10 and the state general fund receiving the rest. In 2017, the circuit courts added a \$20 eFiling fee for each case, applicable to all attorneys and for self-represented defendants who choose to eFile.

The legislature also allows recoupment of a number of costs, including the cost of blood draws in drunk driving cases, attorney fees, guardian ad litem fees, and some aspects of criminal investigations.

## **C. Collection of Fines and Forfeitures**

The clerks of circuit court have the primary responsibility for collecting the financial obligations imposed by the circuit court, including the deposit amount, surcharges, fees, costs and attorney fees. For defendants in prison or on probation, collection of financial obligations is primarily

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<sup>11</sup> The \$93.2 million is based upon the Revenue Summary Report but excludes lines 1 (except the CCAP portion), 7a, 7b, 8, 9, 11, 12, 27a, 27b, and 29.

<sup>12</sup> For instance, the penalty surcharge, created in 1977 to fund law enforcement training, has risen from 10% on every fine and forfeiture to 26%. The driver improvement surcharge, created in 1980 to fund alcohol treatment programs for intoxicated drivers, has risen from \$150 to \$435.

<sup>13</sup> For details regarding the current surcharges in Wisconsin Court System, see WISCONSIN CIRCUIT COURT FEE, FORFEITURE, FINE, AND SURCHARGE TABLES (2017), available at <https://www.wicourts.gov/courts/circuit/docs/fees.pdf>.

handled by the state Department of Corrections during the time defendants are under its supervision.<sup>14</sup>

Most clerks' offices have a number of staff positions devoted to bookkeeping and collections functions. They enter the financial obligations into the judgment in each case, work with defendants to set up payment plans, send reminder notices, take in money over the counter and online, and pursue collections actions if the obligations go unpaid. Enforcement actions may include wage assignments, liens on property, suspension of driver and hunting/fishing licenses, intercept of state tax refunds, and referral to a collections agency. In cases where the court finds that the defendant's failure to pay is willful, a jail sentence may be imposed. When money is collected, the state share is turned over to the county treasurer for distribution to the state Department of Administration.

Beginning in 2000, the clerks worked with the Director of State Courts Office to develop a manual of best practices for collection of court obligations and to offer trainings on debt collection options.<sup>15</sup> Many clerks have entered into contracts with collection agencies to handle difficult collections for a percentage of the money recouped. In 1981, the state Department of Revenue began to offer a program to intercept tax refunds and apply them to debts owed to the state and local governments, and most clerks signed up for this service. In 2009, the Department of Revenue began to offer enhanced services for state debt collection (SDC), including consolidation of debts, payment plans, tax intercept, and bank account seizure. The clerks of circuit court did not begin to use state debt collection services until recently, and in 2018, CCAP added an interface with SDC to allow for easy transfer of debt.

The CCAP case management system has been upgraded over time to automate collections tasks. The software recognizes which fees and surcharges are applicable to an offense and calculates the amounts due. Monthly reporting of the amounts collected is done through an automated report to the Department of Administration. Interfaces with the Department of Revenue are available to submit debts for tax intercept and state debt collection services.

Clerks consider the need to collect court-ordered obligations to be an important part of their work. These obligations represent the judgment of the court and need to be enforced for purposes of punishment and deterrence of future offenses. In addition, government agencies depend on the revenue from surcharges, fees, and costs, so clerks frequently receive inquiries

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<sup>14</sup> The Department of Corrections collects only some of the court-imposed obligations, including restitution and the victim-witness, DNA, drug offender diversion, and child pornography surcharges. Amounts remaining unpaid at the end of supervision are turned back over to the clerk of circuit court for collection.

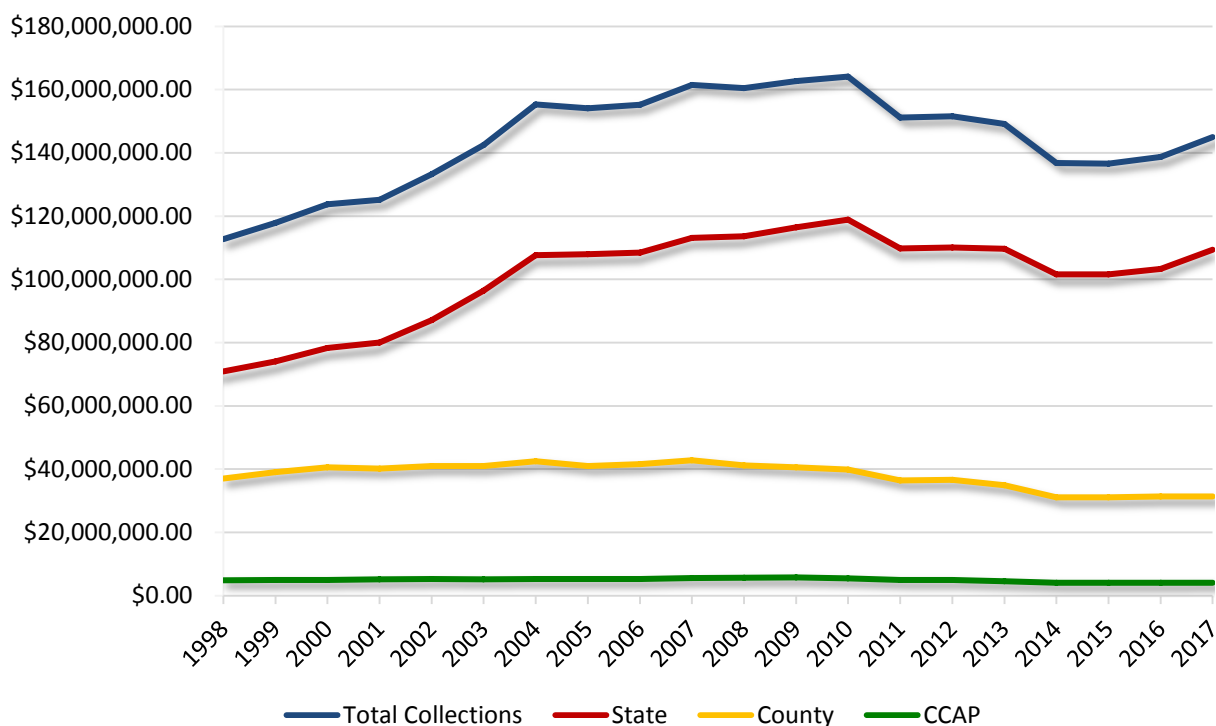
<sup>15</sup> The CLERK OF CIRCUIT COURT COLLECTIONS MANUAL (2018) is available to authorized users of the Wisconsin court system network at <http://courtnet.wicourts.gov/publications/docs/collecthandbook.docx>.



from their county boards and local agencies about the amounts collected. State agencies also contact the state court system with concerns when agency surcharge revenues go down.<sup>16</sup>

Total revenues collected through fines, forfeitures, surcharges, fees, and costs went up steadily from 1977 until 2010. From 2010-2015, revenues were down, and the overall number of criminal and forfeiture cases filed and disposed of also declined. The decline in revenues began to reverse in 2016. The charts below show revenues and cases disposed for the last 20 years.

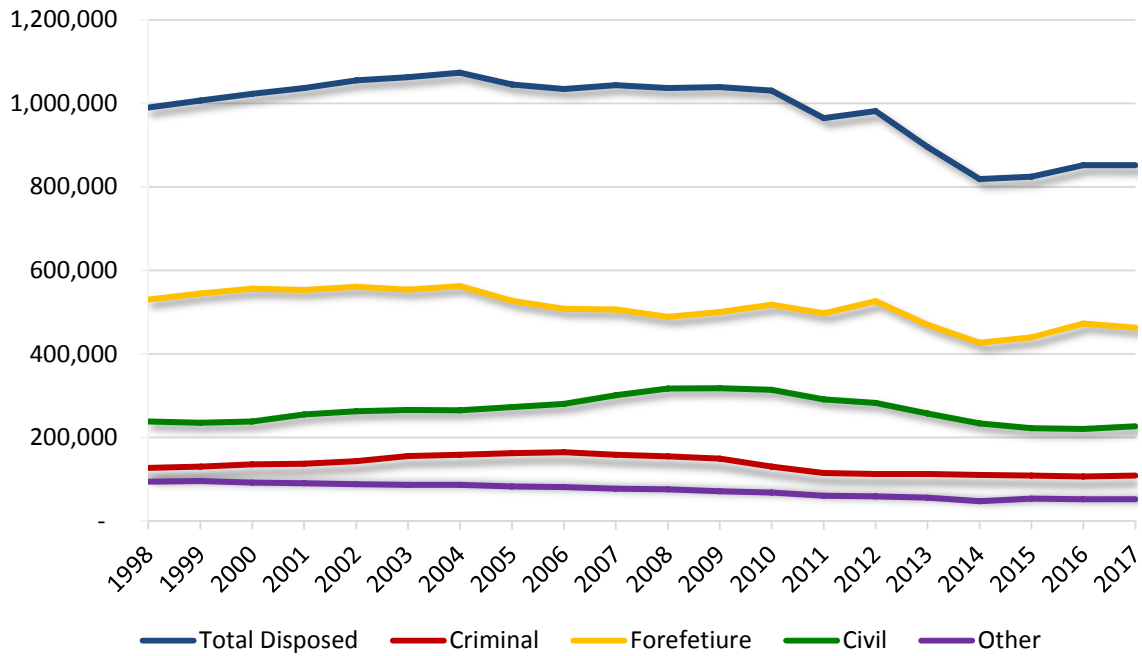
**Figure 1. LFO Revenues Collected, 1998 – 2017**



Source: CCAP Revenue Summary Report

<sup>16</sup> In 2012, the Wisconsin Department of Justice requested that the Legislative Audit Bureau look into why an increase to the victim-witness surcharge failed to produce the anticipated revenues. Possible reasons were that judges were choosing not to impose the surcharge or that clerks were not making sufficient efforts to collect it. The audit concluded that the most likely cause was a downturn in the state and national economies, leading to fewer cases filed and fewer defendants able to meet their obligations and. LEGISLATIVE AUDIT BUREAU, CRIME VICTIM AND WITNESS ASSISTANCE SURCHARGE REVENUE, Report 12-13 (Aug. 2012), available at <https://legis.wisconsin.gov/lab/reports/12-13full.pdf>.

**Figure 2. Wisconsin Circuit court Case Dispositions, 1998 - 2017**

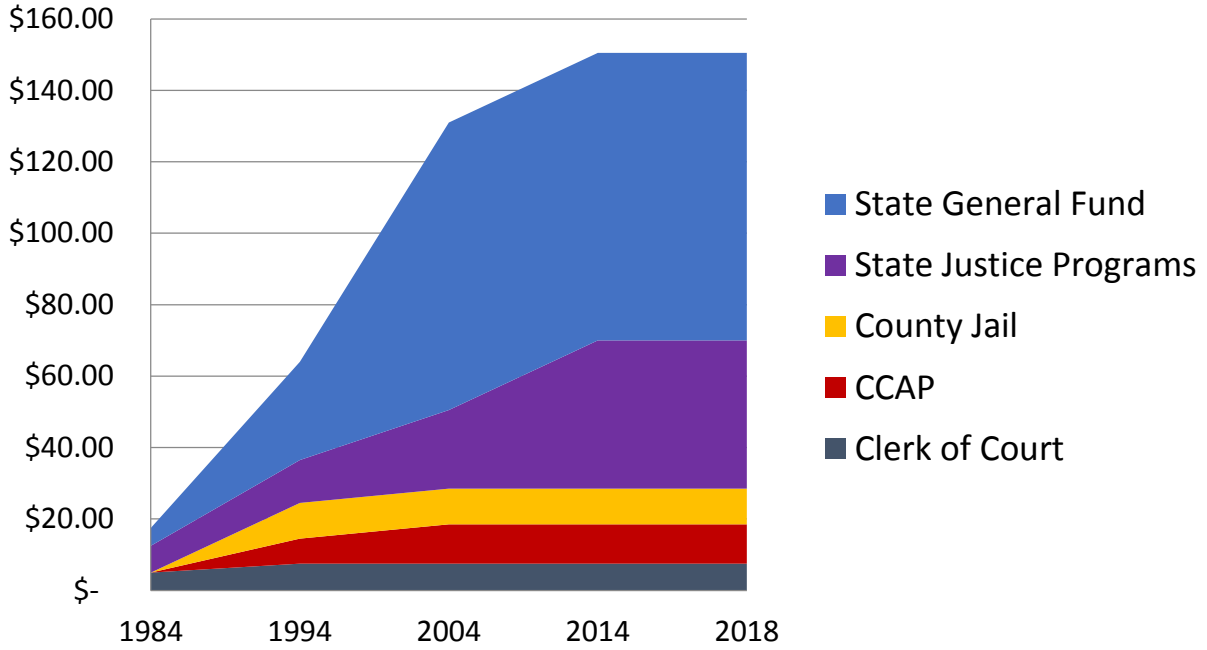


Source: CCAP Caseload Summary Report

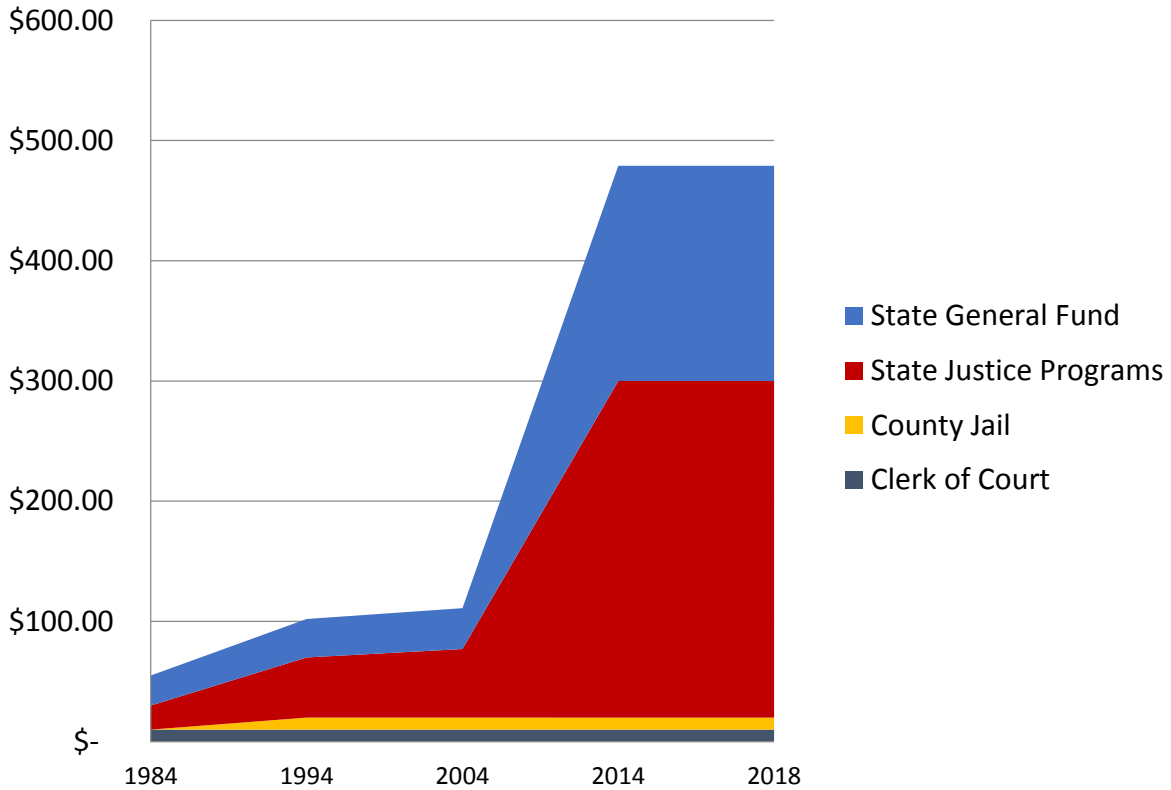
#### **D. Total Financial Obligation**

The increased numbers of fees, costs, and surcharges and the increased amounts have had a cumulative effect over time. The clerk's fee in criminal cases has also been substantially increased. The fees and surcharges imposed on a typical \$50 forfeiture have increased from \$26 in 1984 to \$150.50 in 2018. The fees and surcharges on a typical \$100 misdemeanor fine have increased from \$52 in 1984 to \$479 in 2018.

