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## Debt Bondage: How Private Collection Agencies Keep the Formerly Incarcerated Tethered to the Criminal Justice System

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# Debt Bondage: How Private Collection Agencies Keep the Formerly Incarcerated Tethered to the Criminal Justice System

Bryan L. Adamson\*

## ABSTRACT

*This Article examines the constitutionality of statutes which allow courts to transfer outstanding legal financial obligations to private debt collection agencies. In Washington State, the clerk of courts can transfer the legal financial obligation of a formerly incarcerated person if he or she is only thirty days late making a payment. Upon transfer, the debt collection agencies can assess a “collection fee” of up to 50% of the first \$100,000 of the unpaid legal financial obligation, and up to 35% of the unpaid debt over \$100,000. This fee becomes part of the LFO debt imposed at sentencing, and like that debt, must also be paid in full. Interest accrues at 12% per annum, there is no account for a LFO debtor’s indigence or ability to pay, and the collection fee is not dischargeable in bankruptcy. Not only do these collection fees further consign a formerly incarcerated person to a lifetime of poverty and exacerbate already-severe barriers to community re-entry, but they increase the risks for re-arrest and re-incarceration. Equally troubling is that these fees extend the time during which an ex-offender is tethered to the criminal justice system. This Article argues that Washington State’s collection agency referral law, and similar laws in other states, may violate constitutional due process and excessive fine edicts.*

## INTRODUCTION

While vital work is being directed to address America’s execrable mass incarceration rates and their disproportionate impacts upon people of color,<sup>1</sup> we also see growing efforts to reform an invariable component of criminal conviction: legal financial obligations

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<sup>1</sup> See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012); JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017); BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* (2014).

(LFOs).<sup>2</sup> An LFO is a monetary sanction—a fine, penalty, cost, fee or other expense<sup>3</sup> imposed upon a defendant as part of a sentencing order and judgment in a misdemeanor or felony case.<sup>4</sup> LFOs represent more than the financial penalty a law might require when a defendant is convicted of a given crime. LFOs are also levied for scores of other consequences of involvement in the criminal justice system, including victim compensation, court-appointed counsel, deferred prosecution, appeals, DNA collection, community supervision, appeals, and incarceration itself.<sup>5</sup> In the State of Washington for example, a defendant with one conviction is subject to twenty-eight different monetary sanctions.<sup>6</sup>

For convicted defendants, LFOs can easily swell into the thousands of dollars. And, more often than not, they do. In Washington, individuals with felony convictions owe an average of \$2,540.00 in LFOs.<sup>7</sup> That amount does not include the annual 12% statutory interest that begins to accrue upon sentencing.<sup>8</sup> To add to the financial consequences of criminal convictions, felony defendants often face multiple charges and thus may be under separate, cumulative LFO obligations.<sup>9</sup> Like a term of imprisonment, LFO payment obligations are a condition of sentence.<sup>10</sup> It follows that repayment aggravates LFO debtors' financial hardships.

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<sup>2</sup> See class action cases such as *Fant v. City of Ferguson*, 107 F. Supp. 3d 1016 (E.D. Mo. 2015) (persons repeatedly jailed by the City of Ferguson for being unable to pay fines owed to the City from traffic tickets and other minor offenses, without being afforded an attorney and without any inquiry into their ability to pay); *Kennedy v. City of Biloxi*, No. 1:15-cv-00348-HSO-JCG (S.D. Miss. 2015) (challenging practice of jailing those unable to pay their fines, fees, or court costs), *dismissed*, No. 1:15cv348-HSO-JCG (S.D. Miss. 2016); *Johnson v. Jessup*, 381 F. Supp. 3d 619 (M.D.N.C. 2019) (challenging practice by North Carolina Division of Motor Vehicles to revoke drivers licenses of those unable to pay traffic fines or court costs); *Fuentes v. Benton Cty.*, No. 15-2-02976-1 (Wash. Super. Ct. 2016) (order preliminarily approving class action settlement), <https://www.aclu.org/legal-document/fuentes-v-benton-county-order-granting-plaintiffs-motion-preliminary-approval> (settlement entered after legal challenge to practice of trial court's jailing, threatening to jail, and forcing manual labor on indigent people for failure to pay legal financial obligations).

<sup>3</sup> A legal financial obligation (LFO) is “a sum of money that is ordered by a superior court of the state of Washington for legal financial obligations which may include restitution to the victim, statutorily imposed crime victims' compensation fees as assessed . . . court costs, county or interlocal drug funds, court-appointed attorneys' fees, and costs of defense, fines, and any other financial obligation that is assessed to the offender as a result of a felony conviction.” WASH. REV. CODE § 9.94A.030(31) (2019).

<sup>4</sup> WASH. REV. CODE § RCW 9.94A.030 (31). See also WASH. REV. CODE § 9.94A.760(1) (upon conviction, “the court may order the payment of a legal financial obligation as part of the sentence.”).

<sup>5</sup> See WASH. REV. CODE § 10.01.160 (2019); see also WASH. REV. CODE §§ 9A.20.020–021 (2019), which establishes that crimes classified as “Class C Felonies” (e.g. assault) are punishable by up to five years' imprisonment, a fine of up to \$10,000, or both.

<sup>6</sup> Alexes Harris et al., *Monetary Sanctions in Washington*, in MONETARY SANCTIONS IN THE CRIMINAL JUSTICE SYSTEM 201, 211–12 (2017), <http://www.monetarysanctions.org/wp-content/uploads/2017/04/Monetary-Sanctions-Legal-Review-Final.pdf>.

<sup>7</sup> WASH. STATE REENTRY COUNCIL, REPORT OF THE STATEWIDE REENTRY COUNCIL (Dec. 2018), <http://www.commerce.wa.gov/wp-content/uploads/2013/01/1-2-2019-CSHD-Commerce-Reentry-Report-2018.pdf>.

<sup>8</sup> *Id.*

<sup>9</sup> See generally ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR (2016).

<sup>10</sup> WASH. REV. CODE § 9.94A.760(11) (2019).

Over three quarters of Washington’s felony defendants are indigent.<sup>11</sup> Because of their indigent status, recently incarcerated persons are, at best, able to pay only a little per month— \$25.00 or often less.<sup>12</sup> As a result, it may take years, if not decades, to pay down the principal alone on the average LFO debt. This Article examines a little-discussed consequence of LFO debt that literally and figuratively multiplies the hardships of LFO debtors: court-imposed LFO debt that is referred to private debt collection agencies (DCAs).

In Washington, courts are authorized to contract with DCAs to service and collect outstanding LFOs.<sup>13</sup> Revised Code of Washington (RCW) Section 19.16.500 allows the clerk of courts<sup>14</sup> to transfer a non-incarcerated debtor’s LFO obligations to its DCA if the debtor is a mere thirty days delinquent.<sup>15</sup> By law, that transfer allows a DCA to impose a “collection fee” up to 50% of the outstanding LFO under than \$100,000 and 35% of the unpaid debt over \$100,000.<sup>16</sup> In addition, a DCA will levy a 12% per annum charge on its collection fee.<sup>17</sup>

An example is helpful to demonstrate just how LFO debt compounds: “John” was sentenced to one year in prison and \$2,540.00 in fines, fees and restitution. The mandatory 12% statutory interest on John’s debt will add \$305.00 to his obligation while John is incarcerated. Upon release, he makes \$30.00 in monthly payments, it will be twenty-five

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<sup>11</sup> WASH. STATE OFFICE OF PUB. DEF., 2018 STATUS REPORT ON PUBLIC DEFENSE IN WASHINGTON STATE 18–56 (May 2019), [https://www.opd.wa.gov/documents/00732-2019\\_StatusReport.pdf](https://www.opd.wa.gov/documents/00732-2019_StatusReport.pdf) (calculated from submitted data by county).

<sup>12</sup> HARRIS, *supra* note 9, at 56. On average, LFO debtors pay \$31.25 per month.

<sup>13</sup> WASH. REV. CODE § 36.18.190 (2019) (“Superior court clerks may contract with collection agencies under chapter 19.16 RCW or may use county collection services for the collection of unpaid court-ordered legal financial obligations as enumerated in RCW § 9.94A.030 that are ordered pursuant to a felony or misdemeanor conviction and of unpaid financial obligations imposed under Title 13 RCW. The costs for the agencies or county services shall be paid by the debtor.”); WASH. REV. CODE § 19.16.500(1)(a) (2019) (“Agencies, departments, taxing districts, political subdivisions of the state, counties, and cities may retain, by written contract, collection agencies licensed under this chapter for the purpose of collecting public debts owed by any person, including any restitution that is being collected on behalf of a crime victim.”).

<sup>14</sup> Clerks of courts are charged with administering the LFO payment processes for non-incarcerated debtors. *See, e.g.*, WASH. REV. CODE § 9.94A.760(5) (“The county clerk is authorized to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations.”). Department of Corrections is charged with LFO administration for those in jail or prison. WASH. REV. CODE § 72.65.050 (2019); WASH. REV. CODE § 72.65.060. While an inmate remains in custody, LFOs are paid through automatic twenty percent deductions from most of the deposits placed into an inmate trust account. WASH. REV. CODE § 72.09.111(1)(a)(iv).

<sup>15</sup> WASH. REV. CODE § 19.16.500(2).

<sup>16</sup> “The amount to be paid for collection services shall be left to the agreement of the governmental entity and its collection agency or agencies, but a contingent fee of up to fifty percent of the first one hundred thousand dollars of the unpaid debt per account and up to thirty-five percent of the unpaid debt over one hundred thousand dollars per account is reasonable, and a minimum fee of the full amount of the debt up to one hundred dollars per account is reasonable. Any fee agreement entered into by a governmental entity is presumptively reasonable.” WASH. REV. CODE § 19.16.500(1)(b).

<sup>17</sup> Per WASH. REV. CODE § 19.16.500 (3), “[c]ollection agencies assigned debts under section [WASH. REV. CODE § 19.16.500(3)] shall have only those remedies and powers which would be available to them as assignees of private creditors.” Under WASH. REV. CODE § 19.52.020(1), collection agencies can charge interest on collection accounts “so long as the rate of interest does not exceed...[t]welve percent per annum[.]”

years before his LFO is paid off.<sup>18</sup> Now say, after two payments, John misses his third. Thirty days after the missed payment, the clerk of courts refers his debt to its DCA. Again, as allowed by law, the debt collector adds a fifty percent collection fee to John's outstanding LFO debt. John's \$2,845.00 debt becomes \$4,267.00. The DCA then levies the 12% statutory interest against the court-imposed LFO *and* to the debt it is now owed. John resumes his \$30.00 monthly payments. The DCA then levies a payment plan set up fee, a monthly maintenance fee, and a convenience fee for payment by credit card. After year one, John will owe at least \$4,360.00 to the court and the DCA. In ten years, John will owe \$6,570.00. The debt continues to negatively amortize, such that in year twenty-five, John will owe \$24,408.00. In other words, as direct result of the fees that the DCA is allowed by law to extract—fees that grow far larger than the LFO to which he was originally sentenced—John will never be able to pay off his debt.

LFO obligations remain a mandatory condition of probation, parole, or other correctional supervision. Further, LFO obligations are not dischargeable in bankruptcy,<sup>19</sup> and failure to pay LFOs can result in re-arrest and re-incarceration.<sup>20</sup> Those with LFOs in collection are also exposed to risk of civil judgments, liens, tax refund interception, and wage garnishment.<sup>21</sup> In other words, all things remaining equal, John likely will be tethered to the criminal justice system and yoked to a private debt collection agency for life.

The State of Washington is not alone in allowing exorbitant “collection fees” as a percentage of the outstanding debt upon the transfer of LFO debt to DCAs: Florida (40%), Alabama (30%), Texas (30%), and Illinois (30%) are just a few examples.<sup>22</sup> These transfers can effectively extend the criminal sentence of formerly incarcerated persons through fee extraction on the outstanding debt. Under each statutory regime, the “collection fee” levied

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<sup>18</sup> Under this hypothetical, a monthly payment less than \$27.00—still outside of the affordability for an indigent debtor—will never pay the debt down, as it is insufficient to cover even the accruing interest.

<sup>19</sup> 11 U.S.C. § 523(a)(7) (2018); State of Washington Dept. of Corrections Policy DOC 200.380 (Restitution and other LFOs are non-dischargeable under Chapters 7 and 13 of the Bankruptcy Code).

<sup>20</sup> A court can impose further punishment if an offender violates any condition or requirement of a sentence. *See* WASH. REV. CODE § 9.94A.760. However, the 14<sup>th</sup> Amendment bars courts from revoking probation for failure to pay legal financial obligations without first inquiring into a person's ability to pay and considering alternatives to imprisonment. *See generally* *Bearden v. Georgia*, 461 U.S. 660 (1983). While a defendant cannot be imprisoned for nonpayment due to indigence, imprisonment for willful or contumacious failure to pay is not prohibited. In 1983, the Supreme Court ruled that a debtor can be imprisoned for criminal justice debt only when he has an ability to pay, but willfully refuses to do so. *Williams v. Illinois*, 399 U.S. 235, 240–41 (1970) (extending maximum prison term because a person is too poor to pay fines or court costs violates the Equal Protection Clause of the 14<sup>th</sup> Amendment); WASH. REV. CODE § 10.01.180(1) (2019) (“A defendant sentenced to pay any fine, penalty, assessment, fee, or costs who willfully defaults in the payment thereof or of any installment is in contempt of court[,], and “[t]he court may issue a warrant of arrest for his or her appearance.”). Moreover, Washington Const. art. 1, § 17, prohibiting imprisonment for debt, would likely preclude imprisonment solely for inability to pay.

<sup>21</sup> WASH. REV. CODE § 6.27.150 (2019). One jurisdiction's practice of shutting off LFO debtor's utilities until a payment is made is being challenged. *See* Southern Center for Human Rights, *SCHR Continues to Challenge LaGrange, GA, Policies That Restrict Access to Basic Utility Services*, SCHR.ORG (Mar. 26, 2018), <https://blog.schr.org/2018/03/26/schr-continues-to-challenge-lagrange-ga-policies-that-restrict-access-to-basic-utility-services/>.

