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NEVER MISTAKE LAW FOR JUSTICE: RELEASING INDIGENT DEFENDANTS FROM LEGAL PURGATORY

R.K. Brinkmann*

Abstract: Washington courts impose two mandatory legal financial obligations (LFOs) on almost anyone who pleads guilty to or is convicted of a crime: a \$100 DNA sample fee and a crime victim penalty assessment of \$250 for misdemeanors and \$500 for felonies. These fines run afoul of the Social Security Act, which bars attachment of Social Security benefits to pay debts, including LFOs. As a result, defendants whose sole source of income is Social Security benefits are not obligated to pay their mandatory LFOs. But such defendants cannot obtain certificates of discharge to clear their conviction records and thus complete their reintegration into society. The Supreme Court of Washington recently denied review of *State v. Conway*, in which a disabled Social Security recipient petitioned for remission of her mandatory LFOs. The decision to not hear Conway's case leaves impoverished Social Security recipients in a legal purgatory where they do not have to pay their LFOs but are simultaneously unable to discharge their criminal records. To correct this injustice, Washington should either bar courts from imposing any LFOs on defendants who are indigent or allow such defendants to petition for remission of mandatory LFOs, thereby freeing people such as Ms. Conway from a lifelong purgatory of legal debt.

INTRODUCTION

Karen Conway pleaded guilty in Clark County Superior Court to one Class C felony count of maintaining a dwelling for controlled substances in 2007.¹ As part of her sentence, the court ordered her to pay several thousand dollars in fees, including a \$500 victim penalty assessment.² Ms. Conway lives entirely on Supplemental Security Income (SSI)—a type of Social Security benefit for disabled individuals—and has done so since 1989.³ The Social Security Act forbids courts from forcing Social Security recipients to use their benefits to pay legal fees.⁴ Consequently, the Superior Court remitted, or cancelled, much of Conway's legal debt in

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1. *State v. Conway*, 8 Wash. App. 2d 538, 542, 438 P.3d 1235, 1238 (2019).

2. Petition for Review at 2 n.1, *State v. Conway*, 194 Wash. 2d 1010, 452 P.3d 1240 (2019) (No. 50032-9-II) [hereinafter Petition for Review].

3. *Id.* at 1; *Conway*, 8 Wash. App. 2d at 542, 438 P.3d at 1238.

4. 42 U.S.C. § 407(a).

2016 due to her lack of resources. However, the court could not dismiss Conway's victim penalty assessment because, unlike the rest of her debt, the victim penalty assessment is a mandatory legal financial obligation (LFO).⁵

American courts have imposed monetary sanctions on criminal defendants since the 1800s.⁶ Today, all fifty states impose some form of LFO on defendants.⁷ Some states justify LFOs on rehabilitative grounds, arguing that LFOs discourage defendants from repeating their misbehavior—Washington has not historically claimed any such justification.⁸ In Washington, anyone who is convicted of or pleads guilty to most crimes receives LFOs that they must pay off as part of their sentence.⁹ Former defendants owed Washington State approximately \$2.5 billion in LFO debt in 2014,¹⁰ and the state adds roughly 19,000 new debt accounts each year.¹¹

Washington's legislature, with the intent of fostering rehabilitation, has taken steps to ease the process by which defendants reintegrate into society.¹² But Washingtonians who are indigent—especially those who are disabled and rely on SSI to survive—frequently carry immovable debt burdens long after their prison or jail sentence ends. The Washington legislature and Supreme Court of Washington both have the authority to correct the injustice.

Without an intervention, the clash between state laws mandating LFOs and federal laws shielding Social Security income will continue to trap many people whose stories mirror Ms. Conway's. Due to the protections

5. *Conway*, 8 Wash. App. 2d at 542–43, 438 P.3d at 1238.

6. Alexes Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOCIO. 1753, 1758 (2010).

7. Juleyka Lantigua-Williams, *How Prison Debt Ensnarers Offenders*, THE ATL. (June 2, 2016), <https://www.theatlantic.com/politics/archive/2016/06/how-prison-debt-ensnares-offenders/484826/> [https://perma.cc/W6Y8-K9KS].

8. Harris et al., *supra* note 6, at 1757.

9. See WASH. REV. CODE § 7.68.035(2) (2020) (exempting most vehicle-based offenses from the crime victim penalty assessment but still apply the assessment for people convicted of vehicular assault; vehicular homicide; evading the police; possessing or trading “hot” vehicles; DUI; violating the terms of an occupational, temporary restricted, or ignition interlock driver's license; hit-and-runs; unlawful operation of a snowmobile; unlawful operation of a nonhighway vehicle; negligent driving; leaving children unattended in standing vehicle with motor running; racing on highways; reckless driving; disobeying police officers, flaggers, or firefighters; or operating a mobile home without insurance).

10. Kim Eckart, *Washington State Supreme Court Takes Up Court-Fee Reform, Considers UW Data at Sold-Out Wednesday Symposium*, UNIV. WASH.: UW NEWS (June 6, 2018), <https://www.washington.edu/news/2018/06/06/washington-state-supreme-court-takes-up-court-fee-reform-considers-uw-data-at-sold-out-wednesday-symposium/> [https://perma.cc/24RG-B798].

11. Lantigua-Williams, *supra* note 7.

12. See *infra* Part III.

of the Social Security Act, a court cannot order Ms. Conway to use her SSI benefits to pay off her legal debt; however, no legal mechanism currently exists to let her apply for remittance of her LFOs. As a result, she will never complete the terms of her sentence and the burdens of her guilty plea will follow her for the rest of her life. The repercussions include an outstanding conviction on any background check and permanent damage to her credit score, both of which have undermined her ability to find stable housing since her release.¹³

The Supreme Court of Washington declined to review Ms. Conway's case when she appealed in 2019, seeking remission of her mandatory LFO: the victim penalty assessment.¹⁴ Therefore, until a similar case takes up the issue, it falls to Washington's legislature to grant Ms. Conway and those similarly situated a degree of relief.

This Comment proceeds in four parts. Part I provides substantive and procedural background on LFOs in Washington and explains why the legislature currently stands as the best institution to resolve the issue of mandatory LFOs imposed on SSI recipients. Part II covers recent judicial and legislative developments that provide a foundation for this Comment's proposed legislative solution. Part III details public interest issues related to LFOs that have highlighted the need for change in Washington's mandatory LFO policy. Finally, Part IV proposes two specific ways that Washington's legislature or Supreme Court could liberate former defendants from the purgatory that mandatory LFOs create. One solution would bar courts from imposing any LFOs on a defendant who a court finds indigent. The second solution would allow defendants who can demonstrate financial hardship to petition for remission after courts have imposed the mandatory LFOs. Several possible standards could apply for the second solution, from providing protection for only SSI recipients, to shielding any defendant who receives means-tested benefits, to covering any defendant who meets the statutory definition for indigence. This Comment ultimately suggests adoption of the first solution for the most comprehensive administration of justice.