**Figure 3. Fees and Surcharges on a \$50 Citation, 1984 –2018**



**Figure 4. Fees and Surcharges on a \$100 Fine, 1984 – 2018**



### III. CASE LAW REGARDING LFO ENFORCEMENT

The United States Supreme Court has consistently held that a person may not be imprisoned solely because he or she is unable to pay an LFO. In *Tate v. Short*,<sup>17</sup> the Court ruled that the state of Texas erred when it imposed a jail sentence on a defendant who was indigent and therefore unable to pay the statutory fine for his traffic offenses. Texas required a defendant to pay the fine immediately or report to jail for a period of time sufficient to satisfy the fine at the rate of five dollars per day. Applying an equal protection analysis, the Court found the Texas law in violation of the Fourteenth Amendment, noting that the Constitution requires the application of punishment to be the same for all defendants regardless of their economic status.<sup>18</sup>

In 1983, the Court revisited the question, considering whether the state of Georgia acted constitutionally when, without determining whether a defendant was indigent, it revoked the defendant's probation because he failed to pay an LFO. In the case of *Bearden v. Georgia*,<sup>19</sup> the Court applied both equal protection and due process analysis and held that the Constitution requires that a judge who holds a revocation hearing for failure to pay an LFO "must inquire into the reasons for failure to pay."<sup>20</sup> The *Bearden* Court noted that imprisonment for failure to pay an LFO would be permissible if the court found that the defendant was able to pay but willfully refused to pay or to make a bona fide effort toward acquiring the money to pay the LFO, or if no alternatives to imprisonment were sufficient to meet the state's interest in punishment and deterrence.<sup>21</sup>

The *Bearden* Court stressed that the state was "not powerless to enforce judgments against those financially unable to pay a fine."<sup>22</sup> The Court noted that the state has a significant interest in ensuring that the defendant not be "insulated from punishment" by virtue of his or her indigency and set forth several alternatives for enforcement of the punishment, including extending the time for making payments, reducing the fine, and substituting community service for the fine.<sup>23</sup> Turning to the facts of the case, the Court found that the state of Georgia had imprisoned the defendant, who was indigent, for failure to pay an LFO without considering the reasons he was unable to pay, and without considering any alternative to payment of the LFO in full. This, the Court held, violated the 14<sup>th</sup> Amendment guarantees of due process and equal protection under the law.<sup>24</sup>

Wisconsin courts have come to similar conclusions. In 1972, the Wisconsin Supreme Court held that the *Tate* decision established that "one who has been convicted of a crime and fined is not

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<sup>17</sup> *Tate v. Short*, 401 U.S. 660 (1971)

<sup>18</sup> *Tate*, 401 U.S. at 399, citing favorably *Williams v. Illinois*, 399 U.S. 235, 244 (1970)

<sup>19</sup> *Bearden v. Georgia*, 461 U.S. 660 (1983)

<sup>20</sup> *Bearden*, 461 U.S. at 672.

<sup>21</sup> *Bearden*, 461 U.S. at 672-73.

<sup>22</sup> *Bearden*, 461 U.S. at 672, citing favorably *Williams* and *Tate*.

<sup>23</sup> *Bearden*, 461 U.S. at 672.

<sup>24</sup> *Bearden*, 461 U.S. at 674.

to be imprisoned in satisfaction of the fine or in lieu thereof if he is unable to pay the fine.”<sup>25</sup> The court determined that a Wisconsin statute allowing a person to be imprisoned for no more than six months if he or she fails to pay a fine was constitutional, as it allowed for judicial discretion in determining whether imprisonment is appropriate under the defendant’s circumstances. The court agreed with the proposition that a person may not be imprisoned if he or she is unable to pay because of poverty but determined that an indigent defendant has the burden of proving his or her inability to pay.<sup>26</sup> In Wisconsin, Blessinger hearings are conducted at the request of a defendant, often after a warrant has been issued following the defendant’s failure to pay an LFO, and allow the defendant to prove that he or she is indigent in order to avoid being jailed for nonpayment.

In 2006, a Wisconsin Court of Appeals cited *Bearden* and another United States Supreme Court case, *Fuller v. Oregon*,<sup>27</sup> in holding that, in cases of “recoupment” LFOs, such as county appointed attorney fees, the court must determine a defendant’s ability to pay the LFO before the defendant may be imprisoned for failure to pay.<sup>28</sup> The *Helsper* court determined that, in order to pass constitutional muster, the statute allowing for imprisonment for failure to pay requires “at least where no prior determination of ability to pay exists, the court [to] consider whether the defendant had the ability to pay the attorney fee obligation when it exercises its discretion[.] The court's consideration of this issue must be based on a finding of ability to pay made at a hearing where the defendant is given notice and an opportunity to be heard.”<sup>29</sup>

The *Helsper* court acknowledged that the *Blessinger* court placed the burden of requesting a hearing and proving indigency on a defendant who fails to pay a fine, but distinguished the fine at issue in that case from recoupment LFOs. The court noted that the state has a different interest in enforcing fines imposed for punitive and deterrent effect than it has in recouping fees from defendants who, by definition of qualifying for attorney services, are much more likely to fail to pay due to indigence.<sup>30</sup>

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<sup>25</sup> *State Ex Rel. Pedersen v. Blessinger*, 56 Wis. 2d 286, 288 (1972)

<sup>26</sup> *Pedersen*, 56 Wis. 2d at 295-96.

<sup>27</sup> *Fuller v. Oregon*, 417 U.S. 40 (1974), involved a challenge to Oregon’s recoupment statute, under which a defendant’s ability to pay was assessed at three separate points in the process. While the Court did not state that each safeguard contained in the Oregon statute was required under the United States Constitution, it held that the statute was constitutional because it was directed squarely at defendants who were able to pay recoupment and did not subject defendants who are unable to pay to collection procedures. *Fuller*, 417 U.S. at 46.

<sup>28</sup> *In the Matter of Attorney Fees in State v. Helsper*, 724 N.W.2d 414 (2006)

<sup>29</sup> *Helsper*, 724 N.W.2d at 418.

<sup>30</sup> *Helsper*, 724 N.W.2d at 419.

#### IV. COURTOOLS MEASURE 7c SURVEY: FAIR PRACTICES FOR LEGAL FINANCIAL OBLIGATIONS

In 2017, NCSC deployed the CourTools Measure 7c Survey to assess attitudes and practices surrounding LFO enforcement among Wisconsin trial court judges, judicial officers, court clerks, and clerk's office staff. A total of 85 circuit court judges and judicial officers, 55 circuit court clerks and staff, 88 municipal court judges and judicial officers, and 148 municipal court clerks and staff participated in the survey. The web-based survey asked participants to assess 26 practices for determining, monitoring, and enforcing compliance with legal financial obligations (LFOs), including fines, fees, forfeitures, and surcharges, in criminal and forfeiture cases. Participants rated each practice on two dimensions—importance and the court's current practice—using a five-point Likert-type scale, as shown in Table 1.

**Table 1. Response Scales for CourTools Measure 7c Survey**

<b>Importance</b>	<b>Current Practice in My Court</b>
Rate each statement's importance as part of a strategy to support fair and effective compliance with LFOs for courts in general:	Rate the extent to which each statement reflects current practice in your court:
1 = Not Important	1 = Never True
2 = Slightly Important	2 = Slightly True
3 = Moderately Important	3 = True About Half the Time
4 = Important	4 = Mostly True
5 = Very Important	5 = Always True
DK = Don't Know	DK = Don't Know

Results are presented separately for judges/judicial officers and clerks of court/staff at each court level (Figures 5 – 6). In addition to the average scores for importance and current practice, the frequency of responses for each item is shown in a small bar graph, ranging from 1 (Not Important or Never True) on the left to 5 (Very Important or Always True) on the right. For reference, dotted horizontal lines indicate the 50% and 100% frequency marks. A high frequency of responses in a single category, or a distribution heavily skewed towards one end of the scale, indicates a high degree of consensus among respondents; a flatter distribution indicates less agreement.

In circuit court, ratings of importance exceeded ratings of practice on nearly every item, for judges/judicial officers as well as for clerks/staff. For items in Area 1: Assessing Ability to Pay, the distribution of responses on the Practice scale tended to be much flatter than the distribution of responses on the Importance scale, indicating a relative lack of agreement regarding current practices surrounding ability-to-pay assessments that may result from differences in practice among courts. For each practice listed in Area 2: Establishing Payment Plans, there was strong consensus among judges/judicial officers and clerks of court/staff that the practice was important and consistently applied. In Area 3: Providing Compliance Assistance and Payment Alternatives to Satisfy LFOs, there was less consensus regarding either the

importance or the current application of the listed practices. The same general pattern applied to items in Area 4: Examining Enforcement Policies and Identifying Uncollectible Debt, with the exception of item 15. More than half of judges and judicial officers rated this item as “Very Important” and “Always True,” indicating a strong commitment within the judiciary to limit the use of incarceration as a sanction for nonpayment of LFOs to situations in which the defendant has not made a good faith effort to pay despite a proven ability to do so. In Area 5: Identifying Information Relevant to LFOs on Court Website and Notices, judges and judicial officers indicated that it was moderately important to make the information described in each item available, but that this information was generally not provided in practice. Clerks of court and staff rated the availability of this information somewhat more positively. In Area 6: Training for Judicial Officers and Staff, both judges/judicial officers and clerks/staff tended to rate the importance of training as relatively high in importance, but relatively low in availability.

In municipal court, there appears to be a higher level of agreement on the importance of the practices described in the survey, as well as more widespread implementation of these practices, than in circuit court. For most items in Areas 1, 2, 3, 4, and 6 (Assessing Ability to Pay, Establishing Payment Plans, Providing Compliance Assistance and Payment Alternatives to Satisfy LFOs, Examining Enforcement Policies and Identifying Uncollectible Debt, and Training for Judicial Officers and Staff), more than half of municipal court judges/judicial officers and clerks of court/staff rated importance as “Very Important” and practice as “Always True.” Average ratings for practice frequently exceeded average ratings for importance. Usage of payment plans is especially widespread, with close to 100% of judges and staff rating each item in Area 2: Establishing Payment Plans as “Very Important” and “Always True.” Practices rated as comparatively less important and less frequently implemented included tools for assessing ability to pay (item 3), reminders of court dates and payment due dates (item 9), formal notice to defendants of non-monetary compliance options (item 11), using driver’s license suspension only as a sanction of last resort (item 16), and writing off uncollectible debts (item 18). There was also a lack of consensus regarding the importance of identifying information relevant to LFOs on the court website and in notices (Area 5), as well as a lack of consistency in the availability of this information in practice.

In general, the results of the CourTools Measure 7c survey indicate that municipal court judges, judicial officers, clerks of court, and staff are highly aware of ability-to-pay issues and believe their courts have implemented a wide variety of practices designed to assist defendants in satisfying LFOs in a fair and effective manner. These attitudes and practices are somewhat less well established in circuit court, although certain measures such as payment plans are widely used. At both court levels, there is room to explore the increased use of formal tools for assessing ability to pay, the implementation of court date and payment reminders, and the provision of additional information regarding LFOs through the court website and formal notices. Circuit court judges, judicial officers, clerks, and staff may also benefit from additional training regarding LFOs and ability-to-pay issues.

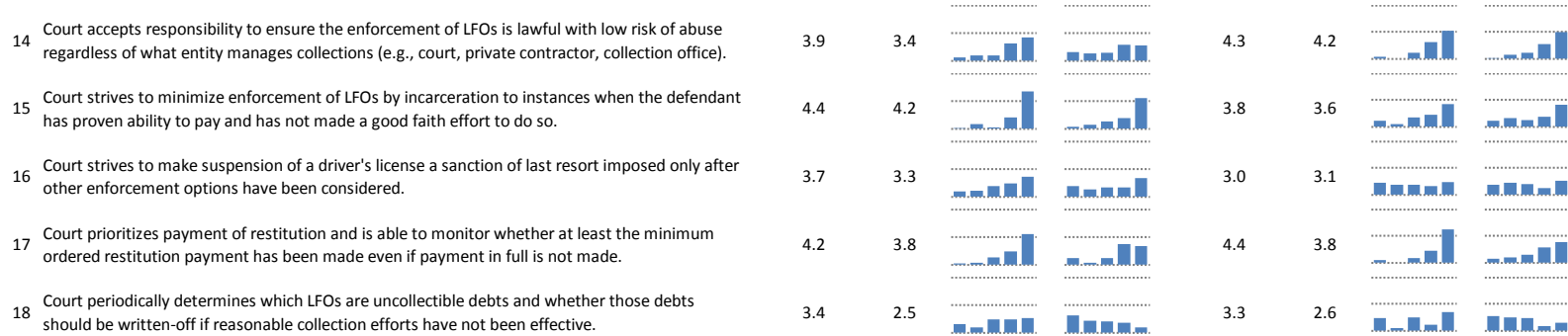
Figure 5. CourTools Measure 7c: Court Practices Survey, Circuit court

Item No.	Survey Question	Judges/Judicial Officers				Clerks of Court/Staff			
		Average Importance	Average Practice	Importance	Practice	Average Importance	Average Practice	Importance	Practice
<b>Area 1: Assessing Ability to Pay</b>									
1	Court provides clear guidelines to judicial officers on how to assess ability to pay for each individual defendant when initially setting Legal Financial Obligations (LFOs).	3.8	3.0			4.2	3.3		
2	Court provides clear guidelines to judicial officers on how to assess ability to pay before imposing incarceration for a defendant's failure to pay.	3.8	3.0			4.0	3.3		
3	Court uses tools (e.g., payment calculators that reference federal poverty guidelines or state standards) to accurately and consistently assess ability to pay.	3.8	2.9			4.0	3.1		
4	Court uses formal notice procedures to inform defendants of their right to contest the LFO because they are unable to pay.	3.5	2.6			3.7	3.0		
<b>Area 2: Establishing Payment Plans</b>									
5	Court provides options for people with a proven inability to immediately pay the full amount of a LFO to set up a reasonable installment payment plan.	4.6	4.6			4.8	4.8		
6	Court sets payment plan amounts that the defendant can reasonably be expected to make, considering the amount owed and the defendant's ability to pay.	4.5	4.3			4.7	4.6		
7	Court provides defendants with alternative methods to pay their LFO, such as credit card, debit card, personal check, PayPal, and/or prepaid business reply envelopes for mailing money order payments.	4.2	3.7			4.6	4.6		
<b>Area 3: Providing Compliance Assistance and Payment Alternatives to Satisfy LFOs</b>									
8	Court has established a local compliance program with at least one staff person to monitor defendant compliance with court LFOs and payment plans.	4.2	3.8			4.5	4.4		
9	Court contacts defendants (e.g., phone call, text message) to remind them in advance of upcoming court dates and/or missed payments in the effort to promote compliance.	3.5	2.9			3.3	2.8		
10	Court encourages compliance and voluntary appearance in court by notifying defendants who fail to appear that a warrant will be issued unless the defendant comes to court within a given time frame (e.g., five days).	3.5	3.0			3.6	3.1		
11	Court uses formal notice procedures to inform defendants of non-monetary compliance options that may be available to them.	3.7	2.7			3.2	2.8		
12	Court provides community service and other options such as completion of a GED program, obtaining a driver's license, participating in counseling, and alternative orders to satisfy the LFO for defendants with a demonstrated inability to pay.	3.4	2.5			3.1	2.5		
13	Court agrees to community service and other options such as completion of a GED program, obtaining a driver's license, participating in counseling to satisfy LFOs only with the agreement of the defendant.	3.4	2.6			2.9	2.5		