<sup>22</sup> ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, *CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY* 17 (2010), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf). While these states have referral structures similar to Washington State, the mechanism through which they are set up (e.g., statute, administration rule) differ in ways that would impel a different constitutional analysis.

by a DCA then becomes part of the LFO debt.<sup>23</sup> This scenario unfolds by operation of law, occurs without adequate notice or a pre-transfer hearing, without an ability to pay assessment, and without examination as to whether the “collection fee” imposed is excessive.

The collateral consequences of LFO debt are demonstrably severe. Outstanding LFOs limit access to public and private housing, gainful employment, and damage credit, and they render debtors unable to establish bank accounts, obtain financial aid for educational or job training programs, and foreclose them from obtaining professional licenses.<sup>24</sup> Individuals with even one missed payment can have their driver’s license revoked and are denied from accessing public benefits, such as Temporary Aid to Needy Families, low income housing, Supplementary Nutrition Assistance Program benefits, and Supplemental Security Income for the elderly and disabled.<sup>25</sup> LFO debtors with felony convictions cannot have their voting rights restored until their LFO debt is satisfied.<sup>26</sup> LFO obligations effectively operate like a modern-day poll tax, and this is playing out most notoriously in Florida.<sup>27</sup> LFOs exacted by DCAs extend these consequences into a formerly incarcerated person’s lifetime, heighten the barriers to community re-entry, and prolong the social stigmas associated with felony conviction.

LFO debt also affects individuals’ perceptions of the criminal justice system and their images of themselves and their futures. As one recently incarcerated person said about this spiral of debt in a report prepared by the American Civil Liberties Union: “I have a balance of \$1838.74, and that’s exactly what I owe in interest. It’s discouraging to keep paying and

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<sup>23</sup> WASH. REV. CODE § 19.16.500(4) (2019) (“For purposes of this section, the term debt shall include fines and other debts, including the [collection] fee allowed under subsection (1)(b) of this section.”).

<sup>24</sup> See Tarra Simmons, *Transcending the Stigma of a Criminal Record: A Proposal to Reform State Bar Character and Fitness Evaluations*, 128 YALE L.J.F. 759, 761 (2019); see generally Jamila Jefferson-Jones, *Extending ‘Dignity Takings’: Re-Conceptualizing the Damage Caused by Criminal History and Ex-Offender Status*, 62 ST. LOUIS U. L.J. 863 (2018) (criminal conviction impact on fundamental necessities of life).

<sup>25</sup> 42 U.S.C. § 608(a)(9)(A) (2012)(Temporary Aid to Needy Families (TANF) benefits); 42 U.S.C. § 1437f(d)(1)(B)(v)(II)(2018) (low income housing assistance); 7 U.S.C. § 2015(k)(1) (2018) (Supplemental Nutrition Assistance Program (SNAP) benefits); 42 U.S.C. § 1382(e)(4)(A)(ii) (2012) (Supplemental Security Income).

<sup>26</sup> Thirty states require all LFOs be paid in order for people with conviction records to regain the right to vote. ALLYSON FREDERICKSEN & LINNEA LASSITER, ALL. FOR A JUST SOC’Y, *DISENFRANCHISED BY DEBT* 11 (Mar. 2016), <http://allianceforajustsociety.org/wp-content/uploads/2016/03/Disenfranchised-by-Debt-FINAL-3.8.pdf>. In Washington, upon release from incarceration, the voting rights of a person convicted of a felony are provisionally restored. WASH. REV. CODE § 29A.08.520(1). However, non-payment of LFOs can result in a loss of voting rights if either of the following occurs: 1) if a court finds that the debtor’s failure to pay was willful, or 2) if the debtor fails to make three payments in a twelve-month period. WASH. REV. CODE § 29A.08.520(2)(a), 2(b) (2013). In the latter case, the county clerk or restitution recipient may request the prosecutor to seek the revocation of voting rights. Harris et.al, *supra* note 6, at 204. Once revoked, voting rights are not restored until the individual has made a “good faith effort” to pay, meaning the individual has paid the full principal (non-interest) amount, or made at least fifteen monthly payments in an eighteen-month period. *Id.*

<sup>27</sup> Patricia Mazzei, *Florida Limits Ex-Felon Voting, Prompting a Lawsuit and Cries of ‘Poll Tax’*, N.Y. TIMES (June 28, 2019), <https://www.nytimes.com/2019/06/28/us/florida-felons-voting-rights.html>. In a move that re-enfranchised more than 1.4 million Florida citizens, Amendment 4 was passed by the majority of voters in November 2018. *Id.* The following June, Florida Governor Ron DeSantis signed into law a requirement that those who have committed serious offenses and have LFOs must pay them back in full before becoming eligible to vote. *Id.*

see that interest amount grow. It's exhausting."<sup>28</sup> LFO debt, made worse by the fees DCAs are permitted to exact, intensifies perceptions of the criminal justice system as unfair and unforgiving. The perpetual cycle of debt repayment also deepens the sense of hopelessness many feel toward their ability to escape the burdens of the criminal justice system.

Four principles inform how we, as a polity, view the ideal outcomes for punishment: (1) that it should fit the crime (proportionality); (2) that it should not exceed the minimum needed to achieve its purpose (parsimony); (3) that the punishment should not foreclose the ability of a formerly incarcerated person's ability to lead a fulfilling and successful life; and (4) that our penal system should avoid reproducing social inequities, especially since those involved in the system are already likely the most disadvantaged in our society. In the drafting and implementation of RCW 19.16.500, these principles seem to have been completely ignored.

With a focus on LFOs arising out of felony convictions in Washington courts,<sup>29</sup> this Article challenges the unique form debt bondage that RCW 19.16.500 exacts. This Article contends that Washington State's legal structure allowing private DCAs to service LFO debts of those charged with felonies may violate the 8<sup>th</sup> Amendment Excessive Fines,<sup>30</sup> the 14<sup>th</sup> Amendment's Due Process and Equal Protection proscriptions,<sup>31</sup> and Washington State's constitutional provisions proscribing the same.<sup>32</sup> This Article further argues that states must discontinue LFO debt referral to private DCAs, re-assume the responsibility of collection services, and generally engage in wholesale LFO reform. Part I of this Article explains the LFO statutory provisions and processes in Washington and some recent state reforms. Part II places LFO debt and the relationship between courts and private enterprises into historical context, drawing connections to the convict leasing schemes that emerged during Reconstruction and their racial intent and impact. Part III sets forth the results of a review of seventy-seven contracts between Washington courts and debt collection agencies, their predatory impacts, and associated constitutional concerns. The Article closes with reform propositions for the law and use of DCAs.

## I. LEGAL FINANCIAL OBLIGATIONS IN THE STATE OF WASHINGTON

To appreciate the impact of RCW 19.16.500 upon the lives of LFO debtors and how it extends their involvement with the criminal justice system, it is critical to understand

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<sup>28</sup> AM. CIVIL LIBERTIES UNION OF WASH. & COLUMBIA LEGAL SERVS., MODERN-DAY DEBTORS' PRISONS: THE WAYS COURT-IMPOSED DEBTS PUNISH PEOPLE FOR BEING POOR 14 (2014).

<sup>29</sup> Although Washington's statutory scheme applies equally to transfer of misdemeanor LFOs to DCAs, this Article is concerned explicitly with felony LFOs because of the cumulative consequences and unique disabilities felony debt transfer imposes upon the formerly incarcerated and makes more acute the constitutional concerns.

<sup>30</sup> U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

<sup>31</sup> U.S. CONST. amend. XIV, § 1 ("No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

<sup>32</sup> WASH. CONST. art. I, § 3 ("No person shall be deprived of life, liberty, or property, without due process of law."); *id.* § 12 ("No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."); *id.* § 14 ("Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted."). For discussion, *see infra* Part III, at 319.

more specifically what constitutes LFOs and the process of imposition and collection in Washington state.

### A. LFO Overview

LFOs are ordered by a court either at sentencing,<sup>33</sup> at a restitution hearing,<sup>34</sup> or following an appeal.<sup>35</sup> Generally, LFOs fall into five categories: restitution, fines, costs, fees, and surcharges. Restitution is a monetary sum the court orders the defendant to pay a victim for damages (e.g., lost wages, medical bills, property loss).<sup>36</sup> A fine is also monetary penalty, typically established by statute and tied to the type or class of crime.<sup>37</sup> Unlike fines, which are punitive, costs are imposed to recoup court expenses incurred, for example, by probation services, warrant service, juror compensation, or incarceration.<sup>38</sup> Fees are payments required for specific purposes, such as a victim penalty assessment (VPA),<sup>39</sup> DNA collection,<sup>40</sup> or the debt collection costs. Surcharges are other costs used to support court- and state-related functions, typically calculated as a percentage of total LFOs.<sup>41</sup> Until recently, a statutory interest of 12% attached to all restitution and non-restitution debt upon sentencing.<sup>42</sup>

Restitution, fines, costs, fees and surcharges can be mandatory or discretionary. Restitution and certain fines and costs related to felony convictions are mandatory, and a court must impose those without consideration of a defendant's financial circumstances or ability to pay.<sup>43</sup> Sanctions for public defender costs,<sup>44</sup> criminal filing fees,<sup>45</sup> jury fees,<sup>46</sup> appellate costs,<sup>47</sup> and costs of incarceration<sup>48</sup> are discretionary as to whether or how much a defendant must pay.

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<sup>33</sup> WASH. REV. CODE § 9.94A.760(1)(2019) (“Whenever a person is convicted in superior court, the court may order the payment of a legal financial obligation as part of the sentence.”); WASH. REV. CODE § 10.01.160(1)(2019) (“[T]he the court may require a defendant to pay costs” upon conviction).

<sup>34</sup> WASH. REV. CODE § 9.94A.753 (2018) (“When restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days[.]”).

<sup>35</sup> WASH. REV. CODE § 10.73.160.

<sup>36</sup> WASH. REV. CODE § 9.94A.753.

<sup>37</sup> See, e.g., WASH. REV. CODE § 9.94A.760(10).

<sup>38</sup> HARRIS, *supra* note 9, at 26.

<sup>39</sup> WASH. REV. CODE § 7.68.035 (2019).

<sup>40</sup> WASH. REV. CODE § 43.43.7541 (2019).

<sup>41</sup> Harris et.al., *supra* note 6, at 10.

<sup>42</sup> WASH. REV. CODE § 10.82.090 (2017) (interest on judgments), *superseded by* WASH. REV. CODE § 10.82.090 (2)(a) (2018); WASH. REV. CODE § 4.56.110(6) (interest on judgments); WASH. REV. CODE § 19.52.020 (maximum interest on judgments).

<sup>43</sup> Other mandatory fines include public education and assessment fees. WASH. REV. CODE § 3.67.090 (equal to 75% of the fines, forfeitures or penalties imposed, costs of supervision, and fines for Violation of the Uniform Controlled Substance Act. WASH. REV. CODE § 69.50.430 (2019)).

<sup>44</sup> WASH. REV. CODE § 10.01.160 (2) (2019).

<sup>45</sup> WASH. REV. CODE § 36.18.020(h) (2019).

<sup>46</sup> WASH. REV. CODE § 10.46.190; WASH. REV. CODE § 10.64.015.

<sup>47</sup> WASH. REV. CODE § 10.73.160.

<sup>48</sup> WASH. REV. CODE § 10.01.160; WASH. REV. CODE § 9.94A.760.

While there are mechanisms by which an incarcerated person can pay down LFO debt,<sup>49</sup> a person is under an affirmative obligation to begin payment on any outstanding amounts upon release from incarceration if they have not been making payments while incarcerated. Clerks of court or the department of corrections (in the case of incarcerated LFO debtors) manage and service LFO debt in the first instance, taking and applying payments to a debtor's account or accounts.<sup>50</sup> While not available to incarcerated persons, relief from some discretionary LFOs and interest payments can be available. Prior to 2015, a person returning from incarceration<sup>51</sup> could request modification or remittance of accrued interest on non-restitution LFOs if the amounts due would result in "manifest hardship" to the debtor or the debtor's family—if the debtor was not already in default.<sup>52</sup> Beginning in 2015, laws governing LFO debt modification changed dramatically.

### B. LFO Reform in Washington State

The 2015 Washington Supreme Court's decision in *State v. Blazina*<sup>53</sup> marked a watershed moment in Washington LFO reform. In *Blazina*, Nicholas Blazina was sentenced to twenty months in prison for second degree assault.<sup>54</sup> Co-petitioner Mauricio Paige-Colter was sentenced to thirty years for first degree assault and unlawful possession of a firearm.<sup>55</sup> Along with Blazina's prison sentence, he was charged a \$500 victim penalty assessment, a \$200 filing fee, a \$100 DNA sample fee, a \$400 assigned counsel fee, and a \$2,087.87 assessment for extradition costs. Paige-Colter, as part of his judgment and sentence, was charged a \$500 crime victim penalty assessment, a \$200 filing fee, a \$100 fee for the DNA sample, a \$1500 assigned counsel fee, and restitution by a later order.<sup>56</sup>

At the time, a trial court had discretion to order costs, but it was not required to look at a defendant's current and future ability to pay. The court did not conduct an ability to pay determination for either defendant.<sup>57</sup> While it did not discuss the constitutional questions, the Washington Supreme Court held that a sentencing judge must "make an individualized inquiry into the defendant's current and future ability to pay" before imposing LFOs and do so on the record.<sup>58</sup> Such an inquiry also demands that the sentencing court consider factors such as whether the defendant will be incarcerated and the defendant's other debts, including restitution.<sup>59</sup> Because the record did not reflect that the

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<sup>49</sup> See WASH. REV. CODE §§ 72.09.111, 480 (2019), which set forth the method by which LFO deductions are debited from inmate accounts—typically monies given to inmates by families and friends or earned through work while incarcerated.