I. LEGAL FINANCIAL OBLIGATIONS: THE POST-PRISON PUNISHMENT

Every state in the nation imposes financial obligations on criminal

13. Ericka B. Adams, Elsa Y. Chen & Rosella Chapman, *Erasing the Mark of a Criminal Past: Ex-Offenders' Expectations and Experiences with Record Clearance*, 19 PUNISHMENT & SOC'Y 23, 26 (2017).

14. *State v. Conway*, 194 Wash. 2d 1010, 452 P.3d 1240 (2019) (denying review).

defendants. Each jurisdiction has its own particularities and nuances. In Washington, courts have the discretion to waive or remit most LFOs.¹⁵ Only a few LFOs are mandatory and apply to almost every criminal case.¹⁶ Even defendants whose financial status qualifies them for automatic waiver of discretionary LFOs will still receive mandatory LFOs, despite their inability to pay the fines.

A. *Obligations of All Shapes and Sizes*

All fifty states impose LFOs.¹⁷ The fines' amounts, justifications, labels, and beneficiaries vary as widely as the weather between jurisdictions. LFOs are either discretionary or mandatory. Courts may make a judgment call about imposing discretionary LFOs, weighing relevant factors such as the defendant's income or if the crime resulted in harm that monetary restitution could repair.¹⁸ In contrast, mandatory LFOs grant courts no discretion: if the LFO's criteria are met, then the court must impose the fine.¹⁹

Washington and many other states impose LFOs to recoup some of the costs of running their court systems. Twenty-seven states charge defendants for court costs;²⁰ thirty-one for drug, alcohol, mental health, or DNA testing;²¹ and forty-five require defendants to pay for costs of monitoring or incarceration.²² Florida, North Carolina, and Virginia all impose mandatory fees for the use of a public defender that a court has no opportunity to remit if a defendant lacks the ability to pay.²³ North Carolina charges defendants seventy-five dollars per hour for public

15. WASH. STATE SUP. CT. MINORITY & JUST. COMM'N, WA STATE SUPERIOR COURTS: 2018 REFERENCE GUIDE ON LEGAL FINANCIAL OBLIGATIONS (LFOs) (2018) [hereinafter LFO REFERENCE GUIDE], <https://www.courts.wa.gov/content/manuals/superior%20court%20lfos.pdf> [https://perma.cc/47NM-UE7K].

16. *Id.*

17. Monica Llorente, *Criminalizing Poverty Through Fines, Fees, and Costs*, AM. BAR ASS'N: ARTICLES (Oct. 3, 2016), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2016/criminalizing-poverty-fines-fees-costs/> [https://perma.cc/T3BA-FA5H].

18. LFO REFERENCE GUIDE, *supra* note 15.

19. *Id.*

20. Llorente, *supra* note 17 ("Examples are single fees, witness fees, transportation costs, prosecution costs, court operations, depositions, and transcripts.").

21. *Id.*

22. *Id.*

23. See ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUST., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 12–13 (2010), https://www.brennancenter.org/sites/default/files/2019-08/Report_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf [https://perma.cc/4XXZ-AKNG] (showing that fourteen of fifteen states surveyed had at least one mandatory fee that courts must impose on convicted defendants).

defense services in non-capital cases.²⁴ For some felonies, Virginia bills defendants up to \$1,235 per charge.²⁵ And it costs defendants in Maine \$300 to have a jury trial.²⁶

Across the United States, persistent legal debt interferes with the ability to acquire loans “to support business endeavors or purchase assets,” and the fear of wage garnishments can create disincentives to find work for those otherwise capable.²⁷ Several former defendants interviewed for a 2010 study examining legal debt throughout the United States indicated that LFOs encouraged them to re-offend by incentivizing them to seek “illegal means to support themselves and, ironically, to make LFO payments.”²⁸ Even restitution LFOs—imposed to recoup state payouts to crime victims—frequently fail to serve their purpose: if a defendant can only afford ten dollars per month in LFOs, a \$3,000 restitution LFO will keep the state waiting for twenty-five years before it is paid off.²⁹

Many states also punish the failure to pay LFOs. Approximately thirty states impose additional fines if a defendant misses or makes a delayed payment.³⁰ Roughly twenty states consider failure to pay as a probation or other supervised-release violation.³¹ California has allowed 15% interest rates on LFO accounts that have been delinquent for more than thirty days,³² while Illinois charges the same rate on unpaid balances—plus a 30% collection fee.³³ Finally, thirteen states either charge defendants for expunging their criminal records or, like Washington, do not permit defendants to seek expungement until they have paid off all of their LFOs.³⁴

The fact that judges are *supposed* to impose the fines does not mean that they always comply: some North Carolina judges “waive or remit [North Carolina’s mandatory] reimbursement provision, citing constitutional concerns” such as due process and equal protection.³⁵ Washington trial court judges who have attempted a similar tactic have

24. *Id.*

25. *Id.*

26. Llorente, *supra* note 17.

27. Harris et al., *supra* note 6, at 1781.

28. *Id.* at 1785.

29. Llorente, *supra* note 17.

30. Lantigua-Williams, *supra* note 7; *see also infra* Part II.

31. Llorente, *supra* note 17.

32. Harris et al., *supra* note 6, at 1759 (citing CAL. REV. & TAX. CODE § 19280 (West 2019)).

33. Llorente, *supra* note 17.

34. *Id.*

35. BANNON ET AL., *supra* note 23, at 12 & 38 n.40 (citing Telephone Interview with Danielle Carman, Assistant Dir., N.C. Off. of Indigent Def. Servs. (Nov. 20, 2009)).

seen those decisions overturned on appeal.³⁶ But overall, states that condition the return of defendants' voting rights on payment of their LFOs have started to face legal challenges—and are losing.³⁷

B. The Burden at Home: Mandatory LFOs in Washington

Washington State justifies imposing LFOs by arguing that the fines hold defendants financially accountable to their communities, provide remedies for victims, and help fund the court system. These justifications backfire when defendants cannot pay.³⁸ LFOs in Washington vary based on the crime and financial capacity of the defendant. Courts can decide to not impose some LFOs or to remit them later if a defendant demonstrates sufficient financial hardship. Other LFOs do not give courts a choice.

Washington instituted its practice of imposing LFOs to “hold[] offenders accountable to victims, counties, cities, the state, municipalities, and society for the assessed costs associated with their crimes; and [to] provide[] remedies for an individual or other entities to recoup or at least defray a portion of the loss associated with the costs of felonious behavior.”³⁹ Thus, in addition to deterrence and retribution, LFOs serve as a source of funding for Washington courts. Trial courts in Washington receive only a small portion of their budget from the state government, deriving most of their funding from local sources.⁴⁰ This results in a mix of unpredictable income sources—especially in areas where voters resist tax-based budgetary initiatives.⁴¹ Despite their inconsistency, LFOs are a

36. *State v. Lacy*, No. 50738-2-II, 2019 Wash. App. LEXIS 1342, at *8 (May 29, 2019) (“Under the current version of RCW 9.94A.6333(3)(f), the trial court does not have authority to waive the crime victim penalty assessment. Therefore, we reverse the trial court’s waiver of the crime victim penalty assessment imposed on Lacy.”).