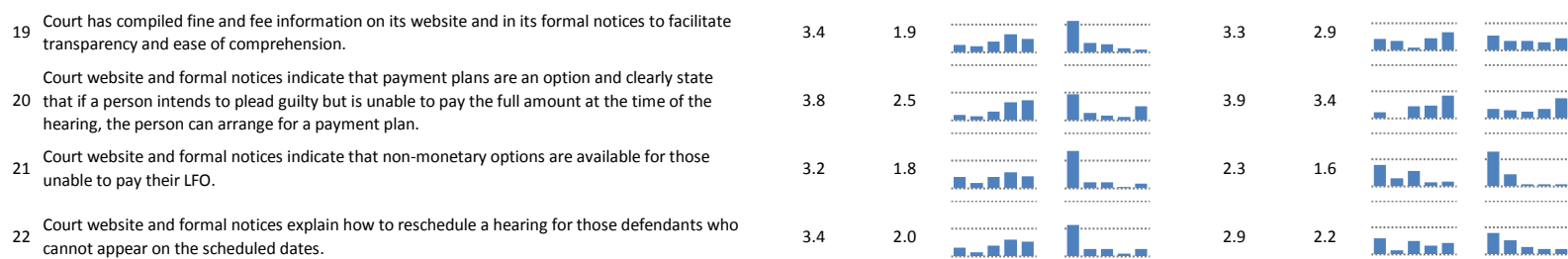


**Figure 5. CourTools Measure 7c: Court Practices Survey, Circuit court (continued)**

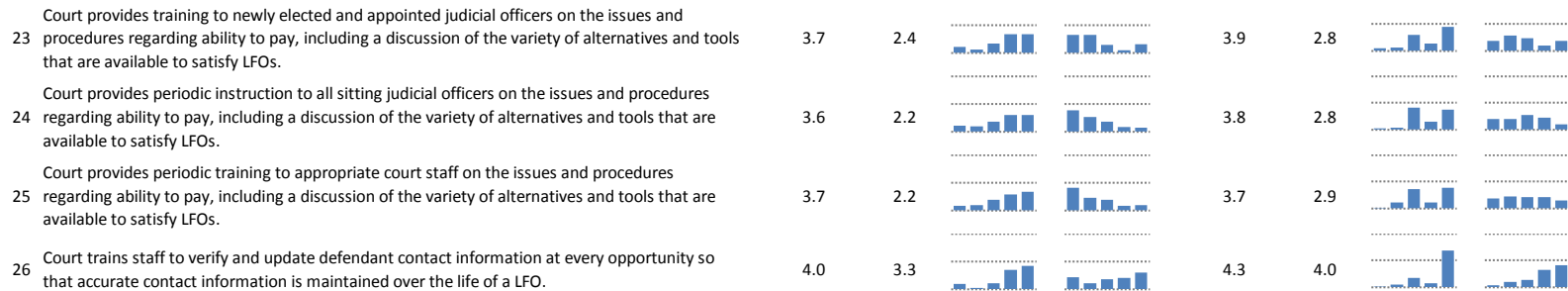
**Area 4: Examining Enforcement Policies and Identifying Uncollectible Debt**



**Area 5: Identifying Information Relevant to LFOs on Court Website and Notices**



**Area 6: Training for Judicial Officers and Staff**



**Figure 6. CourTools Measure 7c: Court Practices Survey, Municipal Court**

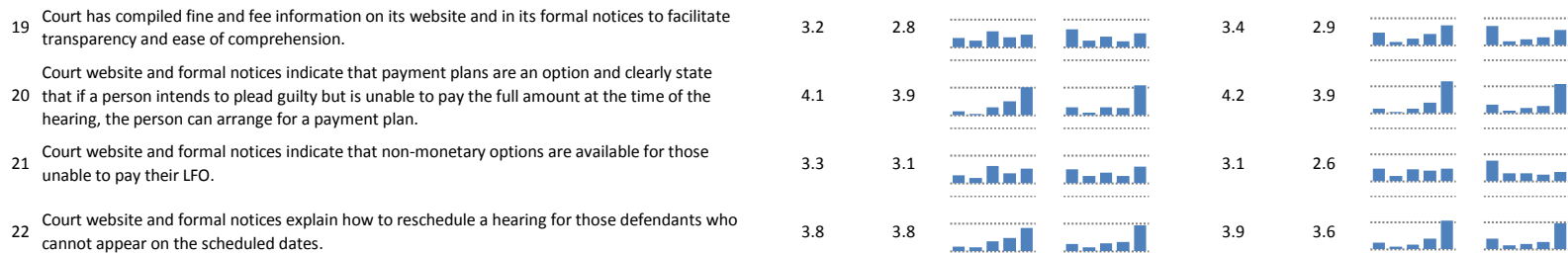
Item No.	Survey Question	Judges/Judicial Officers				Clerks of Court/Staff			
		Average Importance	Average Practice	Importance	Practice	Average Importance	Average Practice	Importance	Practice
<b>Area 1: Assessing Ability to Pay</b>									
1	Court provides clear guidelines to judicial officers on how to assess ability to pay for each individual defendant when initially setting Legal Financial Obligations (LFOs).	4.3	4.2			4.4	4.3		
2	Court provides clear guidelines to judicial officers on how to assess ability to pay before imposing incarceration for a defendant's failure to pay.	4.4	4.4			4.5	4.3		
3	Court uses tools (e.g., payment calculators that reference federal poverty guidelines or state standards) to accurately and consistently assess ability to pay.	3.8	3.7			4.2	3.7		
4	Court uses formal notice procedures to inform defendants of their right to contest the LFO because they are unable to pay.	4.5	4.5			4.5	4.3		
<b>Area 2: Establishing Payment Plans</b>									
5	Court provides options for people with a proven inability to immediately pay the full amount of a LFO to set up a reasonable installment payment plan.	4.9	5.0			4.8	4.9		
6	Court sets payment plan amounts that the defendant can reasonably be expected to make, considering the amount owed and the defendant's ability to pay.	4.8	4.9			4.9	4.9		
7	Court provides defendants with alternative methods to pay their LFO, such as credit card, debit card, personal check, PayPal, and/or prepaid business reply envelopes for mailing money order payments.	4.6	4.8			4.8	4.8		
<b>Area 3: Providing Compliance Assistance and Payment Alternatives to Satisfy LFOs</b>									
8	Court has established a local compliance program with at least one staff person to monitor defendant compliance with court LFOs and payment plans.	4.3	4.2			4.4	4.5		
9	Court contacts defendants (e.g., phone call, text message) to remind them in advance of upcoming court dates and/or missed payments in the effort to promote compliance.	3.0	2.9			2.9	2.9		
10	Court encourages compliance and voluntary appearance in court by notifying defendants who fail to appear that a warrant will be issued unless the defendant comes to court within a given time frame (e.g., five days).	3.9	4.0			3.9	3.9		
11	Court uses formal notice procedures to inform defendants of non-monetary compliance options that may be available to them.	3.9	4.0			3.4	3.2		
12	Court provides community service and other options such as completion of a GED program, obtaining a driver's license, participating in counseling, and other orders to satisfy the LFO for defendants with a demonstrated inability to pay.	4.2	4.0			3.9	3.7		
13	Court agrees to community service and other options such as completion of a GED program, obtaining a driver's license, participating in counseling to satisfy LFOs only with the agreement of the defendant.	4.1	4.1			3.9	3.8		

**Figure 6. CourTools Measure 7c: Court Practices Survey, Municipal Court (continued)**

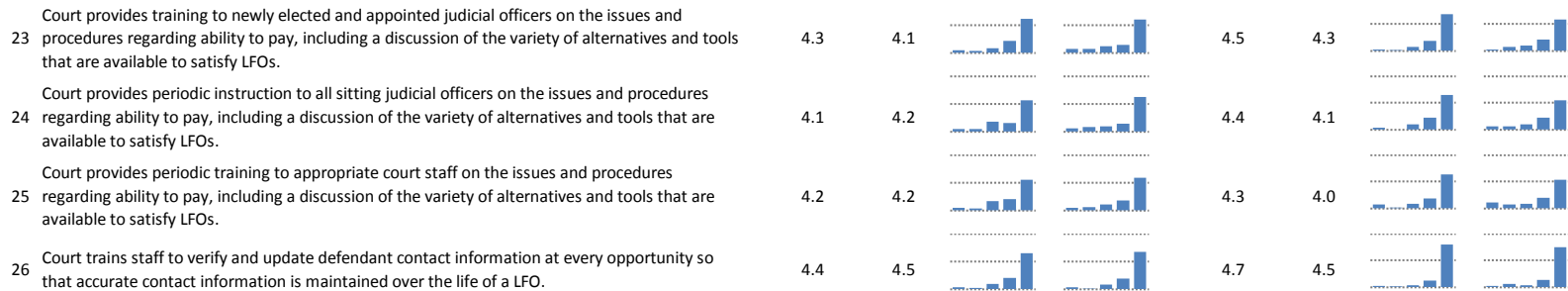
**Area 4: Examining Enforcement Policies and Identifying Uncollectible Debt**



**Area 5: Identifying Information Relevant to LFOs on Court Website and Notices**



**Area 6: Training for Judicial Officers and Staff**



## **V. QUALITATIVE INTERVIEWS**

To provide additional context and detail regarding court practices for encouraging LFO compliance, Director of State Courts Office staff visited twelve Wisconsin counties to interview judges and one court commissioner (judicial officers), and eight clerks of circuit court and various staff members of the clerks of courts offices (clerk of court staff).

During the interviews, several important themes developed within each of the two respondent groups. Judicial officers held a variety of beliefs regarding their inherent authority to waive LFOs, but many were concerned about the burden LFOs had on defendants, which led them to impose low monetary fines in an effort to reduce the total burden.<sup>31</sup> The clerk of court staff expressed concerns over the complexity of the LFO system; particularly the Department of Corrections collections process and its relationship to their duties. Additionally, clerks were concerned that collection of certain LFOs was prioritized over the collection of clerk's fees, resulting in diminished revenue to the clerk's office.

### **A. Interview Methodology**

The interviews had several goals: 1) gather information on the policies and procedures each county has regarding LFOs; 2) identify specific problems with the current LFO system; 3) recommend areas where more education and training could be incorporated; and 4) create an open dialogue about the LFOs process with individuals who are tasked with implementation in order to improve the system.

Each interview took around forty-five minutes depending on the depth and length of the interviewees' responses. The interviewer used open-ended questions that began with asking judicial officers and clerk of court staff to explain the LFO process from imposition to collection. At points throughout the explanation, the interviewer asked clarifying questions to flesh out details. Once the interviewee completed his or her initial explanation of the LFO process, the interviewer asked a series of follow-up questions designed to answer specific study questions. If the interviewee had already answered one of the follow-up questions during their open-ended responses, the question was skipped. Follow-up questions were also open-ended so as not to bias the interviewees' responses but to allow as much or as little explanation he or she deemed necessary. The full interview protocol is included in Appendix A.

### **B. Judicial Officer Perspectives**

#### **1. Size of LFOs**

One of the most consequential themes to emerge from a majority of the judicial officer interviews was the belief that the amounts of the LFOs are too high in comparison with defendants' ability to pay. Judicial officers expressed an added concern about the source of LFO

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<sup>31</sup> Fines are the base amount of an LFO; fees, surcharges, and other costs are added after the fine is assessed.

payments potentially coming from family members or other criminal activity. A smaller subset of the nine judicial officers expressed concerns over adding to the cycle of crime (i.e. a debtor committing a new crime to pay an LFO).

Although the majority of judicial officers expressed concerns about the current level of LFOs, two respondents believed the LFOs were adequate or just approaching too high. Both judicial officers felt the level of LFO should be commensurate with the severity of the crime.

The final two officers had two very different reasons for their opinions. One judicial officer presided in a violent felony rotation for a larger county and did not believe monetary penalties were too high because the length of prison sentences judges are required to impose are so long that defendants will never have the opportunity to pay off any level of LFO debt. To this judicial officer, the amount of the LFO was almost meaningless, because the size of the LFO is irrelevant to a long-incarcerated defendant with no means to pay any amount. This judicial officer was much more concerned with the length of incarceration than with the amount of LFOs imposed. The other judicial officer stated that the LFO process was a legislative issue, and not a concern of the judiciary.

## ***2. Common Use of Zero Dollar Fines***

A second theme to develop from the majority's opinion that LFOs are too high is the tendency for judicial officers to impose zero dollar fines. A majority of judicial officers indicated they often limit the fine to a low dollar value or even zero, with the exception of OWIs that require a fine of \$100. The goal of reducing the fine is twofold: first, this directly limits the total amount owed; and second, it reduces or prevents the addition of percentage-based surcharges. For example, a common misdemeanor in which a judge assesses a zero dollar fine would have a total cost of \$443, whereas a fine of \$25 would cost \$484.50. Increasing the fine to \$25 actually increases the costs by \$41.50; higher fine amounts amplify this effect.

## ***3. Alternatives and Burden of the Parties***

Another theme to emerge from the thirteen judicial officers is their belief that it is the defendant's duty to raise issues of indigence or ability to pay with the court. Eight of the thirteen judicial officers acknowledged a willingness to offer some form of monetary relief, such as community service, if a financial resources argument is made at or before sentencing. The judicial officers also indicated a tendency to follow the parties' joint recommendations, meaning parties should address the ability to pay in their joint recommendations. While judicial officers think ability to pay is an important issue to consider, they also believe parties, particularly defendants, have the burden of bringing this matter to the court's attention.

## ***4. Warrants Work***

Although not asked specifically in the interviews, judicial officers commonly volunteered the belief that arrest warrants are successful at compelling payment of LFOs. One judicial official

stated, “I issue a warrant today, and tomorrow they pay.” While most judicial officers shared this opinion, some expressed concern over the implications of using warrants. Two judicial officers expressed particular concern with the use of warrants to compel payment, because the money may be paid by someone other than the defendant and therefore, the defendant is not being punished for his or her actions.

### **5. Power to Waive**

The last notable theme to emerge from judicial officer interviews was the understanding of their right to waive LFOs. Four judicial officers stated they had the authority to waive all LFOs; three stated they had the power unless otherwise outlined by statute; four believed their power to waive LFOs was limited; while two stated they were unsure of their authority. Their answers seemed to raise key ideological differences about the overall power and role of judges in society.

The discussion of waiver authority centered on two major arguments. The first argument was that judicial officers have specific inherent authorities and responsibilities to carry out justice. In terms of LFOs, this duty means it is within a judicial officer’s authority to waive LFOs under any circumstances they deem appropriate, so long as the decision is in the best interest of justice. The competing argument centered on statutory interpretation, meaning judicial officers must follow the statute even if they do not agree with the outcome. With regard to LFOs, this belief means that judges may not waive LFOs unless the statute authorizes them to do so.

Every judicial officer’s opinion and practices either conformed to one of these arguments or used a mix of the two arguments as justification. For judicial officers who used a combination of the arguments, their interpretation seemed to revolve around the specific wording of the statute. Four judicial officers stated that the judge has the inherent authority to waive fees unless the legislature specifically indicates otherwise. For example, in several statutes the legislature added a second clause or subsection to the primary LFO statute specifically prohibiting the waiver of that particular LFO. The four judicial officers with a mixed interpretation viewed this action by the legislature to be intentional. They believed only statutes with this additional clause are ineligible for waiving leaving the rest at the judicial officer’s discretion.

Judicial officers on the opposite side who argued a limited right to waive LFOs used similar logic, but believed if no statute authorizing an LFO be waived existed, then it could not be waived. Most of the judicial officers expressing an opinion for limited waiver authority bolstered their argument with the structure of LFO statutes that tend to use the wording “shall impose.” They felt if the legislature intended to allow judges to waive the LFO, the legislature would have used the words “may impose.”

## **B. Clerk of Court Staff Perspectives**

When discussing LFOs with clerks of circuit court and their staff, there were similar concerns over the amounts of LFOs. However, these interviews tended to lean more toward discussion of the logistics and complexity of the current LFO system, such as collection methods and management of the Department of Corrections's (DOC) collections process (DOC Collects).

### ***1. DOC Collects Program***

The greatest concern from the clerks of courts staff surrounded the DOC Collects program. Most defendants placed on probation or incarceration with DOC pay their LFOs to their probation agent or another DOC entity, who tracks the payments in DOC's system. The process causes difficulties for the clerks for several reasons:

1. Duplication of payments,
2. Payment tracking, and
3. Reconciliation

Because CCAP does not track the exact amount paid to DOC, it is possible for someone to pay both DOC and the clerk's office without either entity being aware of a duplicate payment. This flaw results in confusion and possible over/under payment. Regarding the issue of tracking payments, DOC does not always forward payment information to the clerks in an expedited fashion, which can result in the clerks not knowing an amount due when asked. This situation can cause tension when defendants come to the clerk's office seeking their balanced owed, but the clerk is unable to provide this basic information. Finally, the DOC Collects process causes issues with reconciliation. At the end of a defendant's term, DOC transfers all outstanding LFOs back to the clerk. However, this process is fraught with difficulty because clerks do not always know to which fees and surcharges the funds have been applied. The result is that clerks must try to reconcile their records with DOC's records; this is a confusing and time-consuming process.

### ***2. Financial "Squeezing" of the Clerk's Office***

Many clerk of court staff raised a concern about the growing number of LFOs taking priority over the clerk's fee. Under the current statutory scheme, the clerk's fee is the last LFO on the priority list; in other words, of the money collected, the clerks are the last to receive funds. If the defendant fails to pay the entire amount, the clerks may receive nothing at all. For the clerks of court staff, this low priority level is concerning because it reduces their operational budgets and requires them to seek additional funding from their local county government, many of which are unable to provide the requested support. As a result, some of the clerk's offices cannot purchase office equipment or perform office upgrades needed to improve their services to the public.