<sup>50</sup> WASH. REV. CODE § 9.94A.760(5) authorizes the county clerk "to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations." See also, WASH. REV. CODE § 9.94A.753(4) (authorizing collection of restitution); § 9.94A.760(5) (authorizing collection of fees), and WASH. REV. CODE § 9.94A.760(9) (authorizing collection of costs).

<sup>51</sup> WASH. REV. CODE § 10.01.160(4) (2019).

<sup>52</sup> WASH. REV. CODE § 10.01.180 (5); WASH. REV. CODE § 10.73.160(4).

<sup>53</sup> 344 P.3d 680 (Wash. 2015).

<sup>54</sup> *Id.* at 681.

<sup>55</sup> *Id.* at 682.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 685.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

trial court had engaged in that inquiry, the court reversed and remanded on the LFO determinations.<sup>60</sup>

In the wake of *Blazina*, law reform related to LFOs accelerated, culminating in sweeping changes to dozens of statutes that touched upon Washington’s LFO regime. In 2018, HB 1783 ushered in changes regarding standards for indigency determinations, classification of mandatory LFOs, interest rates, and community service. RCW 10.01.160, which codifies Washington’s court costs and fee structure,<sup>61</sup> now requires judges to make an individualized inquiry into a defendant’s current and future ability to pay at the time of sentencing.<sup>62</sup> If a defendant is found to be indigent,<sup>63</sup> a court may not impose discretionary costs.<sup>64</sup> The ability to pay directive extends to appellate costs,<sup>65</sup> costs of incarceration,<sup>66</sup> and post-conviction sanctions.<sup>67</sup> The law also reduced the LFOs that were required to be imposed (for example, jury fees<sup>68</sup> and conviction fees<sup>69</sup> had been mandatory) and limited certain assessments to a once-only fee (DNA collection fee).<sup>70</sup> However, VPA fees and restitution remain compulsory.<sup>71</sup> Importantly, courts are now empowered to convert non-restitution LFOs into community service at a rate no less than the state minimum wage.<sup>72</sup>

Regardless of indigence status, HB 1783 also prohibits the accrual of interest on non-restitution LFOs.<sup>73</sup> The law is retroactive so that, upon petition by an LFO debtor, a court *must* waive all interest accrued on all outstanding LFOs except restitution.<sup>74</sup> Interest on restitution can only be waived or modified after the principal is paid.<sup>75</sup> If a LFO debtor fails to pay, the court can issue warrants and file show cause motions, but HB 1783 explicitly prohibits incarceration unless failure to pay is found to be “willful.”<sup>76</sup>

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<sup>60</sup> *Id.*

<sup>61</sup> WASH. REV. CODE § 10.01.160 (2019) applies only to discretionary costs.

<sup>62</sup> *Id.* at § 10.01.160(3).

<sup>63</sup> “Indigent” here is defined as follows: (a) receiving public assistance; (b) involuntarily committed to a mental health facility; or (c) having a post-tax income less than 125% of the federal poverty level. WASH. REV. CODE § 10.101.010(3)(a)–(c).

<sup>64</sup> WASH. REV. CODE § 10.01.160(3).

<sup>65</sup> WASH. REV. CODE § 10.01.160(4).

<sup>66</sup> WASH. REV. CODE § 10.73.160; WASH. REV. CODE § 9.94A.760 (2019).

<sup>67</sup> WASH. REV. CODE § 10.01.180; WASH. REV. CODE § 9.94A.6333; WASH. REV. CODE § 9.94B.040.

<sup>68</sup> WASH. REV. CODE § 10.46.190.

<sup>69</sup> WASH. REV. CODE § 3.62.085 (2019).

<sup>70</sup> WASH. REV. CODE § 43.43.7541 (2019). In the past, a DNA collection fee was imposed even if the defendant had one, or even several prior convictions at which a DNA sample had been submitted and the fee assessed. Travis Stearns, *Legal Financial Obligations: Fulfilling the Promise of Gideon by Reducing the Burden*, 11 SEATTLE J. FOR SOC. JUST., 963, 967 (2013).

<sup>71</sup> The courts may not reduce or waive the VPA and may not convert the VPA to community restitution. WASH. REV. CODE § 9.94A.6333(3)(f); § 10.01.180(5). The crime victim penalty assessment may not be reduced, waived, or converted to community restitution hours. Nothing in the act requires the courts to refund or reimburse amounts previously paid toward LFOs or interest on LFOs.

<sup>72</sup> WASH. REV. CODE § 9.94A.6333(3); WASH. REV. CODE § 9.94B.040(4).

<sup>73</sup> WASH. REV. CODE § 10.82.090. *See also* WASH. REV. CODE § 3.50.100; WASH. REV. CODE § 3.62.085; WASH. REV. CODE § 35.20.220 (2019).

<sup>74</sup> WASH. REV. CODE § 10.82.090(2). The courts are required to waive such interest and may reduce interest on restitution if the principal has been paid off. WASH. REV. CODE § 10.82.090(2)(b).

<sup>75</sup> WASH. REV. CODE § 10.82.090.

<sup>76</sup> When determining whether an individual’s failure to pay was willful, the court must consider the individual’s income and assets; basic living costs and other liabilities including child support and other LFOs; and bona fide efforts to acquire additional resources. The defendant has the burden of showing that

### C. Unfinished LFO Reform in Washington State

Despite all of the reforms, LFOs continue to place substantial, if not insurmountable, burdens to re-entry upon formerly incarcerated persons. HB 1783 did not go far enough.<sup>77</sup> Greater efforts are needed to inform LFO debtors of their rights and judges of their responsibilities. Legal advocates, court administrators, and judges alike admit that, despite *Blazina* and HB 1783, the overwhelming majority of LFO debtors are not aware of their rights of remission of non-restitution interest, nor their ability to challenge the failure of a sentencing judge to make an individualized inquiry and finding on the defendant's present and future ability to pay.<sup>78</sup> Washington district, municipal and superior courts are not consistently making the individualized ability to pay assessments—despite *Blazina* and HB 1783.<sup>79</sup> What is more, many judges view the ability to pay determination as discretionary policy, not binding law.<sup>80</sup> Judges must be informed of the mandatory nature of the law, and robust communication to LFO debtors must be undertaken.

Very practical but meaningful reforms are also due. While needed reforms took hold that clarified clerk discretion in how to allocate LFO payments remitted,<sup>81</sup> nothing was done to clarify the wildly varying payment methods a debtor encounters in trying to pay LFOs. Some jurisdictions accept credit cards, while others only take certified checks.<sup>82</sup> Those jurisdictions with online payment systems charge “convenience fees,” and many courts charge fees for a LFO debtor who requests to be placed on a payment plan.<sup>83</sup> Debtors with LFOs with different cause numbers must remit separate payments for each instead of submitting one lump payment.

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the failure to pay was not willful. *Smith v. Whatcom Cty. Dist. Court*, 52 P.3d 485, 492 (Wash. 2002). An individual who is indigent is presumed to lack the current ability to pay. WASH. REV. CODE § 10.01.180(3)(a)–(b). Moreover, if the court determines that an individual is homeless or is a person who is mentally ill, failure to pay LFOs is not willful and does not subject the individual to penalties. WASH. REV. CODE § 9.94A.6333(3)(d); WASH. REV. CODE § 9.94A.760(11); WASH. REV. CODE § 9.94B.040(4)(d); WASH. REV. CODE § 10.01.180(3)(c). If the court finds that failure to pay is not willful, the court *may*, and if the defendant is indigent the court *must*: (1) modify the terms of payment; (2) reduce or waive non-restitution amounts; or (3) allow conversion of non-restitution obligations to community restitution hours. WASH. REV. CODE § 10.01.180(5); WASH. REV. CODE § 9.94A.6333(3); WASH. REV. CODE § 9.94A.760.

<sup>77</sup> See *infra* Part IV, at 330.

<sup>78</sup> Interview with Superior Court Judge Linda Coburn, July 9, 2019 (on file with author).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> WASH. REV. CODE § 9.92.070 (2019); WASH. REV. CODE § 10.01.170. The priority of payment is relevant because, in many counties, a yearly \$100 collection fee is collected, and, in the past, the clerk could exercise discretion in deciding how to apportion the rest of payment. If, for example, an LFO debtor made a \$200 payment, and the clerk could direct \$100 to the office of public defense and the other \$100 to the collection fee, and the debtor's restitution and VPA LFOs go unchanged and accumulating interest.

<sup>82</sup> See, e.g., King Cty. Superior Court, *Legal Financial Obligations Collections Program: Paying Court Costs, Fees, Fines, and Restitution* (last updated Mar. 6, 2018),

<https://www.kingcounty.gov/courts/clerk/programs/LFO.aspx> (no personal checks or credit/debit cards);

Kitsap County, LFO Collections (last updated 2020), <https://www.kitsapgov.com/clerk/Pages/Payment-Information.aspx> (allowing all forms of payment but personal check; but convenience fee of \$2.00 to 2.4% of the transaction amount); Pend Oreille County, *Legal Financial Obligations*,

<https://pendoreilleco.org/your-government/county-clerk/legal-financial-obligations/> (credit card payments

allowed and convenience fee assessed).

<sup>83</sup> HARRIS, *supra* note 9, at 42. Nine other states charge extra fees as a condition to being placed into a payment plan. BANNON ET AL., *supra* note 22, at 14.

The financial and time burdens imposed upon LFO debtors due to restrictions on the form and method of payment accepted should not be readily dismissed. Many of those subjected to LFO debt are likely to be unbanked.<sup>84</sup> In such circumstances, the unbanked must resort to check cashing services to purchase money orders or certified checks. A survey of check-cashing outlets revealed that the average fee charged for money orders was \$1.08 and ranged from fifty cents to \$16.<sup>85</sup> To the indigent, these are not insignificant costs.

There should be a uniform, centralized system through which LFO debtors can tender their monthly payments without shifting costs upon the debtor. With thirty-nine counties and hundreds of courts of limited jurisdiction, variations in collection methods and surcharges makes the payment process needlessly costly and burdensome. These myriad “poverty penalties”<sup>86</sup>—the additional late fees, payment plan fees, and interest—are exorbitant and exceed ordinary standards of fairness. The cumulative impact of these financial penalties means an LFO debtor is effectively consigned to a lifetime of fiscal servitude.

## II. A LIFETIME OF FISCAL SERVITUDE

When placed in historical context, we see more clearly that this type of consignment is not new. The criminal justice system generally and the LFO debt repayment regime specifically have a targeted and particular impact upon communities of color. As with so many aspects of our criminal court systems and institutions, the government’s transfer of debt into the hands of private interests is firmly rooted in our country’s legacy of slavery.

### A. *Debt Bondage: A Brief History*

“Offender-funded justice” defines the current state of funding for court systems across the country.<sup>87</sup> The current regime emerged out of a belief that those who “use” the system should be the ones who pay for it.<sup>88</sup> That ethos was born out of a “smaller government” ideology and a movement of state legislatures de-funding court and incarceration systems at county and local levels.<sup>89</sup> Privatization of court and penal operations was not an ideological stretch for policymakers to enable private, for-profit entities to step in to manage, and profit from, those caught in the criminal justice system. Public-private contracts are a feature in virtually every jurisdiction. Such contracts exist not only for prisons and bail bonds, but also for prison telephone and email systems, inmate

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<sup>84</sup> Ronald Kelly, *The Financial Community Has a Role to Play in Improving the Economic Mobility of Returning Citizens*, CAPITAL IMPACT PARTNERS: BLOG STRATEGY (Apr. 23, 2018), at <https://www.capitalimpact.org/financial-institutions-economic-mobility-for-returning-citizens/>.

<sup>85</sup> JEAN ANN FOX & PATRICK WOODALL, CONSUMER FED’N OF AM., CASHED OUT: CONSUMERS PAY STEEP PREMIUM TO “BANK” AT CHECK CASHING OUTLETS 7 (Nov. 2006), [https://consumerfed.org/pdfs/CFA\\_2006\\_Check\\_Cashing\\_Study111506.pdf](https://consumerfed.org/pdfs/CFA_2006_Check_Cashing_Study111506.pdf).

<sup>86</sup> See BANNON ET AL., *supra* note 22, at 1. “Poverty penalties” are those additional fees are incurred primarily because debtors are unable to pay the full amount due, thus falling on those most impoverished.

<sup>87</sup> Michael Pinard, *Poor, Black and “Wanted:” Criminal Justice in Ferguson and Baltimore*, 58 HOW. L.J. 857, 868 (2015).

<sup>88</sup> HARRIS, *supra* note 9, at 4, 11.

<sup>89</sup> *Id.*

accounts, probation supervision, electronic monitoring, community supervision, health care.<sup>90</sup>

From debtors' prisons<sup>91</sup> to convict leasing, the facilitation of private profit from those subjected to the criminal justice system is not new. At the close of the Civil War, the Thirteenth Amendment was ratified to abolish slavery and involuntary servitude.<sup>92</sup> Such conditions were retained, however, as punishment for a "crime whereof the party shall have been duly convicted."<sup>93</sup> Although Congress passed the Anti-Peonage Act in 1867 to prohibit coerced labor, "[s]outhern states innovated ways to continue to reap many of the economic and labor market benefits of chattel slavery by enacting a network of criminal and penal statutes that effectively turned over convicted defendants—most of them newly freed slaves—to private employers."<sup>94</sup> Black Code laws required Blacks to sign yearly labor contracts.<sup>95</sup> South Carolina, for example, prohibited Blacks from holding any occupation other than farmer or servant unless they paid an annual tax of \$10 to \$100.<sup>96</sup> Blacks who broke contracts or failed to pay the tax could be arrested and fined.<sup>97</sup>

Criminal vagrancy and loitering laws were especially pernicious and sweeping.<sup>98</sup> In Mississippi, Blacks would be fined \$50 and sentenced to ten days in jail if found in public and without lawful employment.<sup>99</sup> A loitering offense in Alabama would result in a \$50 fine and six months in jail, and in Florida, a \$500 fine and one year in prison.<sup>100</sup> These fines were intentionally excessive and thus unaffordable, with jail time being the inevitable consequence. A feature of the new laws were criminal surety statutes. These statutes allowed employers to pay the debts of Blacks who could not pay the fine. In exchange, Blacks were forced to work off the debt—e.g. in mines, cotton mills, with local merchants, or even on the plantations from which they were emancipated.<sup>101</sup> Surety contracts were

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<sup>90</sup> Alexes Harris, Symposium, *Monetary Sanctions as a Permanent Punishment: LFOs in Washington State Today in Supreme Court Symposium Legal Financial Obligations (LFOs): Beyond Defining the Problem; Advancing Solutions*, WASHINGTON STATE AT MINORITY AND JUSTICE COMMISSION (June 6, 2018), <https://www.tvw.org/watch/?eventID=2018061018>.