37. Iowa, the last state to permanently disenfranchise every person convicted of a felony unless that person directly appealed to the governor, recently restored voting rights to most former defendants (except for people convicted of homicide) who complete the terms of their sentence without requiring full payment of LFOs. Katarina Sostaric, *Governor Acts to Restore Voting Rights to Iowans With Felony Convictions*, NAT’L PUB. RADIO (Aug. 5, 2020), <https://www.npr.org/2020/08/05/899284703/governor-acts-to-restore-voting-rights-to-iowans-with-past-felony-convictions> [<https://perma.cc/BQ8X-YVAR>].

38. KATHERINE A. BECKETT, ALEXES M. HARRIS & HEATHER EVANS, WASH. STATE MINORITY & JUST. COMM’N, *THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE* 74 (2008), http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf [<https://perma.cc/8CYK-RZJM>].

39. *See* 1989 Wash. Sess. Laws 1170.

40. ALAN CARLSON, KATE HARRISON & JOHN K. HUDZIK, JUST. MGMT. INST., *ADEQUATE, STABLE, EQUITABLE, AND RESPONSIBLE TRIAL COURT FUNDING: REFRAMING THE STATE VS. LOCAL DEBATE* 1 (2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/223973.pdf> [<https://perma.cc/49UW-DEB7>].

41. *Id.* at 111.

preferred source of funding for local court systems.⁴²

A Washington Superior Court will impose LFOs on anyone who pleads guilty to or is convicted of a crime; the person must then pay off the LFOs as part of their sentence.⁴³ LFOs come in many forms and with many labels: fees, fines, assessments, costs, restitution, and more.⁴⁴ All LFOs must be paid to the court.⁴⁵ The amount of LFOs that Washington courts imposed increased 41% between 2000 and 2014.⁴⁶ Washington courts imposed LFOs totaling roughly \$335 million in 2018.⁴⁷ But *outstanding* LFO debt in Washington totaled \$2.5 billion in that same year.⁴⁸ The discrepancy stems from the return rate on LFOs: only 23.8%.⁴⁹

Historically, any amount of LFO debt could quickly spiral out of control. Until 2018, LFOs assigned to a collection agency accrued interest at a rate of 12% per year.⁵⁰ Some counties also applied a collection fee of \$100 per year that went directly to the court clerk instead of paying off the LFO debt.⁵¹ As of late 2020, restitution LFOs still accrue interest at the same rate as civil judgments: 12% per year.⁵²

While sentencing courts have discretion to waive or remit certain LFOs, that discretion is not available for all LFOs. For mandatory LFOs, such as the \$500 crime victim penalty assessment (VPA) charged to Ms. Conway, the court must impose the fine if certain criteria are met.⁵³ Defendants have no way to clear the debt except by paying it off.⁵⁴

42. See, e.g., *id.* (explaining how Washington raised several LFOs to fund new court information systems in the late 1990s).

43. See WASH. REV. CODE § 9.94A.760(1) (2020); LFO REFERENCE GUIDE, *supra* note 15.

44. LFO REFERENCE GUIDE, *supra* note 15.

45. WASH. REV. CODE § 9.94A.760.

46. *Unique Calculator Designed to Set Appropriate Fines and Fees Launches for Washington Courts*, WASH. CTS: NEWS & INFO. (June 8, 2018), <https://www.courts.wa.gov/newsinfo/?fa=newsinfo.internetdetail&newid=16005> [https://perma.cc/ZSA4-XP KU].

47. *Id.*

48. *Id.*

49. *Legislature Passes Bill to Bring Fairness to Washington's System of Legal Financial Obligations*, ACLU WASH. (Mar. 6, 2018) [hereinafter *Legislature Passes Bill*], <https://www.aclu-wa.org/news/legislature-passes-bill-bring-fairness-washington%E2%80%99s-system-legal-financial-obligations> [https://perma.cc/6PJ6-UEN4].

50. 2018 Wash. Sess. Laws 1616 (Legal Financial Obligations); see also *Questions and Answers About Legal Financial Obligations (LFOs)*, ACLU WASH. [hereinafter *Questions and Answers*], <https://www.aclu-wa.org/questions-and-answers-about-legal-financial-obligations-lfos> [https://perma.cc/7GK5-SJH2].

51. *Questions and Answers*, *supra* note 50.

52. See WASH. REV. CODE § 10.82.090(1) (2020); WASH. REV. CODE § 4.56.110 (2020); WASH. REV. CODE § 6.01.060 (2020).

53. WASH. REV. CODE § 7.68.035(1)(a) (2020); LFO REFERENCE GUIDE, *supra* note 15.

54. See *State v. Catling*, 193 Wash. 2d 252, 265, 438 P.3d 1174, 1180 (2019) (explaining that a

Washington's state and local governments spent a total of \$15.8 million on LFO collection efforts in 2009—reaping a net profit of \$5.8 million.⁵⁵ With an increasing debt load, and the administrative costs of collecting LFOs all but canceling out their revenue, Washington's legislature decided to make a change in 2018. The legislature rewrote several key LFO statutes in the Revised Code of Washington (RCW) to bar courts from imposing certain LFOs on defendants who meet a statutory definition for indigence.⁵⁶ The 2018 amendments altered RCW 10.101.0101, which now instructs courts to find a defendant indigent for the purpose of LFO payments if, at the time of sentencing, the person has been involuntarily committed in a mental health facility, has a post-tax annual income that is less than 125% of the federal poverty level, or receives certain types of public assistance.⁵⁷ The relevant types of public assistance include “[t]emporary assistance for needy families, aged, blind, or disabled assistance benefits, [certain] medical care services . . . , pregnant women assistance benefits, poverty-related veterans' benefits, food stamps . . . , refugee resettlement benefits,” Medicaid, and Supplemental Security Income.⁵⁸

Under the 2018 legislative amendments, even if a court has ordered a defendant to pay LFOs as part of their sentence, defendants may now petition for remission of any unpaid discretionary LFOs.⁵⁹ If the defendant can demonstrate that paying the discretionary LFOs “will impose manifest hardship on the defendant or the defendant's immediate family,” the court may remit the LFOs wholly or in part, modify the defendant's method of payment, or convert the unpaid portion of the LFOs to community service hours.⁶⁰

Over the last decade, Washington's courts and legislature have amended and reworked the LFO system to increase equity. Today, only a few mandatory LFOs persist. An example of a remaining mandatory LFO is that a person's first felony conviction—as well as certain domestic violence and sex crime misdemeanors—will result in the collection of a

county clerk may monitor defendant's changing circumstances and to alter defendant's payment schedule “as needed,” but cannot remit mandatory LFOs).

55. Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL'Y 509, 527–28 (2011) (citing WASH. STATE ASS'N OF CNTY. OFFS., 2009 REPORT TO THE WASHINGTON STATE LEGISLATURE ON THE FISCAL IMPACT OF ESSB 5990 (2009)).

56. WASH. REV. CODE § 9.94A.760(1) (2020); WASH. REV. CODE § 10.01.160(3).

57. WASH. REV. CODE § 10.101.010(3)(a)–(c).

58. *Id.* § 10.101.010(3)(a).

59. *Id.* § 10.01.160(4).

60. *Id.*

DNA sample and a fee of \$100.⁶¹

Only one mandatory LFO still applies to almost every single criminal case, regardless of the severity of the crime or any other factor. Any person who is convicted or pleads guilty in a Washington Superior Court to *any* crime (except certain minor motor vehicle offenses) must pay the VPA: \$250 for a misdemeanor or \$500 for a felony.⁶² The VPA is then deposited “into a fund maintained exclusively for the support of comprehensive programs to encourage and facilitate testimony by the victims of crimes and witnesses to crimes,” which the county runs.⁶³ The fund also receives at least 1.75% of the money a county collects from most other LFOs⁶⁴ and 1.75% of every city’s and town’s receipts from parking tickets.⁶⁵ Washington instituted and preserved the VPA to financially support witness and victim advocacy, with particular concern dedicated to the families of victims “killed as a result of a criminal act.”⁶⁶ A county’s prosecutor must approve of a program before that program may receive

61. WASH. REV. CODE § 43.43.754 (2020); *id.* § 43.43.7541. Additionally, any conviction or guilty plea results in a \$200 filing fee, although recent amendments to the statute now prohibit courts from imposing this fee on defendants who are indigent. WASH. REV. CODE § 36.18.020(2)(h) (2020); 2018 Wash. Sess. Laws 1632 (Legal Financial Obligations).

62. WASH. REV. CODE § 7.68.035(1)–(2) (2020).

63. *Id.* § 7.68.035(4).

64. *Id.* (“Each county shall deposit [100%] of the money it receives per case or cause of action . . . not less than [1.75%] of the remaining money it retains under RCW 10.82.070 and the money it retains under chapter 3.62 RCW, and all money it receives under subsection (7) of this section into a fund”); *see also* WASH. REV. CODE § 10.82.070 (“(1) All sums of money derived from costs, fines, penalties, and forfeitures imposed or collected, in whole or in part, by a superior court for violation of orders of injunction, mandamus and other like writs, for contempt of court, or for breach of the penal laws shall be paid in cash . . . within [20] days after the collection, to the county treasurer of the county in which the same have accrued. (2) . . . [T]he county treasurer shall remit monthly [32%] of the money received . . . to the state treasurer for deposit in the state general fund and shall deposit the remainder as provided by law. ‘Certain costs’ as used in this subsection, means . . . those costs awarded against convicted defendants in criminal actions under RCW 10.01.160, 10.46.190, or 36.18.040, or other similar statutes . . . awarded for the specific reimbursement of costs incurred by the state or county in the prosecution of the case, including the fees of defense counsel (3) All fees, fines, forfeitures and penalties collected or assessed by a district court because of the violation of a state law shall be remitted as provided in chapter 3.62 RCW as now exists or is later amended. All fees, fines, forfeitures, and penalties collected or assessed by a superior court in cases on appeal from a lower court shall be remitted to the municipal or district court from which the cases were appealed.”).

65. WASH. REV. CODE § 7.68.035(7).

66. 1996 Wash. Sess. Laws 375 (“The increased financial support is intended to allow county victim/witness programs to more fully assist victims and witnesses through the criminal justice processes. On the state level, the increased funds will allow the remedial intent of the crime victims compensation program to be more fully served. Specifically, the increased funds from offender penalty assessments will allow more appropriate compensation for families of victims who are killed as a result of a criminal act”).

money from the VPA fund.⁶⁷

Washington originally instituted the VPA to relieve some of the burden of compensating and assisting victims from the Department of Labor and Industries.⁶⁸ The legislature has reiterated its desire to financially support victims—especially the families of homicide victims—through several iterations of the statute.⁶⁹ Although Washington courts must impose the VPA in almost every criminal case that results in a conviction or a guilty plea, actually collecting the money from defendants does not always prove feasible or legal.

C. How Social Security's Anti-Attachment Provision Affects LFOs in Washington

Roughly 1.3 million Washington residents collected Social Security checks in 2019.⁷⁰ More specifically, 148,731 Washington residents received SSI benefits, which are only available to “low-income aged, blind, or disabled persons.”⁷¹ Although many defendants have financial troubles, those who collect SSI face unique challenges compared to even ordinary Social Security beneficiaries.

67. The programs must meet several criteria: they must provide victims and witnesses with “comprehensive services,” with a “particular emphasis on serious crimes against persons and property”; be administered by the county prosecutor directly or by contract; make reasonable efforts “to inform the known victim or [their] surviving dependents of the existence of this chapter and the procedure for making application for benefits”; assist victims with “the restitution and adjudication process”; and aid “victims of violent crimes in the preparation and presentation of their claims to the department of labor and industries under this chapter.” WASH. REV. CODE § 7.68.035(4).

68. See 1982 Wash. Sess. Laws 1008 (“The intent of the legislature is that the victim of crime program will be self-funded. Toward that end, the department of labor and industries shall not pay benefits beyond the resources of the account. . . . It is further the intent of the legislature that the percentage of funds devoted to comprehensive programs for victim assistance, as provided in section 1 of this act, be re-examined to ensure that it does not unreasonably conflict with the higher priority of compensating victims.”).

69. See 1996 Wash. Sess. Laws 374–75 (“The legislature finds that current funding for county victim-witness advocacy programs is inadequate. Also, the state crime victims compensation program should be enhanced to provide for increased benefits to families of victims who are killed as a result of a criminal act. It is the intent of the legislature to provide increased financial support for the county and state crime victim and witness programs by requiring offenders to pay increased penalty assessments upon conviction of a gross misdemeanor or felony crime. The increased financial support is intended to allow county victim/witness programs to more fully assist victims and witnesses through the criminal justice processes. On the state level, the increased funds will allow the remedial intent of the crime victims compensation program to be more fully served. Specifically, the increased funds from offender penalty assessments will allow more appropriate compensation for families of victims who are killed as a result of a criminal act, including reasonable burial benefits.”).

70. *Congressional Statistics, December 2019: Washington*, SOC. SEC. ADMIN., OFF. OF RET. & DISABILITY POL’Y, https://www.ssa.gov/policy/docs/factsheets/cong_stats/2019/wa.html [<https://perma.cc/LU7Z-N535>].