### **3. Collection Methods**

The interviews highlighted the variety of methods clerks employ to collect LFOs, with payment plans being the most common method. Most of the clerks felt that payment plans work relatively well at getting defendants to pay. Each county had different fees associated with establishing their payment plans: one county required a down payment of 25% of the total LFO to establish a payment plan, while another county required ten dollars. Similarly, clerks in different counties place a wide range of time limits on the payment plans, varying from as little as 12 months to no limitation. Such large variations are mainly the result of individual county policy. Even with the variations, all clerks indicated they had a relatively high success rate of LFO collections using the payment plan system.

The next most common collection method employed is the use of civil judgments. All the clerk of court staff interviewed indicated they issued a civil judgment once a person failed to pay an LFO. A civil judgment allows the clerk to send the debt to collections and garnish a debtor's wages. The clerk of court staff was divided on the success of civil judgments, with most using collections or garnishment on a civil judgment as a last resort.

The clerk of court staff commonly mentioned the Department of Revenue Tax Refund Interception Program (TRIP) as a collection method. TRIP allows the clerks to receive intercepted tax refunds to pay for outstanding LFOs. The clerks indicated a good success rate with cases turned over to TRIP. However, some clerks mentioned that TRIP has several flaws, in particular with people who have other debts like child support. Child support receives priority with TRIP collections, so clerks do not have as good of a success LFO payment rates with parents who owe child support.

The last notable collection method used only in a few counties but becoming more prevalent is the Department of Revenue's State Debt Collection (SDC), which acts as a collection agency for the clerks and other government agencies. SDC has a larger system of tools at its disposal compared to private collection agencies and can establish payment plans directly with debtors. Though the number of counties using the SDC method is small, the participating clerks expressed great admiration for the system, indicating a high level of success. One of the clerks even discussed several payments made by outstanding debtors who were unaware the debt was outstanding.

One clerk did raise concerns about the legality of SDC's fee. Unlike private collection agencies that take their fee from the existing amount due, SDC adds its fee to the top of the existing amount owed in essence creating a new LFO. The clerk's concern was that SDC's fee was not authorized by a judicial officer, not statutorily defined, and therefore unlawful.



## **C. General Observations**

The interviews provided a unique perspective on court system operations relating to LFOs. Additional observations that require the attention of court administration include inter-office disconnects, type of information provided to defendants, and education of judicial officers and the clerks regarding LFOs.

### ***1. Inter-Office Disconnects***

The first observation was the disconnect that seems to exist within some courts, particularly between judicial officers and the clerk of court staff. Several times during interviews, a judicial officer would explain a court's policy and practice, only for a clerk of court staff member to state later that no such policy or practice existed. For example, one judicial officer stated he sends the defendants to the clerk's office to receive information regarding their conviction and amounts owed. When the clerk's staff was interviewed, they indicated that they do not give defendants any information because the case file is still in the courtroom and must go through a closing process before any information was disseminated. This example suggests an inter-office disconnect requiring a need for improved communication between staff.

### ***2. Information Provided to Defendant***

Another observation from the site visits is the manner in which courts convey the amount of money a defendant owes. About half of the counties provide defendants with some form of paperwork (i.e. a receipt) and information on where to pay at the time of sentencing. About a quarter of counties indicate they provide the judgment of conviction at the time of sentencing or directly after, which lists the amount a defendant owes but does not specify how or where to pay. The last quarter either mailed the judgement of conviction afterwards or left it to the defendant to obtain after a certain date.

An additional issue arose concerning how judicial officers describe the amount of money the defendant owes. Most judicial officers indicated they inform the defendant at sentencing the fine is "X" dollars plus costs but do not give a total amount after the court costs are added. For example, the judge might order a zero dollar fine and all appropriate fees but leave it to the clerk's office to provide the exact amount once all fees are calculated. The problem with this process is that in some counties this amount is not provided in an easily understood or accessible format. This failure to provide an exact amount presents another obstacle for a defendant to overcome when trying to understand and comply with his or her LFO obligations.

### ***3. Judge and Clerk Education***

The last key observation from the interviews and site visits is the need and desire for additional education on LFOs. Both the judicial officers and the clerk of court staff expressed interest in learning more about the topic and felt additional training would be valuable. The Director of

State Courts Office could provide educational opportunities on this topic at judicial education events and at clerk of circuit court conferences.

#### **D. Interview Takeaways**

There are clear concerns among judges and clerk of court staff about the level of LFOs and their short and long-term effects on defendants. Current practices and varying philosophies with LFOs seem to be having a ripple effect across the system resulting in lower fine amounts but greater overall costs to defendants. The complexity of these obligations is also influencing how the court collects outstanding debt, which further complicates the work of the clerks of court and their staff. Notwithstanding changes to the LFO system, the Director of State Courts office could improve not just the imposition and collection of LFOs statewide but also the overall operations of local courts. This task includes working to improve communication between offices, helping courts better convey consistent information to defendants, and improving education on the topic of LFOs. Overall, the interviews did not expose any fatal flaws in the system but did highlight areas for improvement for courts to better serve the public's interests.

## VI. LEGAL FINANCIAL OBLIGATION PAYMENTS

To provide an in-depth look at LFO payments over time, the Director of State Courts provided NCSC with CCAP data on more than 4 million criminal and forfeiture cases disposed in Wisconsin's circuit courts between 2010 and 2016. The data reveal that although most forfeiture defendants pay their LFOs in full, misdemeanor and felony defendants pay on average a small fraction of what is owed. Payments tend to be made within the first months after disposition. Larger assessments lead to lower repayment rates. Repayment rates are lower for defendants sentenced to incarceration and higher for defendants whose bond is applied to the LFO and who make prepayments. The data provide no definitive evidence of a dollar amount at which increasing the size of the assessment no longer results in an increase in revenue, but do suggest that such a point may exist at higher assessment amounts than are now commonly observed. Although a court policy of incarcerating defendants in response to failure to pay LFOs is associated with higher rates of repayment, the impact is minimal to moderate across most case types. Counties with high rates of driver's license suspensions are no more effective in collecting traffic forfeiture LFOs than counties with low rates of suspensions, and evidence regarding the effectiveness of driver's license suspensions in increasing payment rates in criminal traffic cases is mixed.

### A. LFO Data Set

The Wisconsin LFO data were delivered as a set of 12 spreadsheets, most containing multiple records per case. Several overlapping identification keys linked records across files. Most files contained multiple records per case. In total, the data set covered 4,190,974 Wisconsin Circuit court criminal and forfeiture cases disposed between January 1, 2010 and December 31, 2016 in which fines, fees, and/or surcharges were assessed. Table 2 presents the distribution of cases by type.

#### ***1. Data Processing for Description and Analysis***

The raw data required substantial processing before meaningful analysis could be conducted. For each case, numerous records from multiple files had to be matched and combined into a single record capturing the total assessments across all conviction charges, any adjustments made to the total assessment, and payments received over time. Receipts data included only payments received directly by the court, and did not include amounts paid to the Department of Corrections during incarceration or probation supervision or recovered through tax intercepts or private collections.

Because the source data included the dates and amounts of individual payments, it was possible to track payments over time in each case. To standardize the payment data, payments were aggregated into cumulative totals for 14 distinct time periods. The first period included all payments received prior to the disposition date. Such payments might include bail applied towards the LFO, prepayments of traffic and non-traffic forfeiture tickets, and other trust account funds held by the court prior to case disposition. Because incarceration may have a

profound impact on a defendant's ability to pay, a second period included all payments that occurred during the expected period of incarceration, based on the length of the sentence. The remaining twelve periods included payments received on a quarterly basis beginning at disposition (for cases with non-custodial sentences) or estimated release from incarceration (for cases with custodial sentences). The latest receipt data are dated September 20, 2017. For cases initiated less than twelve quarters prior to this date, receipt intervals were truncated. For payment analysis, cases were included only during intervals for which payment data were available. For example, cases disposed in 2016 were not included in analysis of payments at the 36-month interval.

Two of the original spreadsheets contained data on 27 separate types of adjustments to assessments. These were categorized into three groupings: account transfers (e.g., application of bail to the LFO) that are duplicated in the receipt data, clerical corrections to errors in recorded receipts, and adjustments that actually modify the amount due (e.g., interest). After verification that the transactions were already represented in the receipt data, the account transfers were excluded from the final data set. The second group of adjustments were recoded as receipts, offsetting the errors in the recorded receipts. Only the third set of "adjustments" was retained in the form of adjustments to the legal financial obligation.

In each case, the total assessment was summed across all conviction charges and accounts. The "assessment" represents the total amount originally assessed in each case, including fines, fees, costs, reimbursements, assessments, and surcharges<sup>32</sup>. A final "obligation" was also calculated by adding or subtracting the applicable adjustments in each case.

## **2. Case Exclusions and Data Limitations**

Cases were excluded from the analysis data set for a variety of technical and data quality reasons, including:

- No data on assessments
- Total assessment of \$0<sup>33</sup>
- Negative obligation after application of adjustments to the original assessment
- Total receipts greater than adjusted obligation

In probation cases, the Department of Corrections (DOC) may be assigned to collect the legal financial obligation. Because payments collected by the Department of Corrections are not consistently recorded in the court's data system, these cases were also excluded from analysis.<sup>34</sup>

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<sup>32</sup> This analysis does not include restitution.

<sup>33</sup> This exclusion does not remove "\$0 fine" cases from the analysis, as these cases still involve costs, fees, and surcharges.

<sup>34</sup> This restriction resulted in the exclusion of the majority of cases in which a DNA surcharge was assessed.

Table 2 shows the original and final number of cases in the data set by case type, along with the number of cases excluded and the reasons for their exclusion.

**Table 2. Case Exclusions by Case Type and Exclusion Criterion**

Criterion	Felonies	Misdemeanors	Criminal		Traffic	Total
			Traffic	Forfeitures		
All Cases	260,340	394,153	182,302	430,121	2,924,058	4,190,974
No Assessment Data	58,285	111,022	35,674	75,473	335,543	615,997
Recorded Assessments = \$0	216	1,300	497	4	0	2,017
Adjusted Obligation < \$0	1,368	1,809	503	648	2,886	7,214
Receipts > Adjusted Obligation	28,896	39,697	19,894	33,715	174,793	296,995
Department of Corrections Collection	84,356	65,106	28,024	5	27	177,518
Cases for Analysis	87,219	175,219	97,710	320,276	2,410,809	3,091,233

In all, nearly three-quarters of cases were retained for analysis, including more than 80 percent of traffic forfeitures and almost 75 percent of non-traffic forfeitures. Around half of criminal traffic and misdemeanor cases, along with two-thirds of felony cases, were excluded. The primary sources of exclusion were missing assessment data and DOC collections. Because a large number of cases involve DOC collections, and there is reason to believe that DOC involvement may have an impact on repayment patterns, improved recording of these payments could generate useful data in the future. Without more information, however, it is impossible to know precisely how any of the data exclusions affects the results of the current analysis.

## B. LFO Payments Over Time

Table 3 summarizes the size of LFOs and payments in Wisconsin Circuit court criminal and forfeiture cases disposed from 2010 through 2016 in cases with assessments not subject to collection by the Department of Corrections. Felony defendants faced the largest assessments, averaging \$4,280 per case. Criminal defendants had lower rates of repayment, ranging from an average of 21 percent of the assessment paid in misdemeanor cases to an average of 43 percent paid in criminal traffic cases after three years.<sup>35</sup> Traffic forfeiture cases had the smallest average assessment (\$184) and the highest average repayment rate (67 percent after three years). In non-traffic forfeitures, the average assessment was somewhat higher than in traffic forfeitures (\$279), whereas the average repayment rate was lower (52 percent). The scope of

<sup>35</sup> In Table 3, the percentages of the assessment and the obligation are calculated at the case level, then averaged across cases. For this reason, the average total payment divided by the average assessment does not equal the average percentage of the assessment repaid.

adjustments to the original assessment was relatively modest in comparison with the size of the assessment, with the average reduction ranging from \$4 in traffic forfeitures to \$612 in felony cases.

**Table 3. LFO Assessments, Obligations, and Payments by Case Type**

Case Type	n	Average Assessment	Average Adjusted Obligation	Average Payments through Quarter 12		
				Average	Percentage of Assessment	Percentage of Obligation
Felony	87,219	\$4,280	\$3,669	\$357	31%	37%
Misdemeanor	175,219	\$751	\$649	\$243	46	48
Criminal Traffic	97,710	\$989	\$876	\$547	66	68
Non-Traffic Forfeiture	320,276	\$279	\$272	\$188	73	74
Traffic Forfeiture	2,410,809	\$184	\$179	\$142	82	82

Note: Includes cases disposed from 2010 through 2016 with LFO assessments not subject to DOC collection. Percentages of assessment and adjusted obligation paid are calculated at the case level, then averaged. Only cases with a 36-month follow-up period are included in payments data. For defendants sentenced to incarceration, follow-up period begins on presumed release date.

Table 4 breaks down the distribution of repayment rates within each case type. In felony cases, 36 percent of defendants paid nothing, and only 13 percent paid the full assessment. Conversely, 79 percent of traffic defendants paid their assessments in full, with only 15 percent paying nothing at all. Across all case types, the vast majority of defendants paid either less than 20 percent or more than 80 percent of the total assessment, with few defendants paying between 20 and 80 percent of the assessment. In other words, most defendants paid either very little or nearly the entire assessment, with relatively few paying a moderate share of the amount.

**Table 4. Proportion of LFO Assessment Paid within 12 Quarters (Percentage of Cases)**

Case Type	Zero Received	Assessment Paid in Full	Obligation Paid in Full	Percentage of Assessment Paid				
				<20%	20 - 40%	40 - 60%	60 - 80%	80 - 100%
Felony	36%	11%	13%	56%	10%	8%	9%	17%
Misdemeanor	31	27	30	43	8	9	8	32
Criminal Traffic	17	49	53	26	6	8	5	56
Non-Traffic Forfeiture	20	67	69	24	2	3	1	70
Traffic Forfeiture	15	79	80	17	1	1	0	81

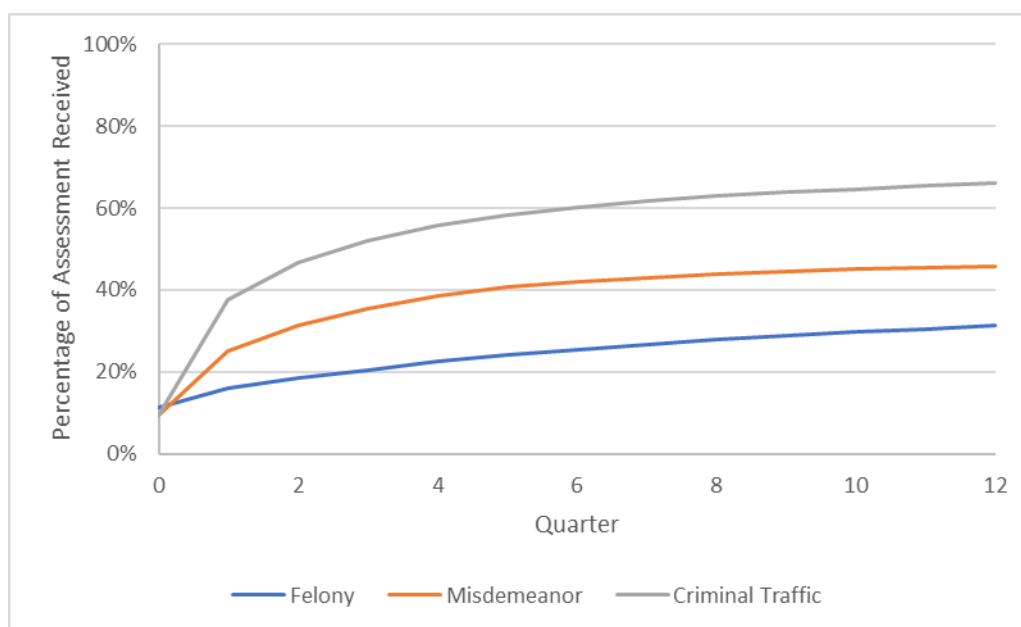
Note: Includes cases disposed from 2010 through 2016 with LFO assessments not subject to DOC collection. Only cases with a 36-month follow-up period are included in payments data. For defendants sentenced to incarceration, follow-up period begins on presumed release date.

n = 3,201,580

As shown in Figures 7 and 8, the bulk of payments are made within the first months, and for most case types payments tend to level off over time. Figure 7 plots the average percentage of

the total assessment received by quarter for the first three years after case disposition (for defendants receiving a non-custodial sentence) or the presumed date of release from incarceration (for defendants sentenced to incarceration) in criminal cases. For misdemeanor and criminal traffic cases, the payment curves are steep during the first two quarters, during which over half of total payments are made. By the fourth quarter, more than three-quarters of total payments have been made, and the upward slope of the payment curve becomes more gradual. In felony cases, the trajectory of the payment curve is similar: more than half of total LFO payments in felony cases are made within the first two quarters, and more than two-thirds of payments within the first year.