<sup>91</sup> Debtors' prisons—jails or other detention facility—housed those incarcerated for owing public and private debts. Such prisons were part of a legal structure adapted from Great Britain. In the United States, debtors' prisons were banned under federal law in 1833. Between 1821 and 1849, most states followed suit. However, state bans on imprisonment for debt exempted the conviction on a commission of a crime from their scope. Tamar R. Birckhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595, 1628–29 (2015). It was not until 1983 that the Supreme Court affirmed that the 14th Amendment barred the incarceration of indigent debtors. *Id.* at 1630.

<sup>92</sup> "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

<sup>93</sup> Birckhead, *supra* note 91, at 1605 (citation omitted).

<sup>94</sup> See 42 U.S.C. § 1994 (2012) (originally enacted as the Peonage Abolition Act of March 2, 1867, ch. 187, § 1, 14 Stat. 546) (providing the civil components of the Anti-Peonage Act); 18 U.S.C. § 1581 (2012) (originally enacted as Criminal Code, § 269) (providing the criminal penalties of the Anti-Peonage Act); Birckhead, *supra* note 91, at 1606.

<sup>95</sup> *Id.* at n.53.

<sup>96</sup> DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* 7 (2008).

<sup>97</sup> *Id.*

<sup>98</sup> Eric Foner, *RECONSTRUCTION: AMERICANS UNFINISHED REVOLUTION 1863-1877* 199 (1988).

<sup>99</sup> Blackmon, *supra* note 96, at 7.

<sup>100</sup> Foner, *supra* note 98, at 199.

<sup>101</sup> Blackmon, *supra* note 96, at 50.

also extended by the courts if the debt record was “lost” or there was an allegation of a defendant’s breach. As a result, the workers became further indebted to their overseers,<sup>102</sup> and a new form of slavery evolved.

By 1877, a system of convict leasing had been adopted via such laws in Texas and every Southern state except Virginia.<sup>103</sup> Those laws criminalizing Black life and consigning them to forced labor also served to benefit government functions. Alabama’s coffers were enriched by fines extracted from convicted Blacks and its courts’ leasing arrangements with private.<sup>104</sup> In Hale County, Alabama, for example, monies derived from convict leasing was placed in the “Fines and Forfeiture Fund,” which was used to pay fees for judges, sheriffs, and other officers.<sup>105</sup>

Convict leasing and the public-private partnerships in criminal justice systems persisted in various forms well into the twentieth century.<sup>106</sup> The 1970s ushered in an era during which the criminal justice policy shifted towards concerns for victims and victim reparations.<sup>107</sup> Aptly referred to as the era of the “New Jim Crow,” the re-emergence of debtor’s prisons and the punishment of indigency most acutely coincided with the rise of mass incarceration beginning in the 1980s.<sup>108</sup> It is no coincidence that the incarceration and post-incarceration population surged with the creation of new criminal laws and the rewriting of others—which included new or enhanced monetary penalties, and allowed for imposition of jail time for failure to pay those penalties.<sup>109</sup> Between 1980 and 2005, the prison population in the United States increased from 500,000 to two million.<sup>110</sup> During that same time frame, the population of those on parole or probation swelled from 1.34 million to 4.95 million.<sup>111</sup>

As the criminal justice system expanded to accommodate the growing population of jails, prisons, probation and parole systems, criminal justice budgets and personnel also increased.<sup>112</sup> Simultaneously, the “smaller government” ethos guided state fiscal policies vis-à-vis local government, resulting in marked decreases in funding by state governments. The recession of the late 2000s further entrenched that ideology, accelerating the disinvestment of local court and penal operations. Nationally, between 2007–2010, there was a net 10–15% decrease in funding of court systems.<sup>113</sup> As of 2015, Washington ranked

<sup>102</sup> Birkhead, *supra* note 91, at 1606.

<sup>103</sup> Blackmon, *supra* note 96, at 39. The conditions under which they worked were unconscionable, in dangerous, unhealthy circumstance, and Blacks were routinely starved and brutalized, flogged, chained, and shot if they attempted to escape. As a consequence, in Alabama, for example, during the first year of convict leasing, 20% of those enslaved died; in the second year, 35% died, and in the third year 45% were killed. *Id.* at 57.

<sup>104</sup> *Id.* at 53.

<sup>105</sup> *Id.* at 55–56.

<sup>106</sup> *Id.* at 56.

<sup>107</sup> Karin D. Martin et al., *Shackled to Debt: Criminal Justice Financial Obligations and The Barriers to Re-entry They Create*, in 4 NEW THINKING IN COMMUNITY CORRECTIONS 1–23 (Jan. 2017).

<sup>108</sup> See generally ALEXANDER, *supra* note 1.

<sup>109</sup> For example, in Washington, the Victim Assessment Penalty was \$25 in 1977; now it is \$500. Harris et al., *supra* note 6, at 201.

<sup>110</sup> PEW CHARITABLE TR., PUBLIC SAFETY, PUBLIC SPENDING: FORECASTING AMERICA’S PRISON POPULATION 2007-2011 2 (rev. June 2007), [https://www.pewtrusts.org/-/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/state-based\\_policy/pspprisonprojections0207pdf](https://www.pewtrusts.org/-/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/state-based_policy/pspprisonprojections0207pdf).

<sup>111</sup> *Id.*

<sup>112</sup> HARRIS, *supra* note 9, at 10.

<sup>113</sup> ABA Resolution 302 and Report 2 (Aug. 8-9, 2011).

last in the nation for state funding of trial courts.<sup>114</sup> For example, in 2019, its counties paid over 96% of the cost of trial court public defense, while the state paid less than 4%.<sup>115</sup> At the same time, the cost of operating those systems continued to rise.<sup>116</sup>

Local governments and courts were compelled to “self-fund” and motivated to explore new sources of revenue. They did so through the imposition of fines and fees for the “use” of court and penal services. Since 2010, forty-eight states increased civil and criminal fees.<sup>117</sup> To reiterate, a defendant can now be tasked with paying for not only victim restitution but also bench warrants, clerks, court-appointed attorneys, lab analyses, juries, drug funds, incarcerations, emergency responses, payment plans, extraditions, convictions, collections, drug and alcohol assessments and treatments, supervisions, and house arrest.<sup>118</sup> Justice system costs are not passed on to taxpayers but are placed instead on those involved in the system.

Lawmakers prefer the imposition of “user” fees because they represent a source of revenue, in contrast to other forms of punishment which “*cost* a [s]tate money.”<sup>119</sup> Lawmakers endure little political risk around the human toll of these new sanctions because those most burdened are considered an unpopular segment of our society: incarcerated, poor, and disproportionately minorities.<sup>120</sup> State disinvestment in local courts has impelled lawmakers to pass ever-increasing system costs on to “users” in the form of new or higher fines and fees. Judges in underfunded courts, consequently, have a perverse incentive to maximize “cost recovery” through the imposition of LFOs and thus exacerbate the burdens placed on the convicted.<sup>121</sup>

### B. LFO Debt and Racial Disparities

Our offender-funded criminal justice system is now subsidized by the poorest members of society, and predominantly by people of color. In the State of Washington, racial and ethnic disproportionalities exist at all stages of the criminal justice system, including arrest, charging, conviction, and imprisonment. Black and Latinx individuals are sentenced more frequently and at a higher penalty rate than other populations, especially in comparison to Whites. Though comprising only 4.1% of the Washington’s population, Blacks constitute 18.4% of its prison population.<sup>122</sup> Blacks are 6.4 times more likely than Whites to be incarcerated.<sup>123</sup> Latinx adults are 1.3 times more likely to be convicted of a serious felony than Whites and represent 13.2% of Washington’s prison population. Latinx

<sup>114</sup> Theresa Doyle, *Legal Financial Obligations: A Ball and Chain*, in MINORITY AND JUSTICE COMMISSION ANNUAL REPORT: WASHINGTON STATE SUPREME COURT 9 (2015).

<sup>115</sup> Counties pay \$153 million, while the state contributes \$6 million. WASH. ST. ASS’N OF COUNTIES, *Increased Funding for Trial Court Public Defense* 3, <http://apps.co.cowlitz.wa.us/weblinkbocworkshop/0/doc/19041798/Electronic.aspx>.

<sup>116</sup> *Id.*

<sup>117</sup> Joseph Shapiro, *Court Fees Drive Many Poor Defendants Underground*, NPR (May 21, 2014), <https://www.npr.org/2014/05/21/314607003/court-fees-drive-many-poor-defendants-underground>.

<sup>118</sup> Harris et al., *supra* note 6, at 201–03.

<sup>119</sup> *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019).

<sup>120</sup> Audie Cornish, *As Court Fees Rise, the Poor Are Paying the Price*, NPR (May 19, 2014), <https://www.npr.org/transcripts/312158516>.

<sup>121</sup> BANNON ET AL., *supra* note 22, at 28.

<sup>122</sup> Department of Corrections Fact Card (2016).

<sup>123</sup> *Id.*

defendants receive significantly greater fees and fines than similarly situated non-Latinx defendants.<sup>124</sup>

Given these disproportionalities, it follows then that Black and Latinx individuals experience sharp racial and ethnic disparities in the amount and age of LFO debt. On a per capita basis, while Whites owed \$210 in LFOs per 100,000 persons, Latinx individuals owed \$235, and Blacks owed \$650.<sup>125</sup> While the number of Black and Latinx individuals subject to LFO debt repayments through DCAs is not recorded,<sup>126</sup> in Washington State, they are also most likely to have long-term LFO debt. Approximately 17% of Blacks' LFO obligations, and over 10% of Latinx individuals' LFO obligations were over ten years old, compared to less than 10% for Whites.<sup>127</sup> Given the education and employment status of those entering and leaving the criminal justice system, what follows from that disparity is the greater likelihood that Black and Latinx individuals with LFO debt are currently in or at risk of being referred to DCAs. Thus, these populations are more vulnerable to the perverse parade of financial and legal consequences that ensue.

The proliferation of laws punishing poverty and pushing debtors into fiscal servitude traces its lineage to the nineteenth century practice of convict leasing. Today, with only slight variations, we see that the disproportionate number of victims of the modern practice of allowing private companies to be enriched by the poor through our criminal justice system. RCW 19.16.500, the focus of the next Part, is a prime example of the privatization of governmental responsibilities, specifically as it relates to the criminal justice system. How this modern bondage to debt collection agencies operates and the constitutional questions raised by its operation are the subject of the next Part.

### III. THE UNCONSTITUTIONALITY OF RCW 19.16.500

The statute authorizing collection fees for LFO debt, RCW 19.16.500, presents a host of troubling legal and practical issues. This Part sets forth the practical impacts of the statute before demonstrating that its punitive intent and effects violate the excessive fines clause and the due process and equal protection clauses of the federal and Washington State constitutions.

#### A. *Predatory Debt Collection Assessments*

RCW 19.16.500 is designed to facilitate collection services in a host of areas in which the government is involved. Enacted in 1982, RCW 19.16.500 originally simply allowed local agencies to contract with DCAs.<sup>128</sup> The original bill also established that the contracts be in writing, that DCAs could annually assess statutory interest on any debt, and that debtors be given thirty-day notice before a debt is transferred.<sup>129</sup> “Debt” was defined broadly to incorporate debts owned by any person involved in a governmental enterprise,

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<sup>124</sup> KATHERINE A. BECKETT ET AL., THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE, WASH. ST. MINORITY JUSTICE COMM’N 70 (2008).

<sup>125</sup> Harris, Symposium, *supra* note 90 (power point data on file with author).

<sup>126</sup> Research question to Washington State Administrative Office of Courts via email (Aug. 7, 2019) (on file with author).

<sup>127</sup> Harris, Symposium, *supra* note 90 (on file with author).

<sup>128</sup> WASH. STATE LEG., 1982 FINAL LEGISLATIVE REP., 47th Leg., 1st and Spec. Sess. 76–77 (1982).

<sup>129</sup> *Id.*

such as educational institutions, government vendors, or in the course of providing residential, health, safety and welfare services.<sup>130</sup> LFO collection on behalf of courts are but one of several types of services the law authorizes. That “debt” includes restitution, fines, fees, costs and surcharges imposed by a court upon criminal conviction.<sup>131</sup>

The most significant amendment was added in 1997 to confer significant benefits to the debt collection industry.<sup>132</sup> Where there was first no explicit allowance for a collection fee, legislators added the 50%/35% clause,<sup>133</sup> and explicitly allowed that any fee set at that rate was presumed “reasonable.”<sup>134</sup> It was also in 1997 that the legislature established that DCA “collection fee” would be treated as LFO debt.<sup>135</sup> No public testimony was offered in objection to the amendments. The only testimony given on the bill were three representatives of a state association of debt collectors, who naturally spoke in their favor.<sup>136</sup> The final amendment in 2011 strengthened DCAs right to prosecute debt collection actions by restricting a debtor’s statute of limitations defense to such actions.<sup>137</sup>

An analysis of seventy-seven Washington DCA contracts reveals that DCAs have taken full advantage of the allowances granted in RCW 19.16.500. While collection fee percentages, surcharges, and remittance requirements vary by contacting DCA, the overwhelming majority of DCAs contract for the maximum fee allowed by statute.<sup>138</sup> The lowest fixed-fee collection imposed upon LFO debtors was 19% (in six different contracts). Nine contracts allow DCAs to extract between 30% and 40% of the outstanding LFOs in fees. Ten DCAs exact a fee between 19% and 30% of outstanding LFO debt.<sup>139</sup> Still other contracts impose a sliding scale percentage against outstanding LFO debt, depending on the age of the debt, with the lowest sliding scale fee percentage is beginning at 16.5%.<sup>140</sup> However, in nearly half of the contracts, the DCAs collect the statutory maximums of 50% and 35%.<sup>141</sup>

Of the eighteen different DCA contractors in Washington, two—AllianceOne and Dynamic Collectors, Inc. (Dynamic)—account for fifty of the seventy-seven LFO contracts. The AllianceOne standard contract imposes a fixed 19% collection fee and uses a sliding scale, which starts at 19% for new debts, 24% for older debts up to four years, and 29% for debts that are older than four years or transferred from a different collection agency.<sup>142</sup> Dynamic assesses the statutory maximum from each LFO payment. In addition to Dynamic, nine of the other DCA contractors assess the statutory maximum. The

<sup>130</sup> WASH. REV. CODE § 19.16.500 (4) (2019)

<sup>131</sup> *Id.* (“For purposes of this section, the term debt shall include fines and other debts, including the fee allowed under subsection (1)(b) of this section.”).