71. *Id.*

SSI recipients are not merely indigent. Applying for SSI requires meeting a high bar for proving an inability to work—only 28.8% of applicants nationwide received benefits in 2018.⁷² Applicants must meet a statutory definition for disability, which means that they must qualify as unable “to engage in any substantial gainful activity” due to blindness or “any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.”⁷³ Indeed, anyone collecting disability benefits has already gone through a rigorous process—one which frequently requires the assistance of an attorney—to certify that they cannot perform any “substantial gainful activity” because of an impairment.⁷⁴

Despite the immense challenge of acquiring SSI benefits, keeping those benefits may be more complicated than qualifying for them in the first place. Even after granting benefits, the government may reduce the amount paid if the recipient acquires additional resources that can be used to meet food or shelter needs.⁷⁵ The government may also terminate SSI benefits if the recipient accumulates more than \$2,000 in assets (or \$3,000 for a married couple).⁷⁶

Social Security benefits also have a different legal status than other forms of income. The federal Social Security Act’s anti-attachment

72. See *Annual Statistical Report on the Social Security Disability Insurance Program, 2019: Outcomes of Applications for Disability Benefits*, SOC. SEC. ADMIN., OFF. OF RET. & DISABILITY POL’Y, https://www.ssa.gov/policy/docs/statcomps/di_asr/2019/sect04.html [https://perma.cc/XK6U-DJWW] (showing, in Table Sixty, the award rate has decreased from 56% in 1999 to 28.8% in 2018).

73. 42 U.S.C. § 423(d)(1)(A)–(B); see also *id.* § 423(d)(5)(A) (“An individual shall not be considered to be under a disability unless [they] furnish[] such medical and other evidence of the existence thereof as the Commissioner of Social Security may require. An individual’s statement as to pain or other symptoms shall not alone be conclusive evidence of disability as defined in this section; there must be medical signs and findings, established by medically acceptable clinical or laboratory diagnostic techniques, which show the existence of a medical impairment that results from anatomical, physiological, or psychological abnormalities which could reasonably be expected to produce the pain or other symptoms alleged and which, when considered with all evidence required to be furnished under this paragraph (including statements of the individual or [their] physician as to the intensity and persistence of such pain or other symptoms which may reasonably be accepted as consistent with the medical signs and findings), would lead to a conclusion that the individual is under a disability. Objective medical evidence of pain or other symptoms established by medically acceptable clinical or laboratory techniques (for example, deteriorating nerve or muscle tissue) must be considered in reaching a conclusion as to whether the individual is under a disability.”).

74. 20 C.F.R. § 404.1520 (2020).

75. *Countable Income for SSI Program*, SOC. SEC. ADMIN. [hereinafter *Countable Income for SSI Program*], <https://www.ssa.gov/oact/cola/countableincome.html> [https://perma.cc/8DKX-9KUL].

76. *Spotlight on Resources—2019 Edition*, SOC. SEC. ADMIN. [hereinafter *Spotlight on Resources—2019 Edition*], <https://www.ssa.gov/ssi/spotlights/spot-resources.htm> [https://perma.cc/W3KX-ACKU].

provision protects money provided under the title from “execution, levy, attachment, garnishment, or other legal process, or . . . the operation of any bankruptcy or insolvency law.”⁷⁷ Washington’s Supreme Court has held that the provision applies to LFO payments: if Social Security benefits are a defendant’s only source of income, a court cannot order that defendant to make payments on those obligations.⁷⁸ However, the anti-attachment provision does not prevent courts from *imposing* LFOs on such defendants in the first place.⁷⁹

D. *Wakefield and Catling’s Effect on LFOs for Social Security Recipients*

Two cases from recent years have altered LFO laws in Washington, beginning to turn the tide in favor of defendants who survive on Social Security benefits. But the cases also left a hole in the law that defendants such as Ms. Conway can fall through.

In *City of Richland v. Wakefield*,⁸⁰ a sentencing court ordered Briana Wakefield to make monthly LFO payments of \$15.⁸¹ Ms. Wakefield was a single mother of four who was both homeless and disabled—her only income was the her monthly Social Security check of \$710.⁸² Ms. Wakefield appealed to the Supreme Court of Washington to ask for the remittance of her discretionary LFOs; she did not contest her mandatory LFOs or the imposition of either set of penalties.⁸³

The Supreme Court of Washington held that the sentencing court violated the anti-attachment provision of the Social Security Act when it ordered Ms. Wakefield to pay \$15 per month from her Social Security benefits towards her LFOs.⁸⁴ The Court explicitly held that “federal law prohibits courts from ordering defendants to pay LFOs if the person’s only source of income” is Social Security benefits.⁸⁵ Consequently, *Wakefield* bars the imposition of discretionary LFOs on defendants who a court finds indigent, and protects Social Security benefits from attachment to pay mandatory LFO payments. But it does not allow petitions for remission or stop courts from imposing mandatory LFOs in the first place on

77. 42 U.S.C. § 407(a).

78. *City of Richland v. Wakefield*, 186 Wash. 2d 596, 609, 380 P.3d 459, 466 (2016).

79. *State v. Catling*, 193 Wash. 2d 252, 260–61, 438 P.3d 1174, 1178 (2019).

80. 186 Wash. 2d 596, 380 P.3d 459 (2016).

81. *Id.* at 599, 380 P.3d at 461.

82. *Id.*

83. *Id.* at 601, 380 P.3d at 462.

84. *Id.* at 608, 380 P.3d at 465 (citing 42 U.S.C. § 407(a)).

85. *Id.* at 609, 380 P.3d at 465–66.

defendants who are indigent.

Three years later, Jason Catling, the defendant in *State v. Catling*,⁸⁶ unsuccessfully attempted to expand *Wakefield* to shield defendants relying on Social Security from the imposition of mandatory LFOs.⁸⁷ Mr. Catling challenged the imposition of his mandatory LFOs on the grounds that, because he was indigent and reliant on Social Security, imposing those LFOs ran counter to both *Wakefield* and the Social Security Act.⁸⁸ The Supreme Court of Washington re-affirmed that defendants who are indigent and rely on Social Security could not be forced to *pay* any LFOs if they had no other income besides Social Security.⁸⁹ But the Court continued to permit sentencing courts to impose mandatory LFOs on such defendants.⁹⁰

Today, *Wakefield* ensures that defendants who are indigent can avoid or remit discretionary LFOs, and *Catling* protects Social Security recipients from being court-ordered to pay mandatory LFOs. However, to avoid forced payment, defendants relying on Social Security must continually demonstrate that those benefits are their only income through regular appearances before a clerk.⁹¹ Because courts cannot consider ability to pay before imposing mandatory LFOs and cannot waive the mandatory fines, even SSI recipients—vetted by the government to ensure that they cannot procure additional income—have no mechanism to clear their LFO debt.