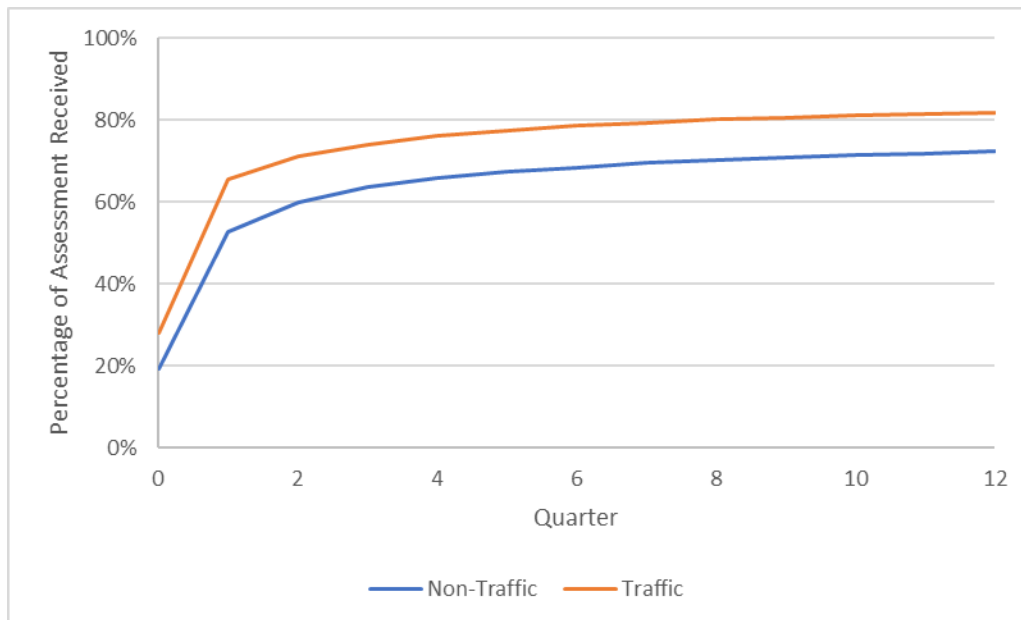
**Figure 7. LFO Payments Over Time, Criminal Cases**



Note: Includes cases disposed from 2010 through 2016 with LFO assessments not subject to DOC collection. Percentage of assessments received is calculated at the case level, then averaged across all cases. Cases with follow-up periods of less than 12 quarters are excluded from the data after the follow-up period ends. For defendants sentenced to incarceration, follow-up period begins on presumed release date.  
n = 360,148

This pattern is even more pronounced in forfeiture cases (Figure 8). In both traffic and non-traffic forfeitures, the lion's share of payments is made within the first quarter, with some additional payments being made during the second quarter before the payment curves flatten out.

**Figure 8. LFO Payments Over Time, Forfeiture Cases**



Note: Includes cases disposed from 2010 through 2016 with LFO assessments not subject to DOC collection. Percentage of assessments received is calculated at the case level, then averaged across all cases. Cases with follow-up periods of less than 12 quarters are excluded from the data after the follow-up period ends. For defendants sentenced to incarceration, follow-up period begins on presumed release date.

n = 2,731,085

These graphs also reveal that a substantial proportion of payments are made on or before the date of disposition. Some of these payments are made through the application of bail to the LFO; others, such as prepayments in forfeiture cases, are made through trust accounts held by the court. Table 5 shows the proportion of cases involving the application of bail or trust funds to LFOs, along with the percentage of aggregate receipts collected through these measures. Across all case types, bail or trust funds were applied to LFOs in 33 percent of cases, representing 39 percent of total payments. Such payments were most prevalent in traffic forfeitures, which are frequently prepaid, and least prevalent in felony cases.



**Table 5. Application of Bail and Trust Funds to LFOs, by Case Type**

<b>Case Type</b>	<b>Percentage of Cases</b>	<b>Percentage of Total Receipts</b>
Felony	12%	16%
Misdemeanor	20	26
Criminal Traffic	21	22
Non-Traffic Forfeitures	28	35
Traffic Forfeitures	35	42
All Cases	33%	39%

Note: Includes cases disposed from 2010 through 2016 with LFO assessments not subject to DOC collection. Percentage of assessments received is calculated at the case level, then averaged across all cases. Cases with follow-up periods of less than 12 quarters are excluded from the data after the follow-up period ends. For defendants sentenced to incarceration, follow-up period begins on presumed release date.

n = 3,201,580

### **C. Impact of Assessment Size on Repayment Rate**

Another question that the LFO data can address is the impact of the size of the initial assessment on the rate of repayment.<sup>36</sup> Payment of court fines and fees can be conceived of as a function of both the defendant's ability to pay and the defendant's motivation to pay. One hypothesis that naturally follows is that as the assessment increases, fewer defendants will have the means to pay the assessment in full, and repayment rates will decline. Circumstances that dampen the motivation to pay may also reduce repayment rates. For example, if the assessment is so large that repayment in full seems out of reach, the defendant may not be motivated to pay even the amount that he or she can afford. If this is the case, we should observe a "discouragement effect" whereby repayment rates decline more rapidly as the value of the assessment rises.

To explore the influence of assessment size on repayment rate, we estimated a series of regression models. Regression allows us to estimate the relationship between assessment value and repayment while controlling for factors that may influence ability to pay. Toward that end, we estimated a separate regression model for each case type (felony, misdemeanor, criminal traffic, non-traffic forfeiture, traffic forfeiture) using the percentage of the initial assessment repaid after three years as the dependent variable.<sup>37</sup> All models included a covariate identifying cases in which a bond or trust account was applied to the financial obligation; to account for

<sup>36</sup> In these models, the repayment rate (percentage of the assessment repaid) is used as the dependent variable. Using the amount repaid as the dependent variable would result in endogeneity with the independent variable of assessment size.

<sup>37</sup> Specifying the percentage repaid after three years, rather than the total percentage repaid, puts every case in the analysis on equal footing by excluding cases that do not have 36 months of receipts measured and discounting any payments made after three years. As in the previous analysis, for defendants sentenced to jail or prison the timing of payments was adjusted to reflect the presumed release date.

the possibility that recent incarceration negatively affects ability to pay, the felony, misdemeanor, and criminal traffic models also included an indicator for defendants sentenced to incarceration.<sup>38</sup> To prevent extreme values from unduly influencing the results, each data set was censored to eliminate the largest 1% of assessments.

The primary independent variable of interest is the dollar value of the assessment. To allow for the possibility of a discouragement effect and a non-linear relationship between assessment size and repayment rate, the square of the assessment size is also included as a covariate. Because larger assessments are more difficult to repay, the coefficient on the linear term is expected to be negative, and a graph of the relationship between assessment size and repayment rate should slope downward. If a discouragement effect is present, the coefficient on the squared term should also be negative, and the graph should slope more sharply downward as assessment size increases.

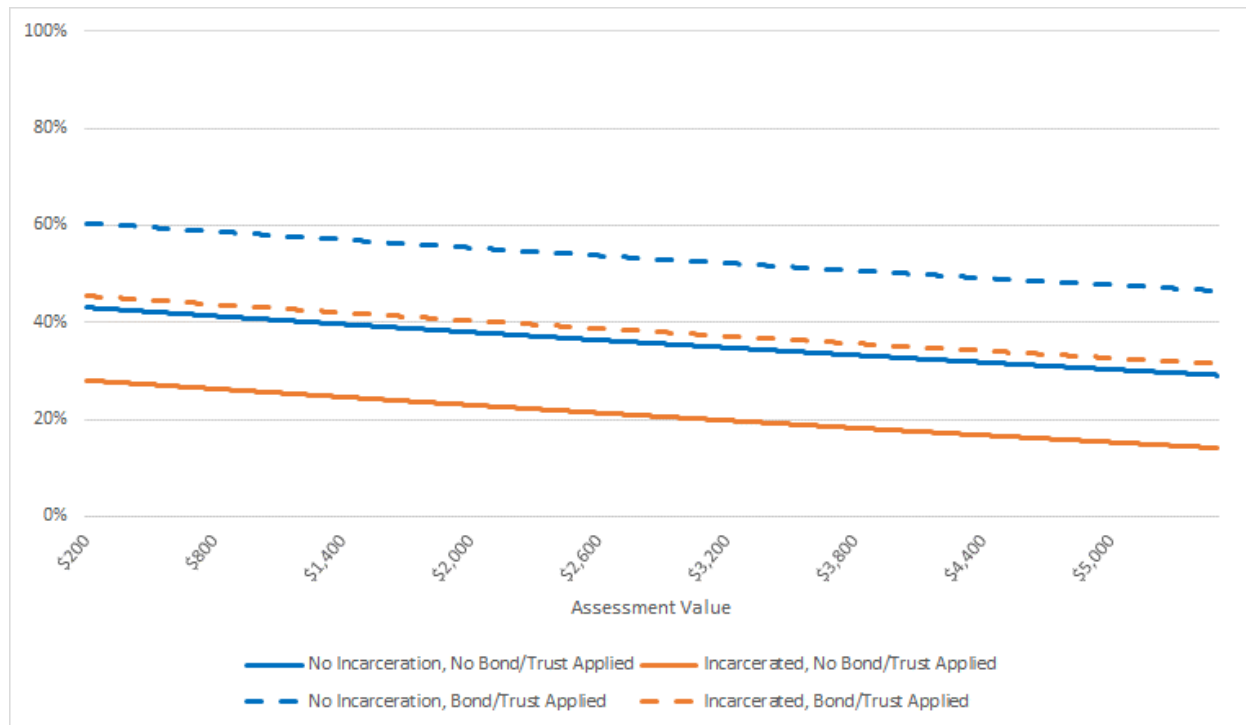
Figures 9 through 13 illustrate the relationship between assessment value and three-year repayment rate. For each case type, we estimated a regression model using ordinary least squares.<sup>39</sup> We then used the model to predict repayment rates across the range of assessment values and plot the relationship between assessment value and predicted repayment rate for groups of defendants defined by the values of the covariates. For the three criminal case types, four lines represent defendants who were incarcerated with no bond/trust applied to the assessment, defendants who were incarcerated and had bond/trust funds applied to the assessment, defendants who were not incarcerated with no bond/trust applied, and defendants who were not incarcerated and had bond/trust funds applied. For the two forfeiture case types, two lines represent defendants who did not have bond/trust funds applied and defendants who had bond/trust funds applied.

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<sup>38</sup> Substituting the amount of time incarcerated and the amount of the assessment paid by a bond or trust application had negligible impact on the estimates. An alternative model controlling for location by allowing the baseline repayment rate to vary by county was estimated, but the county of origin amounted for a very small portion of overall variation in repayment rates.

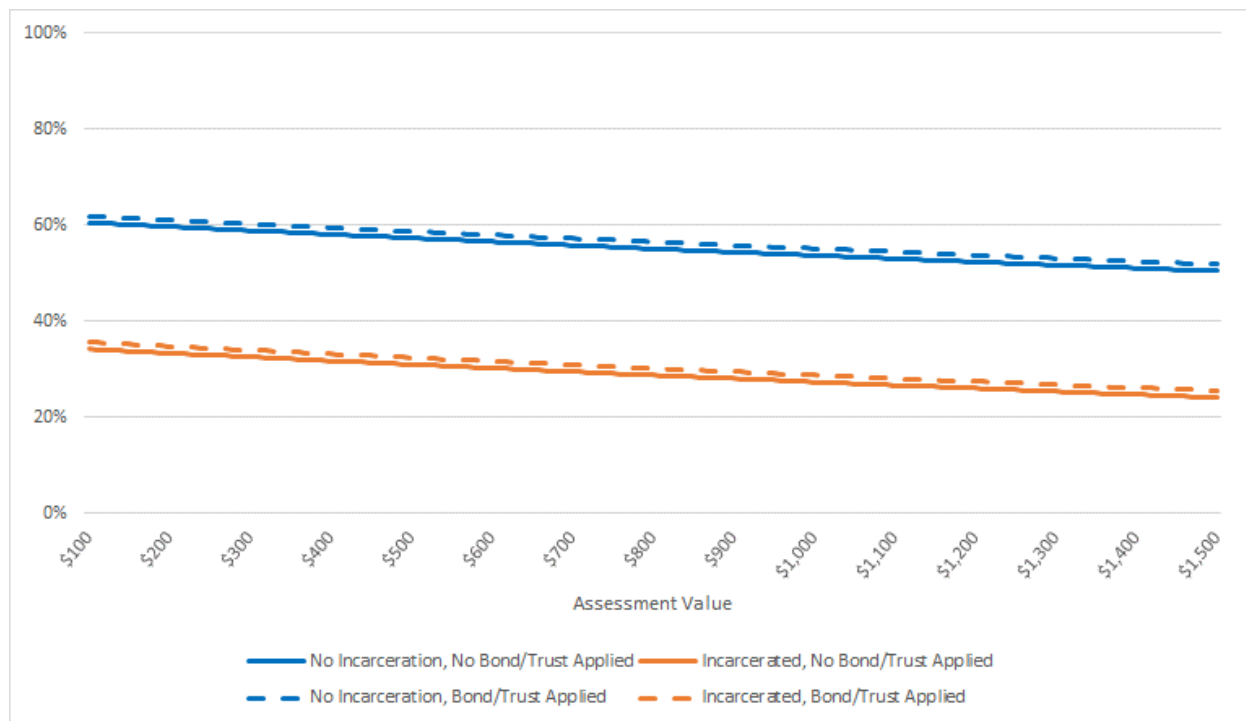
<sup>39</sup> All estimated effects are significant at the .01 level. Full regression results appear in Appendix B.