<sup>132</sup> 1997 Wash. Sess. Laws 2354, Ch. 387 § 1; WASH. REV. CODE § 19.16.500.

<sup>133</sup> *See infra* Introduction, at 305–06.

<sup>134</sup> 1997 Wash. Sess. Laws 2354, Ch. 387 § 1; § 19.16.500(2); § 19.16.500 (1)(b).

<sup>135</sup> 1997 Wash. Sess. Laws 2354, Ch. 387 § 1; § 19.16.500(4) (the term debt includes the collection agency fee and restitution owed to victims of crime).

<sup>136</sup> It was in 2011 that the statute was amended to treat the collection fee as LFO debt.

<sup>137</sup> S.B. 5574, 2011 Leg., 62nd Sess. (Wash. 2011) (“no statute of limitation can be asserted against a collection agency if the same statute of limitation could not be asserted against the assignor governmental entity.”); § 19.16.500(3).

<sup>138</sup> *See* list of contracts at Exhibit A.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *See, e.g.*, AllianceOne standard contract at 2 (on file with author).

bargained-for collection fee is triggered upon referral by the clerk of courts. By operation of the law, the DCA collection fee then becomes an obligation undistinguished from the court-imposed LFO debt.<sup>143</sup>

The economic injustice that RCW 19.16.500 exacts lies not only in the exorbitant fees it permits, but the myriad ways in which RCW 19.16.500 allows DCAs to levy penalties extra-statutorily. LFO debt is typically paid to the DCA by or on behalf of the obligor on a monthly basis, with each payment being allocated to the court and the DCA in proportion to the contracted-for percentage.<sup>144</sup> In addition to the collection fees, DCAs also charge additional fees to establish the accounts and administer payments. Account set-up fees, monthly maintenance fees, convenience fees, payment plan fees, and late fees are just a few features of every contract. For example, AllianceOne also assesses account set-up, servicing, and payment plan fees ranging from \$4.75–\$11.25 per month.<sup>145</sup> Others charge a convenience fee for payment by credit or debit card.<sup>146</sup> Invariably, the contracts allow an assessment of the 12% statutory interest rate on its collection fee. Since the DCAs impose these charges on a per-account, not per-person basis, if an LFO debtor has more than one account placed with the DCA, surcharges aggregate.

RCW 19.16.500 compounds hardships in other ways. DCAs collecting LFO debt are not obligated to consider a debtor's ability to pay, so required minimum payments can be set at levels that far exceed a debtor's economic capacity. Although the new LFO laws disallow statutory interest to attach to initial judgments and sentencings, DCAs may still impose statutory interest on referred LFO accounts. In addition, DCAs also retain threat of incarceration of the debtor for willful failure. The concern arises in allowing DCAs the discretion in the first instance to determine what reasons might constitute a willing refusal to repay (e.g., a refusal to pay an amount a debtor cannot afford) to trigger a referral to the court. Thus, the potential for engaging in abusive or coercive collection tactics and the power to negotiate for the maximum monthly payment possible all serve to advantage the DCA.

Between the collection fees, interests, and other costs levied by DCAs, the amounts extracted by DCAs are predatory. The exorbitant amounts raise questions about the true cost of collection. Reliable figures on the cost of debt collection are difficult to ascertain.<sup>147</sup> However over the past decade, the process of debt collection has been made more efficient and cost-effective. Automated payments systems, debt collection mobile phone applications, and the like have made remittances easier for debtors.<sup>148</sup> On the collectors' end, DCAs have long-recognized that traditional contact methods—landline calls and letters—are less effective given the shift to mobile and electronic communication.<sup>149</sup> Artificial intelligence is being used and applied by DCAs, enhancing efficiencies, pre-

<sup>143</sup> See generally Blackmon, *supra* note 96.

<sup>144</sup> See, e.g., AllianceOne contract at 2; Dynamic contract at 2; Skagit Bonded Collectors at 10; Yakima County Credit Services at 1 (on file with author).

<sup>145</sup> See, e.g. AllianceOne contract with Pierce County at Section 7d (on file with author).

<sup>146</sup> See, e.g., McDonald Credit Services for Pacific County, at <https://mcdonaldcreditservice.com/#alliances> (on file with author).

<sup>147</sup> Email inquiry to Washington Administrative Office of the Courts (Aug. 7, 2019) (on file with author).

<sup>148</sup> A number of consumer complaints lodge 'breach of privacy' cases when debt collection agencies track them through their Facebook and Twitter IDs. Nevertheless, use of social media in tracing defaulters is a practice that has gained popularity.

<sup>149</sup> Tomio B. Narita et al., *FDCPA Update: An Industry in Transition*, 67 BUS. LAWYER 639, 647 (2012).

empting debtor defaults, and enhancing recovery and debt collection rates through process improvements such as debt negotiation portals.<sup>150</sup> Cell phones, text and email systems are pervasive, cost-efficient methods by which to reach debtors.<sup>151</sup> Industry-specific technology has also made it easier to retrieve debtor names, last known addresses, phone numbers. Automated database search services have made skip tracing debtors, in which every DCAs engages, inexpensive.<sup>152</sup>

Presumably, the collection fees, interest, and myriad surcharges demanded by DCAs and allowed by statute reflect the costs of debt collection and services. Yet, there is no evidence of legislative research into RCW 19.16.500's 50%/35% provision and its relationship to true collection costs. In fact, Washington's 50%/35% collection fee extraction exceeds that of other states.<sup>153</sup> There is no evidence that LFO debtors are costlier to pursue than other debtor populations as to justify such fees; in fact, given their probation, parole, debt and/or reporting obligations, they may be easier to locate.

The state legislature has allowed DCAs wide berth to set their rates and conferred extraordinary legal protections in their favor. The legislature has shielded the industry from significant legal challenge by deeming any amount at or below the statutory collection fee "reasonable," and making the time within which DCAs may sue LFO debtors co-extensive with the government's. Enabling private debt collection agencies to maximize profits off the backs of the poorest and most vulnerable groups serves no purpose but to unnecessarily perpetuate punishment.

### *B. How Collection Fees Permitted by RCW 19.16.500 May Violate The 'Excessive Fines' Clauses*

#### 1. The Federal and State Excessive Fines Clause

The Eighth Amendment to the U.S. Constitution prohibits the imposition of excessive fines.<sup>154</sup> Adopted verbatim from the English Bill of Rights of 1689,<sup>155</sup> its original iteration was enacted to curb the excesses of judges under the King James II reign.<sup>156</sup> King

<sup>150</sup> Lisa Phillips & Paul Moggridge, *Artificial Intelligence in Debt Collection* (2019), [https://www.advancedcollection.co.uk/Documents/ACSWP23\\_AI\\_in\\_Debt\\_Collection.pdf](https://www.advancedcollection.co.uk/Documents/ACSWP23_AI_in_Debt_Collection.pdf); Penny Crosman, *Can AI Make Debt Collection Smarter and Easier?* AM. BANKER (July 11, 2017), <https://www.americanbanker.com/news/can-ai-make-debt-collection-smarter-and-easier> ("Artificial intelligence, chatbots and self-service technology have reached a point where they can provide a much-needed makeover to the collections process. Such technologies can help lenders learn to reach out to people at times and in channels that are more conducive to a conversation and repayment.").

<sup>151</sup> Narita et al., *supra* note 149, at 647.

<sup>152</sup> Skip tracing involves the methods by which to locate the latest information about a given debtors most current information (phone numbers, addresses, notice of death, bankruptcies, etc.). Modern skip tracing revolves largely around the interrogation of many diverse databases as well as electronic information gathering which can be performed by purchased software or contracted out by DCAs.

<sup>153</sup> *See supra*, Introduction at 305–06.

<sup>154</sup> U.S. CONST. amend. VIII.

<sup>155</sup> Historically there were only generally applicable limitations on the judge, when imposing the fine were those contained in the English Bill of Rights and the Magna Carta. For a historical summary, *see* United States v. Bajakajian, 524 U.S. 321, 335 (1998); *Timbs v. Indiana*, 139 S.Ct. 682, 693–98 (Thomas, J., concurring).

<sup>156</sup> *Browning-Ferris, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 267 (1989) ("Across the Atlantic, this familiar language was adopted almost verbatim, first in the Virginia Declaration of Rights, then in the Eighth Amendment.").

James had imposed extraordinary fines upon his political enemies, who “were forced to remain in prison because they could not pay the huge monetary penalties that had been assessed.”<sup>157</sup> Seeking to avoid such abuses and limit the “government’s power to extract payments . . . as punishment for some offense,”<sup>158</sup> the Founding Fathers adopted the English Bill of Rights’ prohibition against disproportionate fines into our Bill of Rights.<sup>159</sup> Underlying the inclusion of the “excessive” adjective was an abiding principle that no penalty should “be so large as to deprive [a person] of [their] livelihood.”<sup>160</sup> Judicial abuses of power through the levy of fines and fees, including those imposed under the authority of Black Codes and the practice of convict leasing, have received persistent Eighth Amendment scrutiny.<sup>161</sup>

While the Supreme Court has ostensibly narrowed the excessive fines proscription to constrain only those penalties directly imposed by, and payable to, the *government*,<sup>162</sup> a closer read of its rulings and the rationale that informs the clause reveals a more multi-faceted set of concerns. Those debating the clause in the English Bill, and in the Constitution, argued that fees were being used as ends separate and apart from mere punishment or retribution, *viz.*, for private gain.<sup>163</sup> The issue was not so much whether the government received a direct benefit from the penalty, but the more important need was to “prevent the government from abusing its power to punish an offender.”<sup>164</sup>

The Excessive Fines Clause is codified in Article I, Section 14 of Washington’s Constitution.<sup>165</sup> Washington courts have long interpreted the term “fine” as referring to costs that are levied as punishment,<sup>166</sup> as distinguished from monetary sanctions best characterized as “remedial,” or “compensatory.”<sup>167</sup> While the Washington Supreme Court has examined some criminal penalties in the context of excessive fines claims, it has not specifically examined LFOs imposed as a result of transfers under RCW 19.16.500.<sup>168</sup> While criminal statutes allowing for the levy of monetary penalties labeled as such are most obviously construed as punitive, other types of financial sanctions not so labeled may also be punitive. RCW 19.16.500 does not convert LFO debt into a civil action because a debtor who fails to pay is still at risk for criminal sanction.<sup>169</sup> Even sanctions imposed in the context of certain civil processes can in fact be punitive.<sup>170</sup> What the underlying debt does

<sup>157</sup> *Id.* at 267; *Timbs*, 139 S.Ct. at 688 (“The 17th century Stuart kings, in particular, were criticized for using large fines to raise revenue, harass their political foes, and indefinitely detain those unable to pay.”).

<sup>158</sup> *Browning-Ferris, Inc.*, 492 U.S. at 267; *Austin v. United States*, 509 U.S. 602, 609–10 (1993).

<sup>159</sup> *Browning-Ferris, Inc.*, 492 U.S. at 267.

<sup>160</sup> *Id.* at 268.

<sup>161</sup> *Birckhead*, *supra* note 91, at 1630.

<sup>162</sup> *Browning-Ferris, Inc.*, 492 U.S. at 268.

<sup>163</sup> *Timbs*, 139 S.Ct. at 689 (“The joint resolution that became the Fourteenth Amendment, and similar measures repeatedly mentioned the use of fines to coerce involuntary labor.”).

<sup>164</sup> *Browning-Ferris, Inc.*, 492 U.S. at 268.

<sup>165</sup> WASH. CONST. art. I, § 14. The United States Supreme Court recently decided that 8th Amendment applies to the states in *Indiana v. Timbs*. *See generally Timbs*, 139 S.Ct. 682.

<sup>166</sup> *State v. Clark*, 124 Wash.2d 90, 102–03 (1996).

<sup>167</sup> A monetary sanction best characterized as remedial or compensatory in nature do not come under the excessive fine prohibition. In re *Metcalf*, 92 Wash. App. 165, 178 (1998).

<sup>168</sup> *See, e.g.*, In re *Metcalf*, 963 P.2d 911 (Wash. Ct. App. 1998).

<sup>169</sup> In re *Sanders*, 589 B.R. 874, 883 (Bankr. W.D. Wash 2018) (“[C]ourt costs imposed in the Superior Court Sentencing Orders do not function like ordinary civil debt[.]”).