Court challenges to LFOs have struggled to identify explicit constitutional violations, especially because indigent defendants are not a protected class under the Equal Protection Clause,⁹² which leaves public

86. 193 Wash. 2d 252, 438 P.3d 1174 (2019).

87. *Id.* at 255, 438 P.3d at 1175.

88. *Id.* at 254–56, 438 P.3d at 1175–76.

89. *Id.* at 260, 438 P.3d at 1178.

90. *Id.* (“An offender being indigent . . . is not grounds for failing to impose . . . the crime victim penalty assessment under RCW 7.68.035.” (quoting 2018 Wash. Sess. Laws 1625)). *Catling* relied heavily on a Michigan case that upheld a restitution order when the defendant’s only income was Social Security benefits. The *In re Lampart* Court held that the Social Security Act “merely prohibit[ed] the trial court from using legal process to compel satisfaction of the restitution order from those benefits” but did not prevent courts from imposing the orders on defendants whose only source of income was Social Security. 856 N.W.2d 192, 203 (Mich. Ct. App. 2014). The *Catling* Court specified that sentencing orders must indicate that LFOs “may not be satisfied out of any funds subject to” the Social Security Act, but noted that the Act lacks specific language immunizing against the imposition of mandatory LFOs for defendants who rely on those benefits to survive. *Catling*, 193 Wash. 2d at 264–66, 438 P.3d at 1180–81 (2019) (citing 42 U.S.C. § 407(a)).

91. *Catling*, 193 Wash. 2d at 265, 438 P.3d at 1180 (“During the period of repayment, the county clerk may require the offender to report to the clerk for the purpose of reviewing the appropriateness of the collection schedule for the legal financial obligation.” (citing 2018 Wash. Sess. Laws 1628)).

92. *See, e.g., State v. Allemand*, Nos. 32560-1-III, 32456-7-III, 2016 Wash. App. LEXIS 743, at

policy as the main argument in favor of amending the laws.⁹³ Due process challenges to mandatory LFOs for indigent defendants hit a similar wall because of the presumption that defendants may gain the ability to pay off their LFOs in the future.⁹⁴ In brief: LFOs will not violate an indigent defendant's equal protection or due process rights unless the state imprisons the defendant for failure to pay.⁹⁵ Public interest concerns thus

*24 (Apr. 14, 2016) (indicating that indigent defendants are not a protected class). *But see* Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake, 150 Wash. 2d 791, 806–07, 83 P.3d 419, 425–26 (2004) (indicating that WASH. CONST. art I, § 12 is potentially more protective than the U.S. Constitution's Equal Protection Clause). A statute permitting recoupment of public defense costs from indigent defendants did not violate equal protection because it did not constitute invidious discrimination against impoverished persons, or discrimination between people who are convicted versus acquitted. *Fuller v. Oregon*, 417 U.S. 40, 46 (1974). Washington courts have used *Fuller* to justify mandatory LFOs in the face of equal protection challenges. *State v. Mathers*, 193 Wash. App. 913, 926, 376 P.3d 1163, 1170 (2016) (“Mathers also argues that treating DNA and VPA fees as mandatory violates equal protection under *Fuller*. . . . In that case, the Court reviewed non-mandatory costs accumulated from prosecuting a specific defendant. Mathers improperly relies on [*Fuller*] to demonstrate that the Fourteenth Amendment is only satisfied if RCW 10.01.160(3) is read in tandem with specific cost and fee statutes. *Fuller* asserts no such precedent. The case does not address mandatory cost and fee statutes. Following our Supreme Court precedent, we conclude the imposition of DNA and VPA fees on Mathers did not violate equal protection.” (citations omitted)).

93. *State v. Barklind* delineated “the salient features of a constitutionally permissible costs and fees structure.” *State v. Curry*, 118 Wash. 2d 911, 915, 829 P.2d 166, 167 (1992) (citing *State v. Barklind*, 87 Wash. 2d 814, 557 P.2d 314 (1976)). The Court held that fees (1) must not be mandatory; (2) can only be imposed on convicted defendants; (3) may only be ordered if the defendant is or will be able to pay; (4) must consider the defendant's financial resources; (5) may not be imposed if there is no likelihood defendant's indigency will end; (6) the defendant must be able to petition the court for remission; (7) the defendant cannot be held in contempt for failure to pay if the default did not stem from an intentional refusal to obey the court order or a failure to make a good faith effort to repay. *Barklind*, 87 Wash. 2d at 817–18, 557 P.2d at 317–18; *see also* *State v. Blank*, 131 Wash. 2d 230, 238, 930 P.2d 1213, 1218 (1997) (“While some courts have reasoned that a recoupment statute itself must expressly contain those conditions rendering it constitutional . . . we have already acknowledged that a recoupment order may be entered in the absence of a statute expressly containing all the necessary procedural safeguards, provided that constitutionally necessary features of a recoupment structure are in place.”). Thus, even though mandatory LFOs imposed on defendants who are indigent or disabled may ignore the spirit of *Barklind*, they do not technically violate the letters of the constitution.

94. *See, e.g., State v. Seward*, 196 Wash. App. 579, 384 P.3d 620 (2017) (imposing mandatory LFOs on indigent defendants permissible when premised on assumption that defendants will gain ability to pay in future). Previous cases on the subject indicated that courts could impose mandatory LFOs on indigent defendants as long as those defendants retained the ability to modify the debt via a demonstration that they were “ultimately unable to pay.” *Curry*, 118 Wash. 2d at 916, 829 P.2d at 168; *see also Fuller*, 417 U.S. at 47 (noting that defendants can argue at any time that payment would impose “manifest hardship”); *Bearden v. Georgia*, 461 U.S. 660, 667–68 (1983) (“[I]f the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it.”).

95. *Bearden*, 461 U.S. at 667–68 (“The rule of *Williams* and *Tate*, then, is that the State cannot ‘impos[e] a fine as a sentence and then automatically conver[t] it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.’ In other words, if the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter

provide the best argument for judicial or legislative relief.

With no remission mechanism currently in place for mandatory LFOs, ongoing debt burdens and persistent court jurisdiction impede SSI-dependent defendants from acquiring stable housing or financial security. As a consequence, such defendants struggle to reintegrate into society.

II. MOTIVATIONS FOR JUSTICE: PUBLIC INTEREST CONCERNS STEMMING FROM LFOS IN WASHINGTON

Despite the State's argument that remitting mandatory LFOs would do little to benefit the public's interests,⁹⁶ the current state of LFO law in Washington hinders defendants who are disabled and indigent from reintegrating into society.