**Figure 9. LFO Repayment Rate by Assessment Size, Felony Cases**



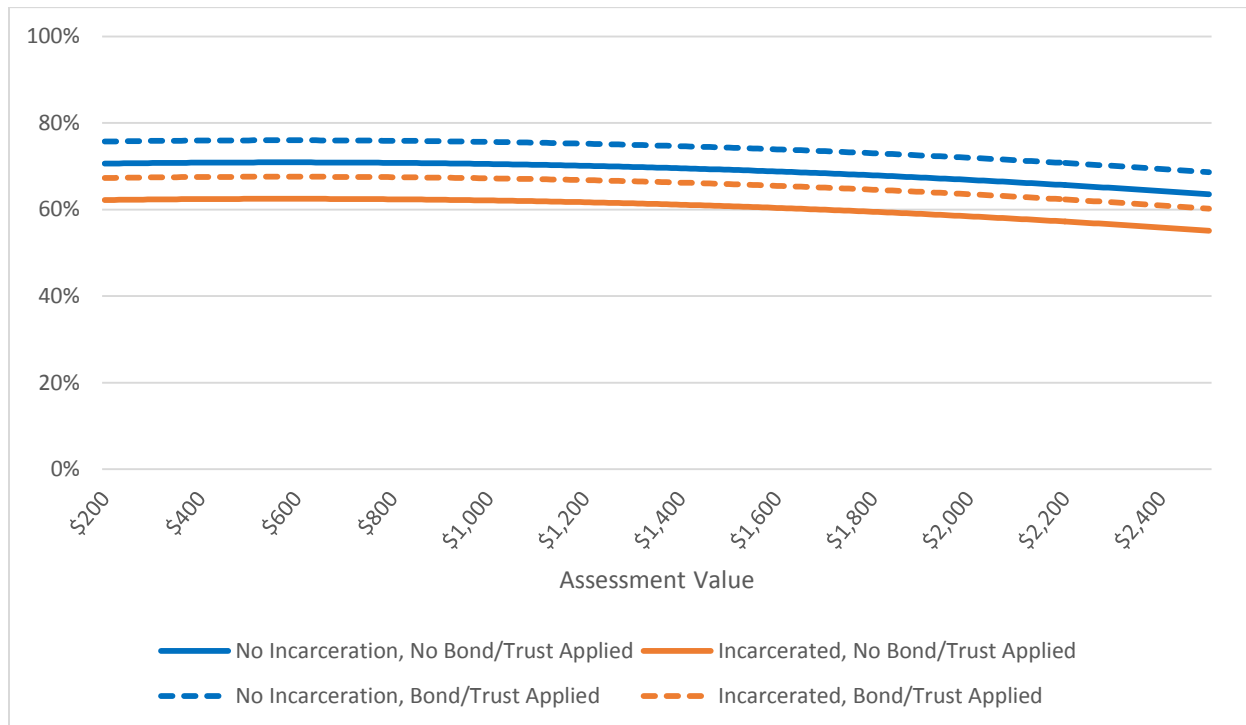
n = 61,710

**Figure 10. LFO Repayment Rate by Assessment Size, Misdemeanor Cases**



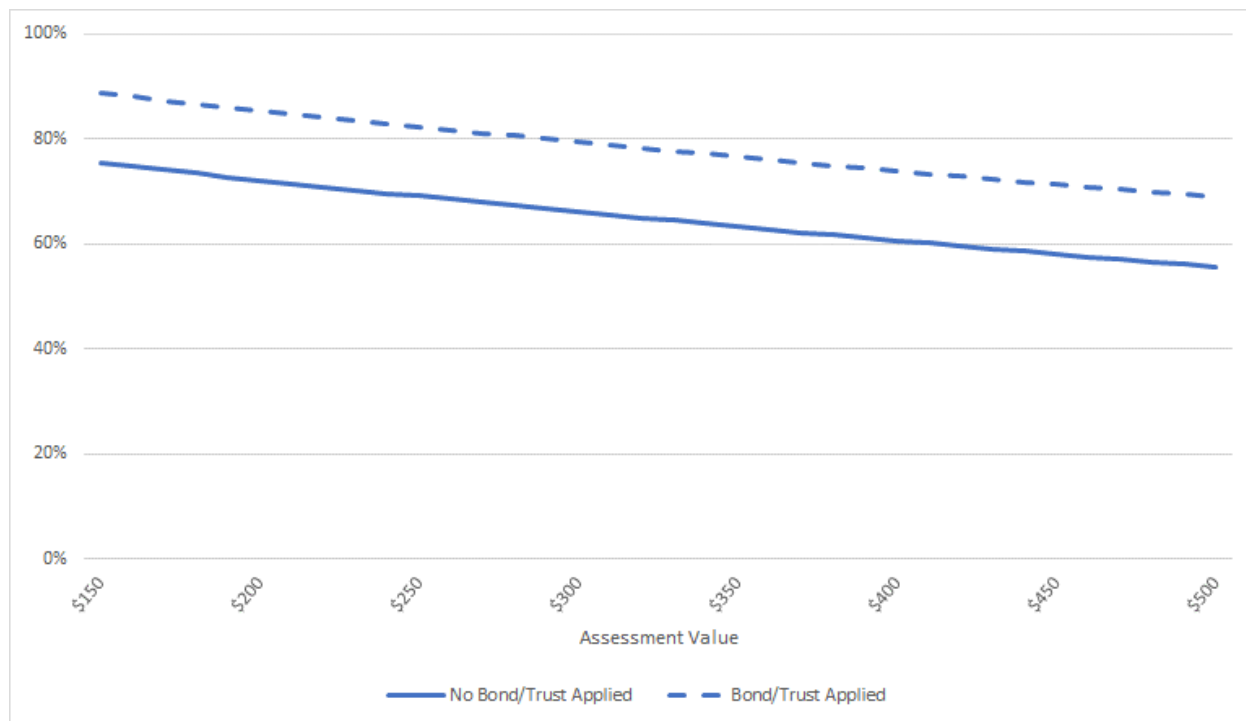
n = 147,867

**Figure 11. LFO Repayment Rate by Assessment Size, Criminal Traffic Cases**



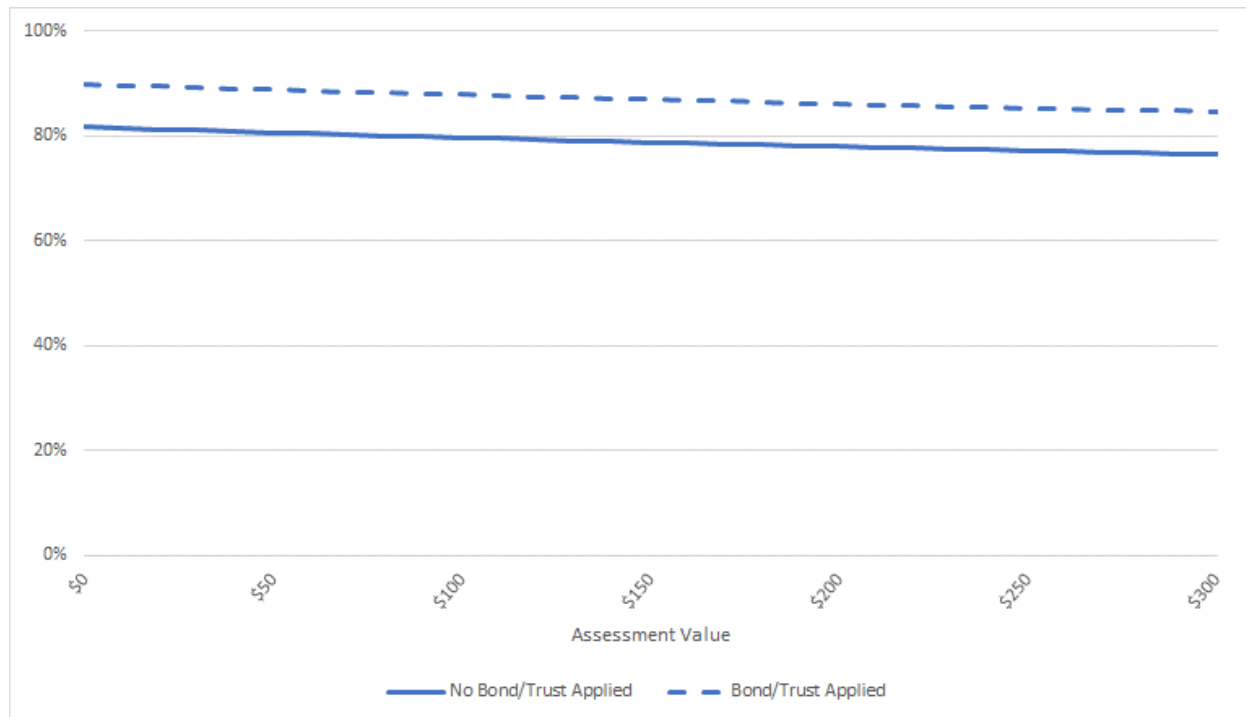
n = 82,631

**Figure 12. LFO Repayment Rate by Assessment Size, Non-Traffic Forfeiture Cases**



n = 226,459

**Figure 13. LFO Repayment Rate by Assessment Size, Traffic Forfeiture Cases**



n = 1,665,797

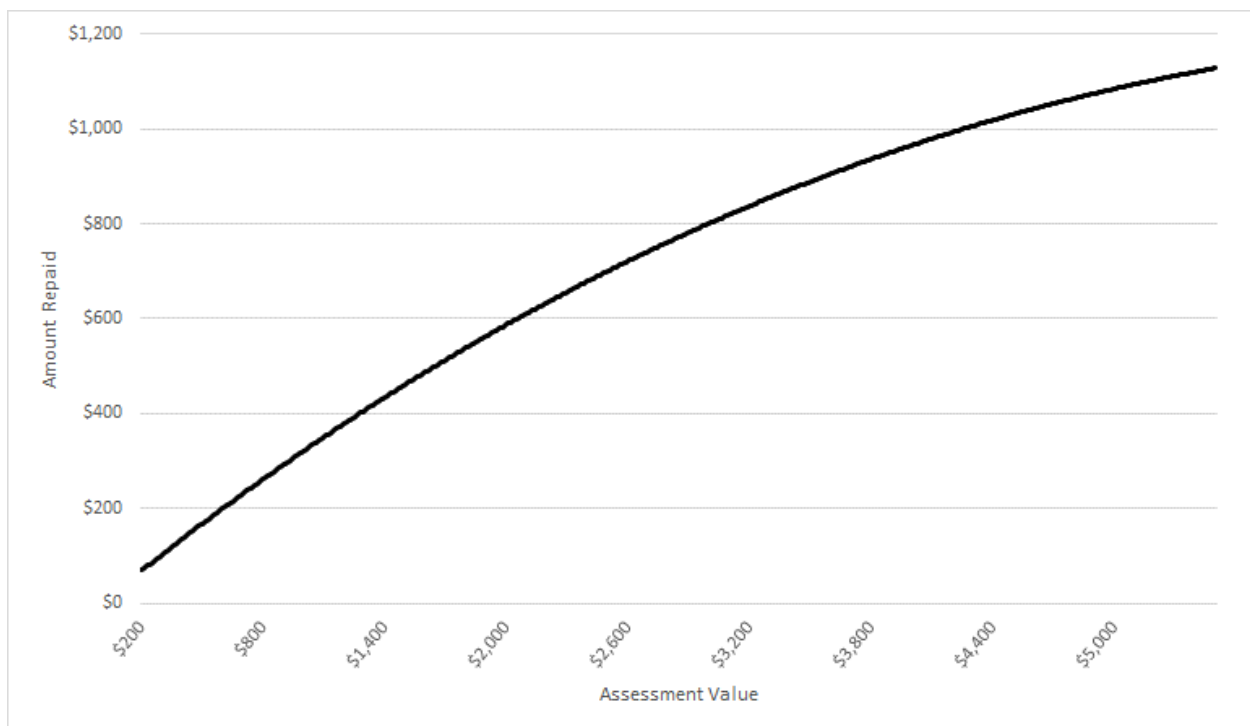
As expected, higher assessments result in lower repayment rates across all case types and conditions. Criminal traffic is the only case type for which a substantial non-linear effect, suggesting the presence of a discouragement effect, appears. For all other case types, the slope of the relationship between assessment value and percentage repaid is essentially linear. The data cannot explain why a discouragement effect is only observable in criminal traffic cases. One potential explanation is the fact that assessments tend to be much larger in criminal traffic cases than in misdemeanor or forfeiture cases, making discouragement more likely. For this explanation to be plausible, the factors that influence repayment in felony cases must be different than those influencing repayment in criminal traffic cases, because there is no evidence of a discouragement effect for felony cases even though felony assessments are larger than criminal traffic assessments.

Across all three criminal case types, repayment rates for defendants sentenced to incarceration are substantially lower than repayment rates for those not incarcerated. This supports the hypothesis that incarceration has a negative impact on defendants' ability and/or willingness to pay their legal financial obligations, even after release. In felony and criminal traffic cases, the application of bond to the legal financial obligation is associated with substantially higher repayment rates. In misdemeanor cases, bond applications increase repayment rates only slightly, perhaps because bonds in these cases tend to be much lower. In traffic and non-traffic forfeitures, the majority of bond/trust funds applied to legal financial obligations are presumed to be prepayments. For both forfeiture case types, repayment rates were much higher for cases in which bond/trust funds were applied. These findings suggest that applying bond to legal

financial obligations in criminal cases and offering the opportunity for prepayment in forfeiture cases are both effective methods of increasing LFO payment rates.

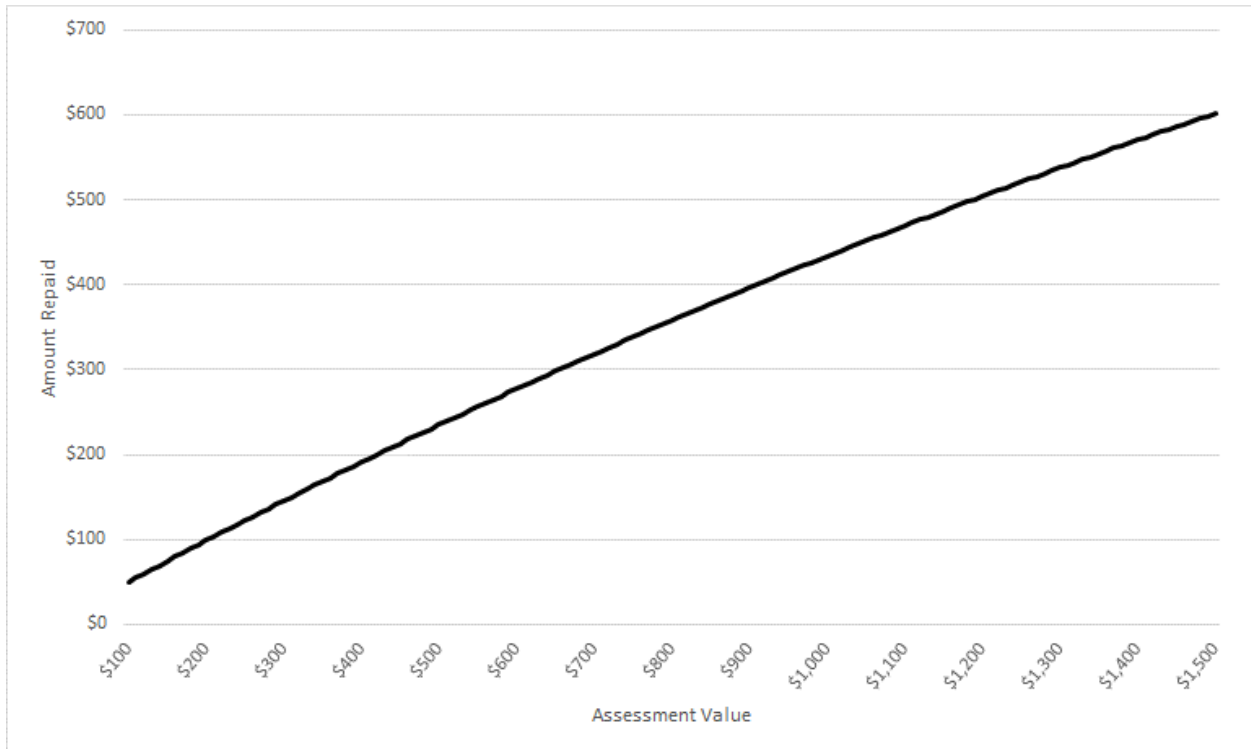
To explore the impact of assessment size on revenues in dollar terms, we used the same models to plot the estimated total payment by assessment size for each case type (Figures 14 to 18). In these figures, the values of the indicators for incarceration and bond/trust application are set to the data set mean values. The predicted repayment amount therefore corresponds to the “average” defendant. We were primarily interested in determining whether there is a point at which increasing the assessment no longer results in an increase in revenue. The predicted repayment curves all trend upward across the full range of assessment values, providing no concrete evidence that a maximum repayment amount exists. For all case types other than traffic forfeitures (for which assessments are by far the smallest), however, the slope of the repayment curve decreases at least slightly as the assessment value increases. This effect is most apparent for felonies, where assessments range highest. This suggests that if assessments continue to rise, at some point increasing the assessment might not result in additional revenue. Based on the felony results, this point is likely to be somewhere above \$5,500.