<sup>170</sup> *United States v. Halper*, 490 U.S. 435, 447–48 (1989) (“The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law”).

to the debtor—not the process by which the debt payment is enforced—should be the constitutional touchstone. And, as precedent prescribes, if even one aspect of a particular penalty the law sets forth has a punitive rationale, colorable Eighth Amendment considerations arise.<sup>171</sup>

Washington’s Supreme Court has determined that whatever the parameters of the federal clause, “Washington State Constitution’s excessive fines clause often provides greater protection than the Eighth Amendment.”<sup>172</sup> Suggested in that determination is that fines beyond those benefitting the government are also subject to the state constitution’s protections.<sup>173</sup> Washington’s Supreme Court has indicated that restitution may be punitive despite the fact that it compensates the victim.<sup>174</sup> As a result, Washington courts have accepted the invitation to scrutinize restitution payments through an excessive fines grievance.<sup>175</sup> Consequently, the fact that the collection fees RCW 19.16.500 do not directly inure to the benefit of the state, but instead, to the benefit of private, third-party DCAs should be no shield to Eighth Amendment scrutiny.<sup>176</sup> The focus of the whether the Excessive Fines Clause applies should not turn on whether the government receives the economic benefit, but whether the government’s directive (in this case the LFO debt referral) constitutes further punishment regardless of who receives the economic benefit.<sup>177</sup>

## 2. Why RCW 19.16.500 is Punitive

Whether RCW 19.16.500 imposes a punishment requires looking at the law as a whole, including the underlying purposes that inform it.<sup>178</sup> The legislative history indicates that the statute was indeed designed to be retributive. In debating the 1997 amendment that added the 50%/35% collection fee, one senator noted that the effect of the law would be to

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<sup>171</sup> Civil sanctions that are solely remedial, such as forfeitures of proceeds, cannot be considered punishment. *State v. Catlett*, 133 Wash. 2d 355, 360 (1997); *State v. Frodert*, 924 P.2d 933, 939 (Wash. Ct. App. 1996). However, “[i]f the statutory provision has any purpose not solely remedial, the forfeiture is punishment within the meaning of the Eighth Amendment.” *Tellevik*, 921 P.2d at 1092. *See also* *Austin v. United States*, 509 U.S. 602, 610 (1993) (if a sanction has a remedial purpose, but it also has a retributive or deterrent purpose, the Eighth Amendment is invoked).

<sup>172</sup> *State v. Bartholomew*, 683 P.2d 1079, 1085 (Wash. 1984) (“We have, in the past, interpreted Const. art. 1, § 14 to provide broader protection than the Supreme Court’s interpretation of the Eighth Amendment.”).

<sup>173</sup> *State v. Sundust*, No. 16273-7-III, 1999 WL 2513 at \*2 (Wash. Ct. App. Jan. 5, 1999) (“A fine necessarily involves payment to the government.”).

<sup>174</sup> *In re Metcalf*, 963 P.2d 911, 920 (Wash. Ct. App. 1998). *See, e.g.*, *State v. Moen*, 919 P.2d 69, 72 n.1 (Wash. 1996) (primary purpose of restitution is not compensation of victims, but rehabilitation and deterrence).

<sup>175</sup> *Moen*, 919 P.2d at 72 n.1 (primary purpose of restitution is not compensation of victims, but rehabilitation and deterrence). *See also* *State v. WWJ Corp.*, 980 P.2d 1257, 1262 (Wash. 1999).

<sup>176</sup> *WWJ Corp.*, 980 P.2d at 1261 (defendant’s excessive fine restitution “claim involves a genuine constitutional issue, but” the record is insufficiently developed to evaluate its merits).

<sup>177</sup> *See Browning-Ferris, Inc.*, 492 U.S. at 275.

<sup>178</sup> *Tellevik v. Real Prop.* Known as 6717 100th St. S.W. Located in Pierce Cty., 921 P.2d 1088, 1092 (Wash. Ct. App. 1996); *Austin v. United States*, 509 U.S. at 619–22 (a categorical approach is necessary to determine whether a law is punitive for Eighth Amendment purposes).

“hold [] debtors accountable.”<sup>179</sup> The insistence upon accountability is to demand that an offender be held answerable for their crime.<sup>180</sup>

In interviews with legislators on a failed bill that would reduce the interest on LFOs, legislators were clear in their views, though not probative of RCW 19.16.500 rationales: “legal financial obligations [are] a system of accountability that provides the courts with an additional punishment and a means to supervise felony convictions...LFOs enable offenders to demonstrate the extent of their remorse and their understanding of their accountability for offending.”<sup>181</sup> Articulating RCW 19.16.500’s purpose as accountability-making invokes one quintessential concept that underlies our criminal justice system’s punitive conventions.

The tenets of guilt, culpability, recompense and responsibility endow our criminal justice system. The precept of responsibility in particular views the defendant as an accountable agent who has violated those standards of an official conventional morality defined by the offense, and thus must be held liable. Consequently, given the articulated rationale for the law, the aim of RCW 19.16.500 is clear: it is an accountability-reinforcing tool, representing the ability of the state to wield its power and use the law to inflict further hardship on defendants in hopes to force “responsible” behavior.<sup>182</sup>

The statute fortifies the government’s punitive purposes first by imposing additional sanctions upon a debtor already sentenced and fined in a court of law upon court referral. The sanctions triggered by the statute automatically increase the debt amount and extend the debt’s life—thus extending the amount of time a debtor remains under court supervision. Second, the statute requires no economic nexus whatsoever between the outstanding debt, the debtor, and the costs of collecting the LFO. Third, the statute grants DCAs rights to penalize LFO debtors in a manner that the government itself cannot exercise: a court cannot add interest to LFO costs and must take into account an LFO debtor’s ability to pay. Nothing of the sort are required of DCAs. Beyond the express legislative intent, the features and operation of RCW 19.16.500 compel the conclusion that RCW 19.16.500 exacts a punishment.<sup>183</sup>

If the law is in fact punitive, the next step is to determine whether the fine it extracts is excessive. Certainly, a “defendant's poverty in no way immunizes him from punishment.”<sup>184</sup> But in *United States v. Bajakajain*,<sup>185</sup> the U.S. Supreme Court insisted that the fine “must bear some relationship to the gravity of the offense that it is designed to punish.”<sup>186</sup> The prevailing rule holds that a fine is excessive when it is “grossly

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<sup>179</sup> WA H.R. B. REP., 1997 REG. SESS. S.B. 5827, Washington Senate Bill Report, March 4. Only three parties were recorded as giving testimony on the bill—each representing the Washington Collection Agency trade group. The amendment eventually passed the Senate by a 41-5-3 margin, and the House, 86-12.

<sup>180</sup> HARRIS, *supra* note 9 at 83–84.

<sup>181</sup> HARRIS, *supra* note 9, at 84.

<sup>182</sup> Donald Braman, Punishment and Accountability: Understanding and Reforming Criminal Sanctions in America, 53 UCLA L. REV. 1143, 1168 (2006).

<sup>183</sup> *See, e.g.*, In re Metcalf, 963 P.2d 911 (Wash. Ct. App. 1998); *see generally* Hudson v. United States, 522 U.S. 93 (1997)

<sup>184</sup> State v. Curry, 829 P.2d 166, 169 n.3 (Wash.1992) (quoting Bearden v. Georgia, 461 U.S. 660, 669 (1983)).

<sup>185</sup> *See generally* United States v. Bajakajain, 524 U.S. 321 (1998).

<sup>186</sup> *Id.* at 334.

disproportional” to the gravity of the offense that it was designed to punish.<sup>187</sup> What that means, it appears, is that a fine must “be proportioned to the offense and that they should not deprive a wrongdoer of his livelihood.”<sup>188</sup> The *Bajakahian* touchstone of proportionality has been adopted by the Washington Supreme Court.<sup>189</sup>

Thus, whether under a federal Eighth Amendment or Washington State’s Excessive Fines analysis, what is “grossly disproportional” must be determined on a case-by-case basis. If the test is a deprivation of ‘a wrongdoer’s’ livelihood, then it seems to allow to account for consideration of personal, subjective economic circumstances.<sup>190</sup> If history is further guidance, the Magna Carta made the requirement of proportional sentencing explicit. In three separate provisions, the Magna Carta mandates that punishment be proportionate to the magnitude of the crime<sup>191</sup> and that the courts should take into account both the offense *and offender* in determining proportionality. The type of monetary sanction may also be of import. Some federal courts have concluded that judges must consider an individual’s financial circumstances when evaluating an Excessive Fines claim; others have declined to consider such circumstances; still others have applied different analyses depending on whether the penalty is a fine, forfeiture, or restitution.<sup>192</sup>

Washington has adopted the *Bajakajian* test of gross disproportionality.<sup>193</sup> However, no Washington case has clarified whether a defendant’s financial circumstances must be considered in answering the Excessive Fines question. In fact, the few cases reaching an evaluation hew closely to an objective assessment of what was imposed versus what the statute at issue allowed.<sup>194</sup>

### 3. Judicial Solutions to Excessive Fines Determinations.

One objective approach would be to consider proportionality in terms of the DCA fee’s relationship to the original debt and the actual cost of collection. For example, a 10%

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 335.

<sup>189</sup> *State v. WWJ Corp.*, 980 P.2d 1257, 1261 (Wash. 1999).

<sup>190</sup> *Id.* at 334 (test of proportionality means the *amount* of the punishment must bear some relationship to the *gravity of the offense* it is designed to punish (emphasis added)); *Alexander v. United States*, 509 U.S. 544, 559 (1993), *cert. denied*, 522 U.S. 869 (1997) (the question is whether the forfeiture was excessive in light of the criminal activity engaged in by the offender).

<sup>191</sup> Beth Colgan, *Reviving the Excessive Fines Clause*, 102 CAL. L. REV. 277, 320–21 (2014).

<sup>192</sup> A gross disproportionality analysis has not been uniformly engaged. While the Supreme Court has left open the question of whether inquiring into an individual’s financial circumstances is required, lower courts are split. *Compare, e.g.*, *United States v. Lippert*, 148 F.3d 974, 978 (8th Cir. 1998) (“[I]n the case of fines, as opposed to forfeitures, the defendant’s ability to pay is a factor under the Excessive Fines Clause”) with *United States v. Smith*, 656 F.3d 821, 828 (8th Cir. 2011) (deeming “defendant’s inability to satisfy a forfeiture at the time of conviction” not relevant to constitutional analysis). The Eleventh Circuit has rejected consideration of an individual’s financial circumstances under the Excessive Fines Clause. *See United States v. Seher*, 562 F.3d 1344, 1371 (11th Cir. 2009).

<sup>193</sup> *State v. WWJ Corp.*, 980 P.2d 1257, 1261 (Wash. 1999).

<sup>194</sup> In those cases, it also appears that the defendants did not argue their individual financial circumstances or indigency. *See, e.g.*, *State v. Clark*, 875 P.2d 613 (Wash.1994); *WWJ Corp.*, 980 P.2d at 1262 (record insufficiently developed). For example, in *Metcalf*, 963 P.2d 911, the Court of Appeals considered whether the costs of an inmate’s incarceration violated the 8<sup>th</sup> Amendment. In affirming that it did not, the court not only concluded that the costs and crime victim fine were for a non-punitive purpose, but also that the assessment was well below the cost of incarceration without regard to the defendant’s personal economic circumstances.

fee added to collection of a \$2500.00 outstanding LFO might not be seen as grossly disproportional, but something that bears a reasonable relationship to the actual cost of collection. On the other hand, a 10% fee on a \$2,000,000 judgment may compels a different conclusion; such an assessment amounts not only to a lifetime of servitude to the private debtor, it provides the DCA with a \$715,000 windfall with no determination that the fee remotely reflects the costs of collection, or a reasonable profit.

A better approach would be to take into consideration a debtor's ability to pay. Given the Supreme Court's proportionality rule regarding punishment, and Washington states demand that ability to pay inquiry must be made by a trier of fact, a similar requirement should be applied to DCA collection fees. Although such an approach works against mandatory LFOs such as restitution (which typically are imposed without regard to ability to pay), the stage at which a DCA has the LFO debt has built-in incentives to ensure the pay-down. If upon establishing what a debtor can afford after taking into account income and other debts (including LFO debt), that payment extends the terms of the debtor's judgment and sentence, then it should be deemed excessive and unconstitutional.

### *C. RCW 19.16.500 Violates Due Process and Equal Protection Constitutional Provisions*

RCW 19.16.500 also triggers other constitutional concerns. As it now stands, LFO debt transfer occurs without adequate notice and hearing and lacks an ability-to-pay determination on a thirty-day delinquency. Finally, the disparate treatment of LFO "debt" under RCW 19.16.500 in contrast to other consumer obligations held by DCAs raises equal protection issues. Each of these contentions are addressed here.

#### 1. Due Process Concerns

The 14th Amendment applies to the imposition of financial obligations on indigent criminal defendants, demanding both procedural and substantive due process.<sup>195</sup> Procedural due process requires fair notice of the conduct that will subject one to punishment.<sup>196</sup> Substantive due process demands that certain fundamental rights are shielded from government constraint.<sup>197</sup> Given the deprivations that attend referrals of LFO debt to DCAs, the risk of error, and the fact that such referrals act as punishment, fundamental processes should be in place.

As set forth in Part(II)B, the legislative history of RCW 19.16.500 and the rights it confers to DCAs regarding LFO demonstrate its punitive intent and effects. Perhaps the

<sup>195</sup> U.S. CONST. AMENDS. V, XIV, § 1; WASH. CONST. ART. I, § 3; *see, e.g.*, *State v. Blank*, 930 P.2d 1213, 1219 (1997) (citing *Bearden v. Georgia*, 461 U.S. 660, 667–68 (1983)).

<sup>196</sup> *BMW of N. Am, Inc. v. Gore*, 517 U.S. 559, 574–75 (1996); *Didlake v. Washington State*, 345 P.3d 43, 47 (Wash. 2015) ("To determine what procedural protections due process requires in a particular situation, a court must consider three factors: (1) the private interest affected, (2) the risk that the relevant procedures will erroneously deprive a party of that interest, and (3) any countervailing governmental interests involved."). Both procedural and substantive due process are protected by the Fourteenth Amendment. *See generally Nielsen v. Dep't of Licensing*, 309 P.3d 1221 (Wash. 2013).