Washington's legislature did not intend for LFOs to be universally equal in application.⁹⁷ However, LFOs produce significant disparities on several fronts. For example, "African-Americans in Washington State are 2.3 times more likely than whites to be sentenced to fines and fees, and carry about three times the debt in unpaid monetary sanctions."⁹⁸ Furthermore, a 2008 study examining LFOs in Washington State found that, due to interest accrual and high rates of non-payment, "the legal debt of most of those sentenced in 2004 had grown rather than shrunk by 2007."⁹⁹

When calculating benefits, the income that Washington derives from LFOs is also questionable. Income from LFOs was equivalent to "an average of 1.3 percent of Washington State county criminal justice budgets" in 2006, challenging the notion that LFOs are a major source of funding for courts.¹⁰⁰ Illustratively, Washington's state and county governments collected \$21.6 million in LFOs in 2003–2004.¹⁰¹ However, the state and counties spent \$16 million on collection efforts for LFOs in

imprison a person solely because he lacked the resources to pay it." (alterations in original) (citations omitted) (quoting *Gate v. Short*, 401 U.S. 395, 398 (1971))).

96. Answer to Petition for Review at 20, *State v. Conway*, 194 Wash. 2d 1010, 452 P.3d 1240 (2019) (No. 97374-1-II) [hereinafter Answer to Petition for Review] ("Conway's case is not representative of all indigent defendants and is not a case in which the public would have a substantial interest.").

97. *See State v. Blazina*, 182 Wash. 2d 827, 834, 344 P.3d 680, 683 (2015).

98. Eckart, *supra* note 10.

99. BECKETT ET AL., *supra* note 38, at 2.

100. *Id.* at 73.

101. Beckett & Harris, *supra* note 55, at 528 (citing WASH. STATE ASS'N OF CNTY. OFFS., 2009 REPORT TO THE WASHINGTON STATE LEGISLATURE ON THE FISCAL IMPACT OF ESSB 5990 (2009)).

that time period.¹⁰² And the State's direct collection costs for LFOs, such as mailing monthly statements and employing additional clerks to work on LFO collection, "include[d] \$3 million in state funds" in addition to other indirect costs.¹⁰³ Accordingly, the net profit from LFOs for the year was less than \$6 million.¹⁰⁴

Statistics such as these prompted the Washington legislature to pass Washington House Bill (HB) 1783 to end interest on non-restitution LFOs and limit their impacts on defendants who are indigent.¹⁰⁵

A. *Constraints on Resources for SSI Recipients*

Washington's high housing prices and the statutory limits on SSI recipients' ability to procure additional income contribute to Washington's disproportionately large number of individuals who are both homeless and have disabilities.

To receive SSI, an individual must be unable "to engage in any substantial gainful activity" due to blindness or a physical or mental impairment that is either terminal or has lasted or can be expected to last for at least a year.¹⁰⁶ The amount of benefits provided will be reduced if the recipient acquires additional resources that they can use to meet food

102. *Id.* at 527–28 (citing WASH. STATE ASS'N OF CNTY. OFFS., 2009 REPORT TO THE WASHINGTON STATE LEGISLATURE ON THE FISCAL IMPACT OF ESSB 5990 (2009)).

103. The study's authors were unable to determine whether LFO collection actually generated enough revenue to pay for the collection of the fees due to insufficient data. BECKETT ET AL., *supra* note 38, at 71–72.

104. Beckett & Harris, *supra* note 55, at 527–28 (citing WASH. STATE ASS'N OF CNTY. OFFS., 2009 REPORT TO THE WASHINGTON STATE LEGISLATURE ON THE FISCAL IMPACT OF ESSB 5990 (2009)).

105. See *Public Hearing on H.B. 1501, H.B. 1720, H.B. 1798, H.B. 1822, and H.B. 1783 Before the H. Comm. on the Judiciary*, 2017 Leg., 65th Sess. (Wash. 2017) [hereinafter *H. Judiciary Comm. Hearing*], <https://www.tvw.org/watch/?clientID=9375922947&eventID=2017021130&startStreamAt=1230&stopStreamAt=1900&autoStartStream=true> [<https://perma.cc/E8JQ-A57B>] (statement of Rep. Roger Goodman, Chair, H. Comm. on Pub. Safety).

106. 42 U.S.C. § 423(d)(1)(A)–(B); see also *id.* § 423(d)(5)(A) ("An individual shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Commissioner of Social Security may require. An individual's statement as to pain or other symptoms shall not alone be conclusive evidence of disability as defined in this section; there must be medical signs and findings, established by medically acceptable clinical or laboratory diagnostic techniques, which show the existence of a medical impairment that results from anatomical, physiological, or psychological abnormalities which could reasonably be expected to produce the pain or other symptoms alleged and which, when considered with all evidence required to be furnished under this paragraph (including statements of the individual or his physician as to the intensity and persistence of such pain or other symptoms which may reasonably be accepted as consistent with the medical signs and findings), would lead to a conclusion that the individual is under a disability. Objective medical evidence of pain or other symptoms established by medically acceptable clinical or laboratory techniques (for example, deteriorating nerve or muscle tissue) must be considered in reaching a conclusion as to whether the individual is under a disability.").

or shelter needs.¹⁰⁷ Additionally, an individual's SSI benefits may be terminated outright if the recipient accumulates more than \$2,000 in assets; or \$3,000 for a couple if both spouses collect SSI.¹⁰⁸

In 2020, a single individual earning precisely 125% of the federal poverty line—the threshold below which a Washington court will not impose discretionary LFOs¹⁰⁹—would have a monthly income of roughly \$1,329.¹¹⁰ A married couple earning \$1,796 per month would have the same financial status, with an added \$467 of wiggle room for each additional family member.¹¹¹ A couple with both spouses collecting SSI received only \$1,175 per month in 2020, and an individual received only \$783 per month.¹¹²

The federal government does not consider local housing markets when calculating benefits. Washington's housing recently ranked seventh most expensive in the nation, with a fair market monthly rent of \$1,164 for a one-bedroom apartment in 2019,¹¹³ up from \$982 in 2017.¹¹⁴ Again: a couple with both parties collecting SSI received only \$1,175 per month in 2020.¹¹⁵

Financial hardship also has greater repercussions for individuals with disabilities when it comes to retaining shelter. In 2010, 36.8% of people in homeless shelters nationwide reported disabilities, compared to 15.3% of the overall population.¹¹⁶ On the state level, 5,775 Washington residents with disabilities experienced homelessness for at least twelve out of the last thirty-six months in 2018.¹¹⁷ And the number of individuals

107. *Countable Income for SSI Program*, *supra* note 75.

108. *Spotlight on Resources—2019 Edition*, *supra* note 76.

109. WASH. REV. CODE § 10.101.010(3)(a)–(c) (2020).

110. *Federal Poverty Guidelines—2020*, MASSLEGAL SERVS. (Jan. 21, 2020), <https://www.masslegalservices.org/content/federal-poverty-guidelines-2020> [<https://perma.cc/QA28-FHTK>].

111. *Id.*

112. *SSI Federal Payment Amounts*, SOC. SEC. ADMIN. [hereinafter *SSI Federal Payment Amounts*], <https://www.ssa.gov/oact/cola/SSlamts.html> [<https://perma.cc/4X5S-M6YA>].