**Figure 14. LFO Revenue by Assessment Size, Felony Cases**



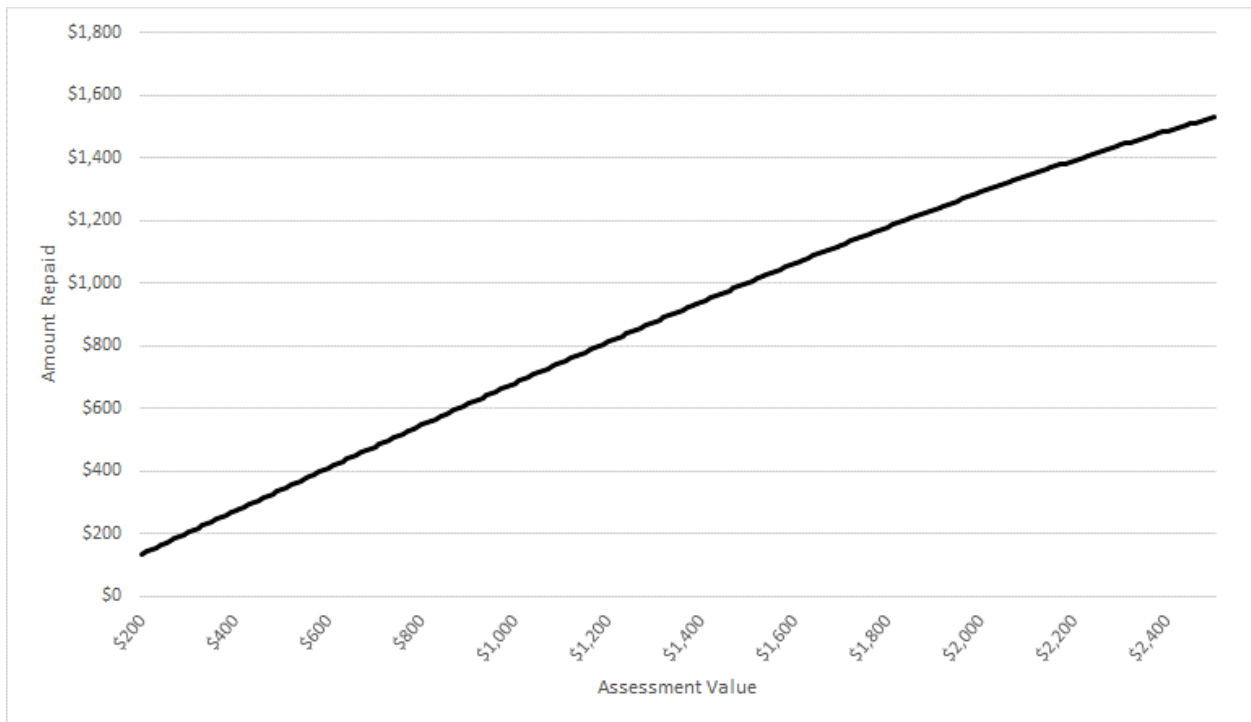
n = 61,710

**Figure 15. LFO Revenue by Assessment Size, Misdemeanor Cases**



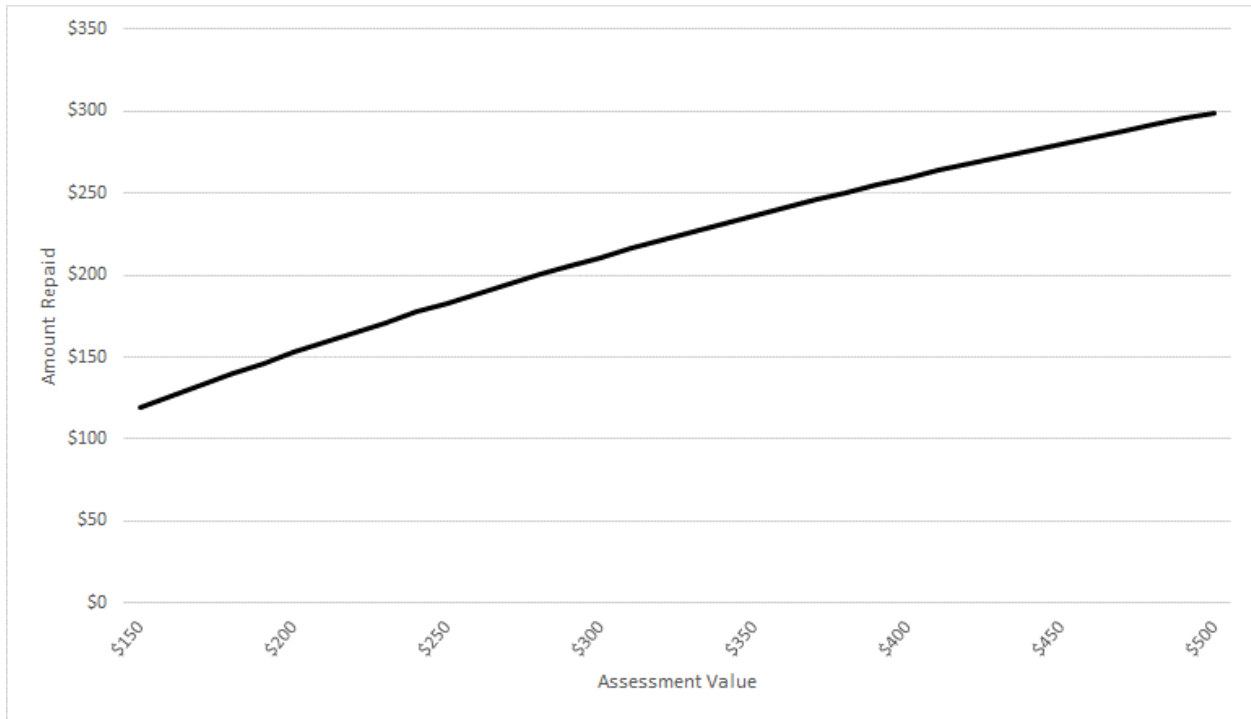
n = 147,867

**Figure 16. LFO Revenue by Assessment Size, Criminal Traffic Cases**



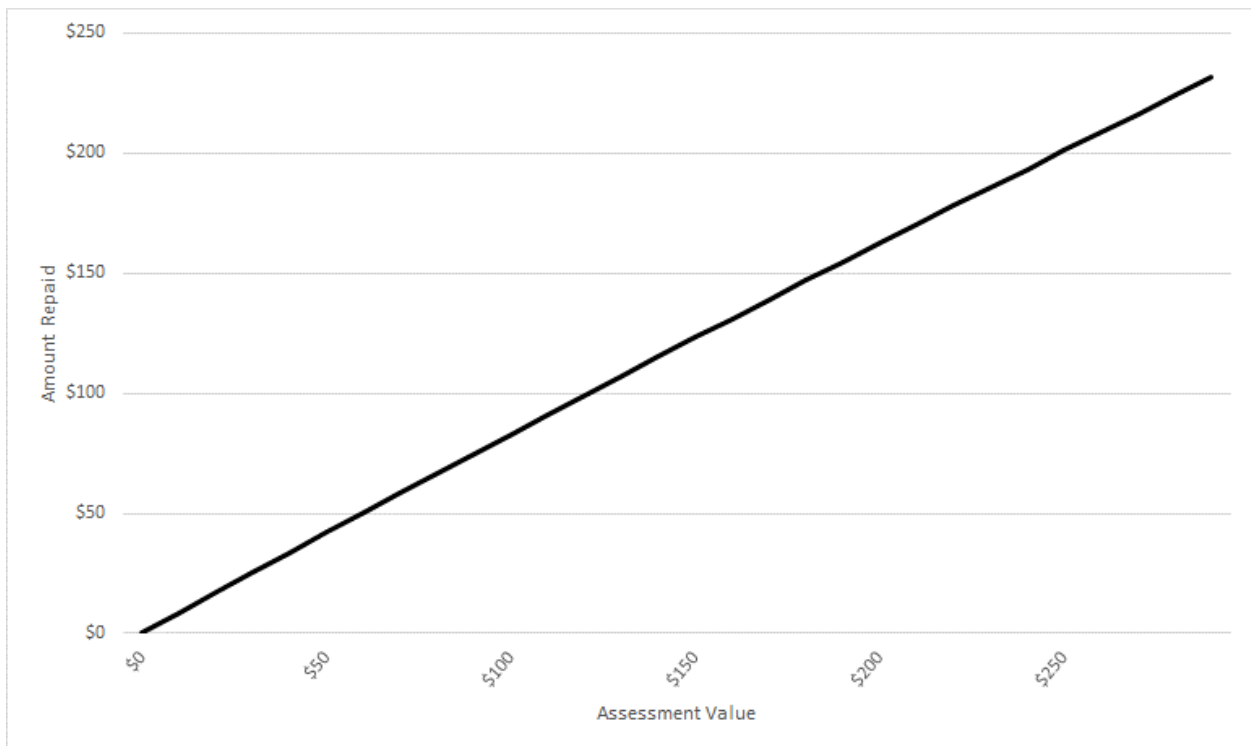
n = 82,631

**Figure 17. LFO Revenue by Assessment Size, Non-Traffic Forfeiture Cases**



n = 226,459

**Figure 18. LFO Revenue by Assessment Size, Traffic Forfeiture Cases**



n = 1,665,797



## D. Impact of Incarceration as a Sanction for Nonpayment

The LFO data set also provides insight into the effectiveness of incarceration as a sanction for nonpayment.<sup>40</sup> In conjunction with the CourTools Measure 7c survey, 57 counties provided information on whether they incarcerate defendants for nonpayment of LFOs. Thirty-seven of the 57 counties reported using incarceration as a sanction; the remaining 20 counties reported that they did not use incarceration. Figures 19 through 23 compare average repayment rates at the 6-month, 18-month, and 36-month follow-up points for defendants in counties that use incarceration as a sanction for nonpayment and defendants in counties that do not use incarceration as a sanction. The impact of incarceration usage is greatest in criminal traffic cases: at 36 months, average repayment rates are 16 percentage points higher in counties that use incarceration than in counties that do not. The impact of incarceration usage is lower in misdemeanor, felony, and non-traffic forfeiture cases (9 percentage points, 7 percentage points, and 6 percentage points at 36 months), and negligible in traffic forfeitures (less than 1 percentage point at 36 months).<sup>41</sup> With the possible exception of criminal traffic cases, the increases in repayment rates associated with the use of incarceration are relatively modest in comparison with the magnitude of the overall obligation. In deciding whether to use incarceration as a sanction for nonpayment of LFOs, counties should carefully weigh the cost of incarceration (to the locality as well as to defendants) against the potential revenue gain from increased LFO compliance.

**Figure 19. Average LFO Repayment Rate by County Policy on Incarceration for Nonpayment, Felony Cases**



n = 74,129

<sup>40</sup> Multiple regression analysis of the impact of incarceration and license suspension on payments at the case level was inappropriate for several reasons, including endogeneity between the outcome (payment) and the explanatory variable of interest (the sanction), the absence of data on the timing of sanctions, and the potential deterrent effect of court sanctioning policies on defendants who were never personally sanctioned.

<sup>41</sup> Based upon t-tests, differences in average repayment rates for defendants in the two groups of counties were statistically significant at the .01 level at every point in time for every case type.

**Figure 20. Average LFO Repayment Rate by County Policy on Incarceration for Nonpayment, Misdemeanor Cases**



n = 148,500

**Figure 21. Average LFO Repayment Rate by County Policy on Incarceration for Nonpayment, Criminal Traffic Cases**



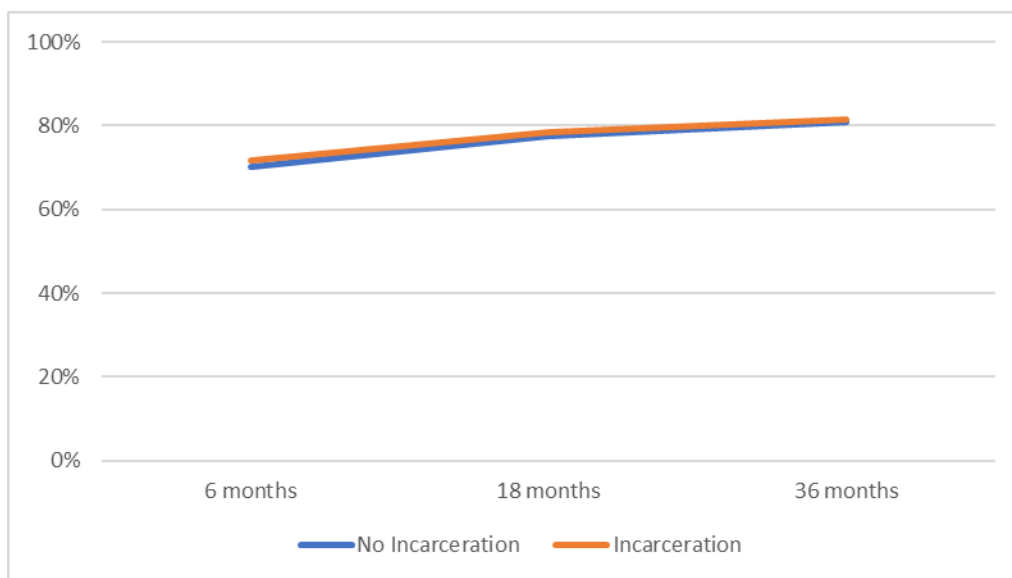
n = 82,439

**Figure 22. Average LFO Repayment Rate by County Policy on Incarceration for Nonpayment, Non-Traffic Forfeiture Cases**



n = 277,547

**Figure 23. Average LFO Repayment Rate by County Policy on Incarceration for Nonpayment, Traffic Forfeiture Cases**



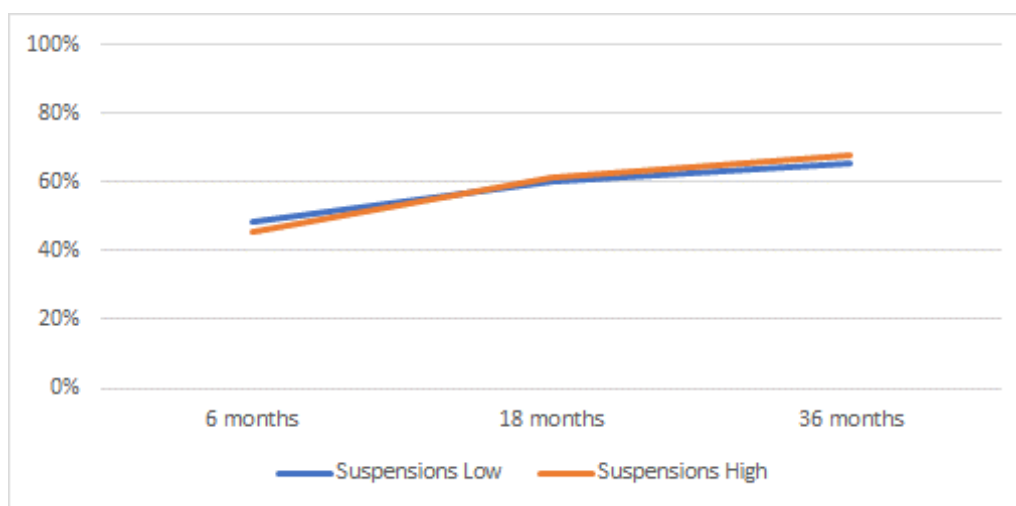
n = 2,108,906

### E. Impact of License Suspension as a Sanction for Nonpayment

To investigate the effectiveness of driver's license suspensions as a means of encouraging LFO payment, we compared average repayment rates in criminal traffic and traffic forfeiture cases for counties with low and high rates of driver's license suspensions. To classify counties' usage of license suspensions, we first calculated the rate of license suspensions at the county level for each case type. Counties whose rate of license suspension fell at or below the 25<sup>th</sup> percentile were classified as low-suspension counties, and counties whose rate of license suspension fell at or above the 75<sup>th</sup> percentile were classified as high-suspension counties. The classification was performed separately for each case type.

Figures 24 and 25 compare the average LFO repayment rate at the 6-month, 18-month, and 36-month follow-up points for counties with low and high rates of driver's license suspensions. In criminal traffic cases, the average repayment rate is lower in high-suspension counties at 6 months, about the same in the two groups at 18 months, and barely higher (less than 2 percentage points) in high-suspension counties at 36 months.<sup>42</sup> In traffic forfeiture cases, average repayment rates are lower in high-suspension counties at all points in time.<sup>43</sup> The data therefore provide no evidence that license suspensions are effective in encouraging repayment in traffic forfeiture cases, and suggest that license suspensions have at best a modest and delayed effect in criminal traffic cases.

**Figure 24. Average LFO Repayment Rate by County Usage of License Suspensions, Criminal Traffic Cases**

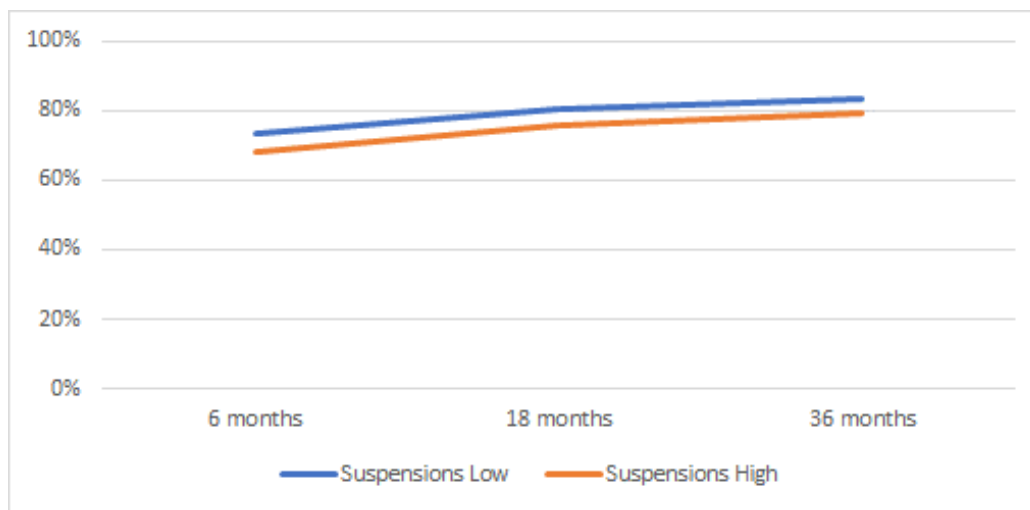


n = 54,000

<sup>42</sup> For criminal traffic cases, the difference is statistically significant at the .01 level at 6 months and 36 months, and not significant at the .05 level at 18 months.