<sup>197</sup> *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). What "process" is "due" requires consideration of three issues: (1) the private interest affected by the official act; (2) the risk of an erroneous deprivation of life, liberty or property interest through the procedure at issue and any probable value of different or additional safeguards, and (3) the government's interest, including administrative or fiscal burdens that the new safeguards might impose. *Id.*

most opprobrious way in which RCW 19.16.500 exacts a due process violation is that it transmutes a DCA “collection fee” into LFO debt. Upon the Clerk’s referral and the DCA’s act of assessing the “collection fee,” that fee becomes an LFO itself and thus extends the debt’s life of the LFO originally imposed by the Court. Until paid in full, like the original LFO sentence, LFO obligations augmented now by the DCA “collection fee” remain a mandatory condition of probation, parole or other correctional supervision. As direct result of the fees that the DCA is allowed to extract without adequate notice or opportunity to be heard, DCAs impose fees that can become larger than the original LFO debt and continue to subject LFO debtors to all of the collateral consequences associated with the original court sentence.

As RCW 19.16.500 exacts additional punishment, then, an inquiry into reasons for non-payment and ability to pay should come at that “point of collection and when sanctions are sought for nonpayment,”<sup>198</sup> before the debt is referred to the DCA. Such an approach is what the Washington Supreme Court urged in *State v. Nason*.<sup>199</sup> James Nason was ordered to pay \$25 per month toward his LFO starting on August 15, 2006 under an auto-jail provision.<sup>200</sup> The provision was a part of Spokane County’s LFO agreement forms, which included spaces for entry of monthly payment amount, a review date, a date on which the defendant was to report to jail to serve a sentence, and the length of the sentence.<sup>201</sup> On the review date, a court collection deputy would examine the case to determine if Nason was current with his monthly payments.<sup>202</sup> If Nason was not current with his payments and had not filed a stay, Nason was required to report to jail on the report date to serve the predetermined jail sentence.<sup>203</sup> Nason did not make his payments and was jailed. The court agreed that the automatic jail provision, which provided an avenue to incarceration, violated his due process rights.<sup>204</sup> Even though Nason had the burden to demonstrate that his nonpayment was not willful, “[b]ecause due process requires the court to inquire into Nason’s reason for nonpayment, and because the inquiry must come at the time of the collection action or sanction, ordering Nason to report to jail without a contemporaneous inquiry into his ability to pay violated due process.”<sup>205</sup>

While *Nason* dealt with liberty interests, attempts to extend LFO obligations beyond the original sentence have also been held to violate due process. In *In re Brady*,<sup>206</sup> Brady, a juvenile defendant, was found guilty of two crimes: second degree malicious mischief and second-degree theft.<sup>207</sup> In his judgment orders and sentence, the judge required him to pay a total of \$3,000 in restitution and \$200 in a penalty assessment. Approximately ten years later, the prosecutor moved for an *ex parte* order to extend the jurisdiction for collection of the LFOs, as allowed by statute.<sup>208</sup> Brady objected to the trial court’s grant of

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<sup>198</sup> *State v. Blank*, 930 P.2d 1213, 1220 (Wash. 1997).

<sup>199</sup> *State v. Nason*, 233 P.3d 848 (2010).

<sup>200</sup> *Id.* at 850.

<sup>201</sup> *Id.* at 850–51.

<sup>202</sup> *Id.* at 851. Nason’s payments were to begin on August 1, 2007, but if “the defendant has not complied with the payment schedule, nor filed a motion with the court for a stay by the review date, the defendant is to report to jail on 11/14/07 by 4:00 p.m. to serve 60 days in jail.” *Id.*

<sup>203</sup> *Id.* at 851.

<sup>204</sup> *Id.* at 852.

<sup>205</sup> *Id.* at 851–52.

<sup>206</sup> *In re Brady*, 224 P.3d 842 (Wash. Ct. App. 2010).

<sup>207</sup> *Id.* at 843.

<sup>208</sup> *Id.*

the prosecutor’s motion on the grounds that, *inter alia*, because the extension of the LFOs affected a property interest, he was entitled to notice and opportunity to be heard.<sup>209</sup>

The appellate court agreed, but it first determined that the State was untimely in its attempt to extend jurisdiction.<sup>210</sup> The court held that Brady had a due process right to receive notice and an opportunity to be heard prior to entry of the *ex parte* orders if the court was modifying its original judgment or imposing further punishment.<sup>211</sup> The issue thus turned on whether the action “modif[ied] the original terms of the judgment[] and sentence”.<sup>212</sup>

RCW 19.16.500 exacts a deprivation of the property of the LFO debtor and does so without adequate notice or opportunity to be heard. Even if the fees imposed under the statute do not constitute punishment, they do amount to a property deprivation. If those fees are punitive, then there is all the more reason to ensure due process protections. In comport with basic due process, a debtor must actually be given notice of the consequences of non-payment. Notice only that the debt will be referred out for collection is insufficient; debtors must be given notice of the additional costs that ensue from that referral. Hearings should comport with the requirements of RCW 10.01.180, which requires a willful failure to pay determination before the clerk may transfer the LFO debt as urged in *Nason* and *Brady*.

## 2. Equal Protection Concerns

It is well understood that a court violates equal protection obligations when it automatically converts unpaid legal financial obligations to a jail sentence solely because the defendant is indigent and lacks the ability to pay.<sup>213</sup> Washington courts have also consistently held that a court may not revoke probation because of a defendant’s inability to pay LFOs.<sup>214</sup> Similarly, equal protection questions are raised when the law allocates legal burdens based on one’s indigency.

Upon referral to a DCA, LFO debt is treated differently in constitutionally significant ways. Unlike debt reposed with the Clerk, LFO debt is still subject to statutory interest. Unlike what must occur at sentencing, an ability-to-pay assessment must be undertaken before establishing LFO payments. The Washington Collection Agency Act (CAA or Act)<sup>215</sup> regulates collection agencies and includes extensive and detailed prohibited collection practices.<sup>216</sup> The Act proscribes DCA conduct with respect to debtor’s claims, which is defined as “any obligation for the payment of money or thing of value arising out of any agreement or contract.”<sup>217</sup> However, the LFO debt authorized under RCW 19.16.500 “include[s] fines and other debts” and allows for the collection fee. In Washington, collection agencies and lobbyists have argued that LFO debt is not a “claim” for purposes

<sup>209</sup> *Id.* at 844.

<sup>210</sup> *Id.* at 847–48.

<sup>211</sup> *Id.* at 848.

<sup>212</sup> *See generally* State v. Hotrum, 87 P.3d 766 (Wash. Ct. App. 2004).

<sup>213</sup> Tate v. Short, 401 U.S. 395, 398–99 (1971); State v. Curry, 829 P.2d 166, 168-169 (1992) (holding that mandatory victim penalty assessment does not violate the equal protection clause on its face as penalizing indigence. Debtors can only when compelled to pay in the case of indigence).

<sup>214</sup> Bearden v. Georgia, 461 U.S. 660, 672 (1983).

<sup>215</sup> WASH. REV. CODE § 19.16, *et. seq.* (2019).

<sup>216</sup> § 19.16.250.

<sup>217</sup> § 19.16.100(2).

of the CAA.<sup>218</sup> This position and RCW 19.16.500 raises at least two equal protection concerns.

If DCAs are not subject to the debt collection practice proscriptions of the CAA for LFO debt, LFO debtors remain vulnerable to a host of actually or potentially abusive collection practices. Moreover, under such a regime, there would be no clear statutory remedies for those who fall victim to those practices.

LFO debt is disadvantaged in yet another way. RCW 19.16.500 transforms the DCA “collection fee” into LFO debt.<sup>219</sup> As LFOs are not dischargeable in bankruptcy,<sup>220</sup> a critical (yet untested) possibility is that the DCAs’ “collection fee,” now an LFO debt, is non-dischargeable as well. This possibility has serious ramifications for LFO debtors and their ability to seek relief in courts. The exorbitant collection fee must be paid off in full—like the original LFO debt. The annual interest that DCAs can exact on the debt is not waivable (as would be the case for all non-restitution debt imposed by a court). Again, the law effectively treats LFO debt differently than other types of debt and thus reinforces its punitive nature and demands reform.

#### IV. RCW 19.16.500 REFORM PROPOSALS

Beyond its constitutional infirmities, RCW 19.16.500 exacerbates hardships on the recently incarcerated and diminishes the likelihood that any indigent LFO debtor will be able to rise out of poverty and untether him or herself from the criminal justice system. In light of the legal, policy, practical, and moral concerns raised by DCA service of LFOs, there are scores of important reforms that should be considered. This Part describes a selection of these reforms.

##### *A. Exempt LFOs from RCW 19.16.500.*

Aside from the fundamentally moral and social policy rationales, exempting LFOs from RCW 19.16.500 is the best solution from a purely economic standpoint. In posing heightened barriers to community re-entry, mounting evidence shows that jurisdictions, on average, collect a small fraction of the LFOs levied. Nationally as of 2017, ten million people owe \$50 billion in criminal fees, fines, forfeitures, and restitution.<sup>221</sup> Debt collection involves scores of un-tabulated expenses, including salaried time of court staff, correctional authorities, and state and local government employees. Arresting and incarcerating people for debt-related reasons is particularly costly, especially for sheriffs’ offices, local jails, and for the courts themselves.<sup>222</sup>

According to data compiled by the Washington Administrative Offices of the Courts for the years 2014-2016, the LFOs which were actually paid into the courts woefully trail behind the LFOs imposed. Of the over \$130 million of LFOs imposed in courts of general jurisdiction, only \$7.8 million or 6% has been paid. As for the courts of limited jurisdiction,

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<sup>218</sup> Personal notes from Washington Collection Agency Bureau hearing on rulemaking (Apr. 17, 2018) (on file with author).

<sup>219</sup> A S. B. REP., 1997 REG. SESS. S.B. 5827 Washington Senate Bill Report, March 18, 1997, p. 2354.

<sup>220</sup> 11 U.S.C. § 523(a)(7) (2018); *In re Sanders*, 589 B.R. 874, 883 (Bankr. W.D. Wash 2018).

<sup>221</sup> Martin et.al., *supra* note 107, at 5.

<sup>222</sup> BANNON ET AL., *supra* note 22, at 10–11.

only 5.1% of the \$88 million in LFOs imposed (\$4.5 million) has been paid.<sup>223</sup> There is no indication that debts are being paid down more quickly once LFOs are referred out to private DCAs. To the contrary, the likelihood of a LFO debtor fulfilling his or her obligation becomes bleaker as DCA referral merely sinks the LFO debtor deeper into debt. DCA referral may ultimately be financially self-defeating, where the government ends up chasing debt that is simply uncollectable.

If crime reduction, victim compensation, rehabilitation, and state cost recoupment are the policy goals behind RCW 19.16.500 and the entire LFO regime, the system has been a failure.<sup>224</sup> Policymakers should evaluate whether LFO debt referral makes economic sense for the state or the debtor. Costs of popular debt collection methods such as DCA referrals, as well as arrests, incarceration, or driver's license suspensions, should be assessed. Included in that assessment should be consideration of the salary and time spent by employees (court officials, police officers, clerks, bailiffs) involved in collection, and the effect of chosen collection methods on payment reentry and recidivism. Any conclusion that the public and systems are better served by returning the administration of LFO collections to the courts will likely also require a fundamental shift in how our court and penal institutions are funded—a move away from the offender-funded system ethos that has far too long informed our subsidization approach.

### *B. Cancel the Contracts*

Given the punitive nature of RCW 19.16.500, short of legislative LFO exemptions, courts should cancel the contracts and reclaim jurisdiction over debt collection. Counties and municipalities contract with DCAs for a term of years,<sup>225</sup> but without exception, the contracts allow for cancellation upon certain notice terms upon, for example, 30 or 60-day notice.<sup>226</sup> In addition, on a case-by-case basis, courts are able to “claw back” LFOs referred out. By statute and by contract, courts retain the power supervise the servicing of LFO debt by DCAs. RCW 36.18.190 maintains that “[t]he servicing of an unpaid court obligation does not constitute assignment of a debt, and no contract with a collection agency may remove the court’s control over unpaid obligations owed to the court.”<sup>227</sup> In addition, a feature of most contracts allows for unilateral contract cancellation and for the recall of any particular LFO debt.<sup>228</sup> While this too will involve a serious examination of costs of

<sup>223</sup> Studies conducted in other states reveal similar levels of futility. In Florida, 4.9% of \$709 million; in Iowa, of \$159 million ordered, only 12% has been collected; and in Texas, only 5.3% of \$43 million of outstanding debt owed. Martin et al., *supra* note 107, at 12–13.

<sup>224</sup> Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary Untied States*, 115 AM. J. SOC. 1753, 1792 (2010).

<sup>225</sup> See, e.g., AllianceOne-King County contract (three years) (on file with author); Gila LLC-Snohomish County contract (two 1-year terms, one 3-year term) (on file with author); Yakima County-Yakima County Credit Services contract (1 year) (on file with author); Skagit County-Skagit Bonded Collectors (3 year) (on file with author).

<sup>226</sup> See, e.g., Yakima County-Yakima County Credit Services contract (on file with author); Personal Services Agreement between Skagit County and Skagit Bonded Collectors (July 23, 2018) (on file with author).

<sup>227</sup> Personal Services Agreement between Skagit County and Skagit Bonded Collectors (July 23, 2018) (on file with author).

<sup>228</sup> Dynamic Collections and East Wenatchee Municipal Court provide an example: “Any judgments referred to the [DCA] may be withdrawn by the Court at any time unless legal action has been commenced by the [DCA].” *Id.* at 3.

returning the collection processes back “in house,” this evaluation must be engaged. Courts may have little ability to influence the mandatory fines and fees imposed through certain laws, such as restitution and VPA fees. However, courts directly control the manner in which LFOs are collected and have the capacity to cancel these contracts.