<sup>43</sup> For traffic forfeitures, the difference is statistically significant at the .01 level at 6 months, 18 months, and 36 months.

**Figure 25. Average LFO Repayment Rate by County Usage of License Suspensions, Traffic Forfeiture Cases**



n = 1,042,199

## VII. Policy Options for Legal Financial Obligations

On the basis of this research, the Director of State Courts Office submits the following policy options for the Committee of Chief Judges and other policymakers to consider in their broader work on LFOs and court administration. These policy options should not be considered a comprehensive list of all potential options when dealing with LFOs.

### ***Policy Option 1: Discourage the Creation of Additional Court Fees***

The use of fees and surcharges as a revenue mechanism is a long-established practice. Although using LFOs to offset justice system costs is understandable, further expansion of these LFOs in the future might not serve the best interest of the public. Courts already have difficulty collecting existing LFOs. Furthermore, the essential function of courts is dispute resolution, not revenue generation and there are concerns over the sources of LFO payments. Policymakers may want to consider the possibility of recommending the legislature not expand LFOs further at this time.

#### *Current Collection Rates are Low*

Even with the courts' robust collection efforts, the full amount of LFOs already established by the legislature cannot be collected. As shown in Part VI, courts collect only 31 percent of LFOs within three years after disposition or presumed release date for felony cases and 46 percent in misdemeanor cases.<sup>44</sup> These low repayment rates demonstrate that despite the courts' robust efforts to collect on LFOs, most people still do not pay their obligations. Increasing the number of statutorily-required fees and surcharges would not address the problem of non-compliance.

#### *Courts are not Revenue Centers*

The use of LFOs as revenues to fund justice initiatives is counterproductive. The growing level of mandatory LFOs conflicts with the court's ability to construct a punishment suitable to the crime. While some judges try to minimize the impact of legal financial obligations by imposing lower or no fine amounts, total LFOs remain high. For example, a fine of \$100 quickly swells to an LFO of \$579 due to additional surcharges and fees.

#### *Source of Payments and LFO Effectiveness*

When discussing repayment of LFOs, policymakers may want to address two areas of concerns with LFO payments: 1) the source of payments and 2) whether the LFO serves its intended purpose. During the qualitative interviews, many judicial officers expressed concern that LFO payments come from sources other than the defendant, such as revenue from new criminal activity or payments by friends and family members. If LFOs are being paid through new crimes, then the LFO is not serving as a deterrent to criminal activity. Additionally, if LFOs are being

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<sup>44</sup> See note from Table 3

paid by friends or family members the defendant is not being held personally financially accountable.

## **Policy Option 2: Improve and Increase Community Service Options**

When considering new policies, policymakers may want to look at improving and increasing the use of community service. Community service fits well with both the *Tate* and *Bearden* decisions (discussed in Part III) and benefits the public interest because it punishes an individual but generally costs less than incarceration.

A recent article published by the National Center for State Courts (NCSC) indicates community service may also improve the collection of LFOs.<sup>45</sup> Community service does not eliminate a judge's ability to design a penalty that suits the defendant but instead provides additional options at sentencing. Statutory changes may be needed to make this option viable. This option does not mean that a judge should always convert monetary payments to community service when a defendant is unable to pay. Rather, this option is intended to broaden a judge's ability to construct an individualized punishment that benefits the community.

### *Comports with Supreme Court Decisions*

The U.S. Supreme Court in *Tate* clearly stated a trial court cannot incarcerate a defendant for being unable to pay because of indigence.<sup>46</sup> In *Bearden*, the court expanded upon the *Tate* holding and instructed judges to consider alternatives to incarceration for failure to pay, when those alternatives serve the public's interest.<sup>47</sup> Community service is one such alternative.

### *Texas Shows Success*

Community service in Texas has been shown to increase collections for minor offenses.<sup>48</sup> When Texas increased the use of community service by roughly 12 percent while decreasing warrants 7 percent, it saw a 6 percent increase in collections over a three-year time frame. Texas State Court Administrator David Slayton hypothesized that the increased collection rate appeared to be the result of the court collecting something from those with limited financial capacity, rather than nothing.<sup>49</sup> For example, a person with an LFO of \$500 who previously would have paid nothing now pays \$100 and does community service for the other \$400.

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<sup>45</sup> National Center for State Courts, *Court Fines & Fees: Collecting Something Rather than Nothing Works* (Oct. 24, 2018), available at [www.ncsc.org/Newsroom/at-the-Center/2018/Oct-24.aspx](http://www.ncsc.org/Newsroom/at-the-Center/2018/Oct-24.aspx).

<sup>46</sup> *TATE V. SHORT*, 401 U.S. 395 (1971)

<sup>47</sup> *BEARDEN V. GEORGIA*, 461 U.S. 660 (1983)

<sup>48</sup> National Center for State Courts, *supra* note 43.

<sup>49</sup> *Id.*

### *Statutory Changes*

Wisconsin policymakers may wish to consider changing statute in order to improve and increase the use of community service, particularly Wis. Stat. § 973.05(3)(a), which governs the use of community service. The statute reads “In lieu of part or all of a fine imposed by a court, the court may stay the execution of part or all of the sentence and provide that the defendant perform community service work under pars. (b) and (c).” Court officials have interpreted the word “fine” to limit community service to cover only the base fine, not including surcharges and fees. Changing the statutory language to include fees and surcharges would allow for greater usage of community service.

### *Establish a State-Run Community Service Coordination Program*

To make community service truly available across Wisconsin, policymakers may want examine the potential for establishing a state-run community service program for enforcement and coordination. At present, some individual counties have hired coordinators to organize their community service programs, but many counties do not have the resources to start such programs. Coordinators would identify appropriate community service options and work with agencies to certify a defendant fulfilled the court’s requirements. If the Texas model can be duplicated in Wisconsin, the increased revenue from LFO collections could offset the cost of such a program. For example, in 2017 Wisconsin collected roughly \$93 million in LFOs. Even a modest 1 percent increase in collections, far below the 6 percent increase realized in Texas, would generate an additional \$930,000 for the state. These funds could be used to offset the costs of creating a community service coordination system.

### ***Policy Option 3: Develop an Ability-to-Pay Calculator***

Determining a defendant’s ability to pay can be a difficult task for judicial officers. The ability to pay can vary based upon an individual’s job, number of children, debt load, city of residence, and many other factors. To help court officials make a more reasoned determination of an individual’s ability to pay, the court system may wish to adopt an ability-to-pay calculator. The goal of the calculator would not be to replace the reasoned decision of a judicial official, but instead to provide the judicial officer with objective guidance in decision-making. One such calculator is already in beta testing in the state of Washington.<sup>50</sup>

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<sup>50</sup> Washington State LFO Calculator, [beta.lfocalculator.org](http://beta.lfocalculator.org) (accessed Dec. 5, 2018).



### ***Policy Option 4: Reducing the Use of Driver's License Suspension***

Courts use driver's license suspensions as an LFO enforcement mechanism in approximately 11 percent of traffic-related cases. The use of driver's license suspension is problematic because of unanswered constitutional questions, the potential to cause further traffic violations, other societal impacts, and the lack of a proven deterrent effect. Wisconsin policy makers may want to examine ways to improve how courts determine whether to suspend a driver's license for failure to pay an LFO.

#### *Constitutional Questions*

*Robinson v. Purkey* is a case currently working its way through the federal court system. The plaintiffs argue that the State of Tennessee does not have the right to revoke drivers' licenses for failure to pay traffic-related debt, unless the court holds an ability to pay hearing to determine whether the defendant willfully did not pay the LFO. The U.S. District Court for the Middle District of Tennessee granted an initial injunction in favor of the plaintiffs' request to halt the use of driver's license suspensions unless one of the following conditions is met:

- a. Notice to the licensee that includes the offer of a fact-based inquiry, with participation by the licensee, as to the licensee's ability to pay and, if such inquiry is requested, a factual determination, prior and as a prerequisite to license suspension that the amount sought is within the licensee's ability to pay; or,
- b. Certification from the reporting jurisdiction that notice containing such offer has been afforded and (if inquiry is requested) such factual determination has been made.<sup>51</sup>

Based upon this decision courts may want to consider limiting the use of driver's license suspensions to cases in which an ability-to-pay hearing has been conducted.

#### *Further Traffic Violations and Societal Impacts*

When suspending a driver's license, the judge should also consider the potential for a defendant to incur further traffic violations as a result of the license suspension, along with the broader potential impact on society. According to the U.S. Census Bureau, 80 percent of Wisconsin workers drive themselves to work as their primary means of transport.<sup>52</sup> In a state such as Wisconsin where workers rely heavily on cars for transportation to work and many areas have limited options for public transportation, a driver's license suspension has a negative impact on both the defendant and society at large. An individual whose driver's license is suspended faces the choice between driving to work on a suspended license, risking additional traffic violations, or job loss if alternate transportation cannot be found. Job loss reduces the

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<sup>51</sup> Robison et al. v. Purkey No. 3:17-CV-01263, JU 4.15 (M.D. TENN. October 16, 2018)

<sup>52</sup> U.S. Census Bureau, 2012-2016 American Community Survey 5-Year Estimates, [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_16\\_5YR\\_S0801&prodType=table](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_16_5YR_S0801&prodType=table)

likelihood of repayment and may increase other costs to the public, such as the individual seeking public assistance benefits.

### *Not a Proven Deterrent*

As shown in Part VI, there is no empirical evidence that a court's use of driver's license suspensions increases LFO payment rates. Other means, such as encouraging prepayments and providing community service opportunities, may be more effective in maximizing collections.

### **Policy Option 5: Reducing the Use of Incarceration for Failure to Pay**

The use of incarceration for failure to pay is one of the most controversial collection methods. Incarceration for failure to pay has significant constitutional implications and is generally not considered cost-effective. This policy option does not suggest the courts suspend or eliminate the ability of judges to incarcerate for failure to pay. Rather, courts should use this tool sparingly after all other options are exhausted.

### *Constitutional Limitations*

The *Tate* and *Bearden* decisions place strict limits on the use of incarceration as a sanction for nonpayment of LFOs. In *Tate*, the U.S. Supreme Court held that a trial court may not incarcerate a defendant for failure to pay due to indigence. Instead, the court must make an affirmative determination that the defendant has the ability to pay but is willfully ignoring the order to pay.<sup>53</sup> *Bearden* expands upon this rationale: "if the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a defendant solely because he lacked the resources to pay it."<sup>54</sup> In both cases, the Court ruled that a judge must make a determination that the individual was not making a bona fide effort to pay or seek work before considering incarceration as an option.<sup>55</sup>

### *Cost-Effectiveness*

It is not cost-effective to incarcerate a defendant for failure to pay. Although the costs of arrest and incarceration vary between counties, the Wisconsin Department of Corrections (DOC) estimates the costs of holding a single inmate in a minimum-security facility at \$88 per day.<sup>56</sup> The results of the Measure 7c survey show that circuit courts incarcerate a defendant for an average of 14 days for failure to pay. If a defendant is incarcerated for 14 days at a cost of \$88 per day, the average cost of incarceration for nonpayment is \$1,232 per defendant. The average assessment for misdemeanors was \$751. Making the optimistic assumption that the defendant pays the assessment in full after incarceration, the net cost of incarceration to taxpayers would be \$481. For forfeitures, the cost to taxpayers is even greater with an average

<sup>53</sup> *Tate*, 401 U.S. at 401

<sup>54</sup> *Bearden*, 461 U.S. at 668

<sup>55</sup> *Bearden*, 461 U.S. at 670

<sup>56</sup> *DAI At-a-Glance*. (October 2018). Wisconsin Department of Corrections. Accessed: December 12, 2018. <https://doc.wi.gov/DataResearch/DataAndReports/DAIAtAGlance.pdf>

assessment of \$184. Incarcerating a defendant for failure to pay forfeiture costs taxpayers \$1,048, which is 5.7 times more than what the defendant owed. Overall, arresting and incarcerating someone for failure to pay is an ineffective mechanism for collecting court related LFOs and should be used sparingly.

**Conclusion**

These policy options may improve fairness and the collections of LFOs in the Wisconsin circuit courts. When considering which policy option to implement, the court system will need to weigh fairness to the defendants and the public's interest. These options are only intended to be a starting point for future discussions. The entire report will be submitted to the Committee of Chief Judges for their consideration and potential policy action.

## APPENDIX A. JUDGE AND CLERK'S STAFF INTERVIEW PROTOCOL

The Director of State Courts Office received a grant from the State Justice Institute (SJI) to look at the repayment rates of fines, forfeitures, surcharges, and fees, or as they are being called Legal Financial Obligations (LFOs). The study is looking at both criminal and forfeiture matters (i.e. traffic violations, OWI, etc.), and is trying to determine a few things, such as: a Repayment rate, time it takes for a person to repay their LFO, is there a diminishing return, etc. The study is broken down into two parts, a quantitative analysis of CCAP financial data and a qualitative analysis of judges and clerks. These interviews are part of the qualitative analysis, which also includes a survey you may have already taken. The completed study will be done in late 2017.

If it is ok with you I am going to record this interview, the recording will not be published, it is merely for my note taking purposes, however, if it is ok with you we may use memorable quotes in the report, is that ok (Yes/No).

1. Take me through what you do the moment the judge imposes fines, forfeitures, and costs until the defendant starts paying.
  - a. Does your office provide the defendant with any information on making payments?
  - b. Does the defendant get a receipt or other forms?
  - c. Is there information on the counties website about making payments?
  - d. Does your office have a single point of contact (or single office) for defendants who need to discuss repayment?
2. What repayment methods are available for defendants paying off their LFOs?
  - a. Payment plans
    - i. Who makes the determination about establishing a payment plan?
    - ii. What guidelines do you follow? (i.e. payment periods)
    - iii. How well do you think payment plans work?
  - b. Community service
    - i. What is pay per hour for community service?
3. Once a defendant misses a payment what the steps you take or what things does your office do to get them back repaying?
  - a. How do you find out that a defendant has missed a payment or failed to pay?
  - b. Is there a number to call or email address for a defendant to notify your office if they cannot make a payment or are having financial difficulty?
  - c. Do you send any type of regular reminders that a payment is due?
4. If you cannot or don't get a person back paying what options do you have or steps do you take?
  - a. Do you use a collections agency?
    - i. Tax Intercept?
      1. How effective do you find this
  - b. Does your office use license suspension?

- i. Who is authorized to suspend a licenses (Clerk/Judge)
        - 1. How effective do you find this
    - c. Private collections agencies
      - i. How often do you use this?
      - ii. How effective is this?
    - d. How soon do you notify a judge once a person has not been paying, if at all?
  - 5. Is there a point in time when you stop attempting to collect?
    - a. Is it there a difference between forfeitures and criminal cases?
      - i. What is the time period?
      - ii. Is the debt still there?
      - iii. Is the debt written off?
  - 6. What have you found is most successful at getting people to repay their LFOs?
  - 7. Is there any training or education that you feel your office lacks, regarding the clerks authority when it comes to fines, fees, or surcharges?
  - 8. Do you feel there is enough communication with the judges on this issue to do your job adequately?

## APPENDIX B. IMPACT OF ASSESSMENT SIZE ON REPAYMENT RATE, BY CASE TYPE

Covariate	Case Type				
	Felony	Misdemeanor	Criminal Traffic	Non-Traffic Forfeiture	Traffic Forfeiture
Assessment value	-2.9E-03	<b>-8.4E-03</b>	2.3E-03	-7.3E-02	-2.1E-02
Assessment value squared	5.5E-08	<b>7.8E-07</b>	-2.0E-06	2.6E-05	<b>1.2E-05</b>
Incarcerated	<b>-15.0</b>	-26.3	<b>-8.4</b>	n.a.	n.a.
Bond or trust applied	<b>17.4</b>	<b>1.4</b>	<b>5.1</b>	<b>13.3</b>	<b>8.2</b>
Constant	<b>43.6</b>	<b>61.3</b>	<b>70.2</b>	<b>85.7</b>	<b>81.6</b>
n =	61,710	147,867	82,631	226,459	1,665,797

Note: Coefficients in **bold** are statistically significant at  $p < 0.001$ .<sup>57</sup>

<sup>57</sup> All model coefficients are statistically significant, despite the fact that some of the effects are substantively small. Due to the number of observations used to estimate the models (from 60,000 to over 1.5 million) the effect sizes are estimated with a great deal of precision, leading to small standard errors and large test statistics. Under these circumstances, even minor relationships between the covariates and the outcome will appear as statistically significant despite having no substantively significant impact on the outcome. The graphical presentations in Part VI present the effects of the variables within reasonable ranges of the variables.