### *C. Curb Unfair Debt Collection Practices*

It is the industry position that debt DCAs service under RCW 19.16.500 must be treated differently from the debt it services under the provisions of the CAA, which ensures that DCAs abide by fair debt collection practices.<sup>229</sup> As a result, LFO debtors are left vulnerable to unfair, deceptive, and even coercive acts. Because debtors remain at risk of arrest and conviction if they do not pay their LFO debts on a regular basis, DCAs are incentivized to engage in threats and other coercive conduct which, under every circumstance violates debt collection practice laws.<sup>230</sup> Moreover, because DCAs need not regard an LFO debtors ability to pay—even if a court has to—they are able to use their leverage the LFO debtors tenuous legal circumstances to extract unfair and unsustainable monthly payment arrangements.

One legal advocate recounted the experience of her client: What started out at \$3,400 in principal ballooned to over \$12,000 in LFOs, interest, and the 50% collection fee. The client was in his fifties and had child dependents and a job, but the DCA would accept nothing less than \$200.00 per month. He could not pay. As result, the DCA initiated garnishment proceedings such that he could no longer pay basic living expenses.<sup>231</sup>

### *D. Require DCA Collection Fees to Bear Some Rational Relationship to True Costs of Collection*

If RCW 19.16.500 continues to apply to LFO debtors, the exorbitant fees, costs and surcharges must be reined in. Washington could do so by including robust consumer protections regarding fee extractions relative to service costs. An example from federal mortgage regulations is instructive.

In the pre-recession era, mortgage lending abuses were rampant, with brokers and banks charging excessive fees associated with closing costs. Abuses included overcharging for credit reports and deed recording, inflating appraisal costs, or unbundling fees (e.g., charging a “loan origination fee,” in addition to charging for underwriting and loan preparation—tasks which should be covered in the loan origination fee).<sup>232</sup> Such hyper-predatory charges (e.g. \$150.00 to obtain a borrower’s credit report; \$150.00 to mail loan documents) were found to bear no relationship to the actual costs of the services provided.<sup>233</sup> As an anti-predatory measure, the Real Estate Settlement Procedures Act was revised, such that fees for mortgage broker services had to bear a reasonable relationship

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<sup>229</sup> Collection Agency Board Meeting Notes (Apr. 2018) (on file with author).

<sup>230</sup> WASH. REV. CODE § 36.18.190 (2019).

<sup>231</sup> Monica Llorente, *Criminalizing Poverty Through Fines, Fees, and Costs*, ABA (Oct. 3, 2016), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2016/criminalizing-poverty-fines-fees-costs/>.

<sup>232</sup> Bryan Adamson, *The Homeowners’ Illusory Safety Net: Mortgage Broker Surety Liability*, 47 GONZ. L. REV. 165, 186 (2011).

<sup>233</sup> Jessica Fogel, *State Consumer Protection Statutes: An Alternative Approach To Solving The Problem of Predatory Mortgage Lending*, 28 Seattle U. L. Rev. 435, 438 (2005).

to the value of services or goods actually performed or provided.<sup>234</sup> Under pain of penalty, this law proved to be successful in curtailing unfair, deceptive and abusive practices, and at aligning consumer charges more with the actual costs of providing mortgage lending services.<sup>235</sup> A 35% “collection fee”—to say nothing of a 50% one—should be not only unconscionable, but presumptively unreasonable under the law.

#### *E. Disallow Transfers to DCA After Only Thirty Days*

Courts, as the first party creditor, are not required to adhere to the Fair Debt Collections Practices Act (FDCPA) or state laws that apply to third-party collection agencies.<sup>236</sup> Under common practices, a creditor can refer a debtor to collections when a default has technically occurred—even if it is one day late. As a result, RCW 19.16.500 allows clerks to refer LFO debts to collection after only thirty days.<sup>237</sup> While not strictly improper, this thirty-day time frame is harsh and bears no resemblance to industry debtor-creditor practice. In traditional commercial transactions, sixty or 180-day delinquencies are common time frames upon which debts are referred to debt collection agencies.<sup>238</sup> Given the severe economic and punitive consequences of DCA transfers on LFO debtors, the thirty-day time frame should be revised if the system remains at all.

#### *F. Disallow Statutory Interest*

Allowing DCAs to collect statutory interest does little but ensure greater private profit. Statutory interest allows agencies to layer on costs over and above the 50%/35% fee allowed by statute, further increasing the amount and the life of the debt.

#### *G. Require an Ability to Pay Analysis*

Imposing collection fees runs contrary to the public policy concerns that prompted the amendment to statutes to limit LFOs imposed on individuals who are indigent or have

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<sup>234</sup> See Real Estate Settlement Procedures Act (RESPA), 12 C.F.R. 1024.14 (2011) (“Prohibition against unearned kickbacks and fees. \*\*\*\* (b) No person shall give and no person shall accept any fee, kickback or other thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or part of a settlement service involving a federally related mortgage loan shall be referred to any person.\*\*\*\* (3) Multiple services. When a person in a position to refer settlement service business, such as an attorney, mortgage lender, real estate broker or agent, or developer or builder, receives a payment for providing additional settlement services as part of a real estate transaction, such payment must be for services that are actual, necessary and distinct from the primary services provided by such person.”). See also 12 U.S.C. § 2607(a) (2018).

<sup>235</sup> See generally 12 U.S.C. 2607 *et. seq.*

<sup>236</sup> The FDCPA defines a creditor as the person or entity that extends credit in the first instance. The FDCPA is designed to protect consumers against third-party debt collectors, not the original creditor. 15 U.S.C. § 1692a(4) (2012); WASH. REV. CODE § 19.16.100(5)(b) (2019).

<sup>237</sup> WASH. REV. CODE § 19.16.500(2) (“No debt may be assigned to a collection agency unless (a) there has been an attempt to advise the debtor (i) of the existence of the debt and (ii) that the debt may be assigned to a collection agency for collection if the debt is not paid, and (b) at least thirty days have elapsed from the time notice was attempted.”).

<sup>238</sup> CONSUMER FIN. PROT. BUREAU, CFPB COMPLIANCE BULLETIN 2015-05 2 (Oct. 8, 2015), [https://files.consumerfinance.gov/f/201510\\_cfpb\\_compliance-bulletin-2015-05-respa-compliance-and-marketing-services-agreements.pdf](https://files.consumerfinance.gov/f/201510_cfpb_compliance-bulletin-2015-05-respa-compliance-and-marketing-services-agreements.pdf).

an inability to pay.<sup>239</sup> As a constitutional imperative, pre-referral hearings should be required. DCA referrals impose greater economic obligations regardless of the type of LFO debt and extend the term of court supervision. Consequently, hearings that assess willful refusal to pay and ability to pay—now required by courts—must be required of DCAs holding LFO accounts.

If a court determines that a LFO non-payment was willful, a DCA referral can go forward. From there however, the court should also determine whether any referral of the defendant's debt—based upon the terms and conditions of the DCA-court contract—would constitute an unconstitutionally excessive fine. If it is determined that the LFO debtor can be referred to the DCA, then DCAs should not have the discretion to set the monthly payment amount. The court or clerk should inquire and establish a payment amount based on the defendant's individual financial circumstances.

#### *H. Make Contracts Uniform*

Contracts between courts and DCAs vary widely.<sup>240</sup> That variance includes the additional fees and charges an LFO debtor is assessed. In turn, this creates additional uncertainties and heightened obligations for LFO debtors. Bringing contract uniformity will enhance predictabilities for courts, improve the experience (and thus perhaps the repayment yield) of debtors, and minimize tools DCAs can leverage through individual contracts to extract additional fees and surcharges.

### CONCLUSION

RCW 19.16.500 represents a severe and likely unconstitutional flaw in our criminal justice system that prolongs LFO debtors' involvement in that system for reasons that can only be described as punitive. Through an analysis of how the law operates, one can see it as yet another example of how our public criminal justice system has become privatized. Sadly, this is nothing new. As in the past, Black and Latinx persons are the ones disproportionately consigned by courts to pay their debt to society which places their fate into the hands of private enterprises. Those DCAs presently engaged in holding formerly incarcerated persons in debt bondage, have been conferred broad discretion and perverse incentives to engage in predatory and abusive debt collection practices. Beyond its unconstitutionality, RCW 19.16.500, in tethering formerly incarcerated persons to a lifetime of government supervision, works to undermine the pro-social ideals that undergird our criminal justice system's rehabilitative goals. The statute exacerbates inequality by creating for many what will become an insurmountable, lifetime barrier to financial stability, housing security, employment opportunity, community reintegration and full citizenship.

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<sup>239</sup> Travis Stearns, *Legal Financial Obligations: Fulfilling the Promise of Gideon by Reducing the Burden*, 11 SEATTLE J. SOC. JUST. 963, 967 (2013).

<sup>240</sup> See *infra*, Part III at 319.

*Table A: County and Municipal Debt Collection Agency Contracts in Washington State*

<b>Court</b>	<b>Collection Agency</b>	<b>Collection-fee Percentage<sup>241</sup></b>
Anacortes Municipal	Debt Collection specialists	19% <sup>242</sup>
Asotin County District	Credit Bureau of Lewiston-Clarkston, Inc.	50%
Battle Ground Municipal	Dynamic	50%, 35% <sup>243</sup>
Benton County District	Washington Collectors Tri-cities	40%
Bothell Municipal	AllianceOne	29%, 24%, 19% <sup>244</sup>
Burlington Municipal	Dynamic	50%, 35%
Clark County District	AllianceOne	19%
Clallam County I district	Dynamic	50%, 35%
Clallam County II district	Dynamic	50%, 35%
Clallam County Superior	Dynamic	50%, 35%
Chelan County	Armada Corp	40%
Columbia District Court	Professional Service Bereau	50%, 35%
Cowlitz County District	Dynamic	35%
Des Moines Municipal	AllianceOne	29%, 24%, 19%
Douglas County District	Dynamic	50%, 35%
East Wenatchee Municipal	Dynamic	50%, 35%
Oakville Municipal	Dynamic	50%, 35%
Elma Municipal	Dynamic	50%, 35%
Enumclaw Municipapl	Dynamic	50%, 35%
Everson-Nooksack Municipal	AllianceOne	19%
City of Federal Way Municipal	AllianceOne	29%, 24%, 19%
Ferndale Municipal	AllianceOne	29%, 24%, 19%
Franklin County District	Washington Collectors Tri-cities	40%
Fife Municipal	AllianceOne	19%
Garfield County District	Armada Corp	50%, 35%
Grant County District	Credit Service of Central Washinton	50%, 35%
Grays Harbor District	Dynamic	50%, 35%
Grays Harbor Superior	Dynamic	50%, 35%
Hoquium Municipapl	Dynamic	40%
Issaquah Municipal	AllianceOne	29%, 24%, 19%
Jefferson County District	Dynamic	50%, 35%
Kent Municipal	AllianceOne	24%

<sup>241</sup> As against the outstanding LFO debt transferred.

<sup>242</sup> This represents a flat fee collected against all LFO debt.

<sup>243</sup> Jurisdictions with 50%/35% fees represent DCAs taking the statutory maximums against LFOs below and above \$100,000.

<sup>244</sup> The first percentage figure represents the collection fee assessed against any LFO debt older than ten years. The second percentage figure represents the collection fee assessed against any LFO account transferred that is five-to-ten years old. The third percentage figure represents the collection fee assessed against new account.

<b>Court</b>	<b>Collection Agency</b>	<b>Collection-fee Percentage<sup>241</sup></b>
King County District	Transworld Systems Inc.	16.5%, 22%, 28%
Kirkland Municipal	AllianceOne	29%, 24%, 19%
Kitsap County Superior	Dynamic	50%, 35%
Klickitat West District	AllianceOne	19%
Klickitat East District	AllianceOne	19%, 24%, 19%
City of Lake Forrest Park Municipal	Allied Credit Services Inc.	35%
Lakewood Municipal Court	Dynamic	50%, 35%
Lewis County Superior Court	Dynamic	50%
Lynwood Municipal	AllianceOne	29%, 24%, 19%
Manson County Superior	Dynamic	50%, 35%
Mercer Island Municipal	AllianceOne	29%, 24%, 19%
Mount Vernon	Skagit Bonded Collectors LLC	30%
Ocean Shores Municipal	Dynamic	50%, 35%
Okanogan County District	Dynamic	50%, 35%
Okanogan County Superior Court	Dynamic	50%, 35%
Pacific County Court	Mcdonald Credit Services	50%
Pacific municipal	Alliance One	29%, 24%, 19%
Pasco Municipal	Washington Collectors Tri-cities	40%
Pierce County Superior	AllianceOne	27%, 32%, 37%
Fircrest Municipal	Dynamic	50%, 35%
Buckley Municipal	Alliance One	29%, 24%, 19%
Pend Oreille County District	Peterson Enterprise Inc.	30%
Raymond Municipal	Mcdonald Credit Services	50%
Renton Municipal	AllianceOne	19%, 24%, 29%
San Juan County District	Allied Credit Companies	50%
Sedro-Woolley Municipal	Debt Recovery Specialists	33.33%
Selah Municipal	AllianceOne	29%, 24%, 19%
Skagit County	Skagit Bonded Collectors LLC	35%
Snohomish County	Gila LLC, dba Municipal Services Bureau Government Services	22.54%
Snohomish County District	AllianceOne	29%, 24%, 19%
Stevens County District	Armada Corp	40%
Sumas Municipal	AllianceOne	19%
Tonasket Municipal Court	Armada Corp	50%, 35%
Bonny Lake Municipal Court	PSC Inc.	50%, 35%
Thurston County District	Account Managers Inc.	25%, 20%
Upper Kittitas County District	AllianceOne	19%, 24%, 29 %
Wahkiakum County District	Dynamic	50%, 35%
Walla Walla County District	Dynamic	50%, 35%

<b>Court</b>	<b>Collection Agency</b>	<b>Collection-fee Percentage<sup>241</sup></b>
Wapato Municipal	Evergreen Financial Services	50%, 35%
Whatcom	AllianceOne	29%, 24%, 19%
Whitman	AllianceOne	29%, 24%, 19%
Yakima County	Yakima County Credit Services	50%, 35%