113. NAT'L LOW INCOME HOUS. COAL., *OUT OF REACH 2019*, at 256 (2019) [hereinafter *OUT OF REACH 2019*].

114. NAT'L LOW INCOME HOUS. COAL., *OUT OF REACH 2017: THE HIGH COST OF HOUSING 252* (2017) [hereinafter *OUT OF REACH 2017*].

115. *SSI Federal Payment Amounts*, *supra* note 112.

116. U.S. DEP'T OF HOUS. & URB. DEV., *THE 2010 ANNUAL HOMELESS ASSESSMENT REPORT TO CONGRESS 16* (2010). That number is nevertheless a decrease from the worst part of the Great Recession in 2008, when 43% of people living in homeless shelters reported having a disability. REBECCA VALLAS, CTR. FOR AM. PROGRESS, *DISABLED BEHIND BARS: THE MASS INCARCERATION OF PEOPLE WITH DISABILITIES IN AMERICA'S JAILS AND PRISONS 14* (2016) (citing U.S. DEP'T OF HOUS. & URB. DEV., *THE 2008 ANNUAL HOMELESS ASSESSMENT REPORT TO CONGRESS* (2009)).

117. U.S. DEP'T OF HOUS. & URB. DEV., *THE 2018 ANNUAL HOMELESS ASSESSMENT REPORT TO CONGRESS 95* (2018).

with disabilities who are on the brink of homelessness is staggering. The Department of Housing and Urban Development found that 40% of households that met the Department's standard for "worst-case housing needs"¹¹⁸ in 2008 were headed by someone between eighteen and sixty-one years of age, and had at least one household member with a disability.¹¹⁹ If housing prices continue to rise at the same rates that they have recently—an 18.53% jump in just two years—Washington's homeless population is sure to continue rising with it.¹²⁰ The COVID-19 pandemic will likely exacerbate the crisis.

B. Criminal Justice Interactions for Disabled Individuals

Interactions with the criminal justice system compound the inherent struggles that SSI recipients already face. From the outset, individuals with disabilities are disproportionately likely to interact with the criminal justice system. Jails and prisons in 2016 contained three times as many people with mental health conditions as state mental hospitals.¹²¹ Further, incarcerated individuals report disabilities at almost three times the rate of nonincarcerated individuals.¹²²

In addition to the everyday challenges of existing with a disability, reentry programs for the formerly incarcerated "often lack necessary accommodations and connections to community services" that would enable them to meet the needs of individuals with disabilities.¹²³ Only 19.1% of the population with a disability was employed in 2018, compared to 65.9% of the population without a disability.¹²⁴ The unemployment rate—measuring individuals actively searching for work—for disabled individuals was more than double the rate for

118. KATHRYN P. NELSON, TECH. ASSISTANCE COLLABORATIVE, THE HIDDEN HOUSING CRISIS: WORST CASE HOUSING NEEDS AMONG ADULTS WITH DISABILITIES 1–2 (2008), <http://www.tacinc.org/media/13262/Hidden%20Housing%20Crisis.pdf> [<https://perma.cc/FCR9-BPMH>] (defining "worst-case housing needs" as "unassisted renters with income below half of their area's median income ('very-low-income' renters) who pay more than half of their income for housing or live in severely substandard housing").

119. VALLAS, *supra* note 116, at 14 (citing NELSON, *supra* note 118).

120. Compare OUT OF REACH 2019, *supra* note 113, at 256, with OUT OF REACH 2017, *supra* note 114, at 252.

121. VALLAS, *supra* note 116, at 1–2 (citing JENNIFER BRONSON, LAURA M. MARUSCHAK & MARCUS BERZOFSKY, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., DISABILITIES AMONG PRISON AND JAIL INMATES, 2011–12 (2015)).

122. *Id.* (citing BRONSON ET AL., *supra* note 121).

123. *Id.* at 3.

124. *Persons with a Disability: Labor Force Characteristics Summary*, U.S. BUREAU OF LAB. STATS.: ECON. NEWS RELEASE (Feb. 26, 2019), <https://www.bls.gov/news.release/disabl.nr0.htm> [<https://perma.cc/UVK2-96PV>].

individuals without a disability in 2018, at 8.0% versus 3.7%.¹²⁵

Former defendants cannot vacate their convictions without discharging their LFO debt—even if their only income is SSI.¹²⁶ A defendant must pay off all their LFO debt to obtain a certificate of discharge, which Washington requires to vacate a conviction from their criminal record.¹²⁷ Convictions that a person cannot vacate sprout collateral consequences, appearing on background checks that are crucial to “stable employment, housing, financial status, and family relations that enable successful reintegration.”¹²⁸

Despite the State’s arguments that mandatory LFOs do not present a significant public interest concern,¹²⁹ a storm brews on the horizon as Washington’s homeless population has continued to rise in recent years.¹³⁰ Experiencing homelessness correlates to higher levels of psychiatric distress, which can exacerbate existing mental illnesses.¹³¹ This triggers a spiral: someone who is disabled by mental illness is likely

125. *Id.*

126. WASH. REV. CODE § 9.94A.637(1)(a) (2020); *see* State v. Catling, 193 Wash. 2d 252, 268, 438 P.3d 1174, 1182 (2019) (Gonzalez, J., dissenting).

127. WASH. REV. CODE § 9.94A.640 (“Every offender who has been discharged under RCW 9.94A.637 may apply to the sentencing court for a vacation of the offender’s record of conviction.”); *id.* § 9.94A.637(1) (“When an offender has completed all requirements of the sentence, including any and all legal financial obligations . . . the secretary or the secretary’s designee shall notify the sentencing court, which shall discharge the offender and provide the offender with a certificate of discharge . . .”); *id.* § 9.94A.637(2)(a) (“When an offender has reached the end of his or her supervision with the department and has completed all the requirements of the sentence *except his or her legal financial obligations*, the secretary’s designee shall provide the county clerk with a notice that the offender has completed all nonfinancial requirements of the sentence. The notice must list the specific sentence requirements that have been completed, so that it is clear to the sentencing court that *the offender is entitled to discharge upon completion of the legal financial obligations of the sentence.*” (emphasis added)).

128. Adams et al., *supra* note 13, at 4.

129. Answer to Petition for Review, *supra* note 96, at 20 (“Conway’s case is not representative of all indigent defendants and is not a case in which the public would have a substantial interest.”).

130. *See, e.g.*, Kate Walters, *Seattle Homeless Population Is Third Largest in U.S., After LA and NYC*, KUOW (Dec. 18, 2018, 7:19 PM), <https://www.kuow.org/stories/here-s-how-seattle-and-washington-compare-to-national-homeless-trends> [https://perma.cc/8VAA-4YFY] (“Washington state’s homeless population saw one of the biggest increases in the country this year, up by more than 1,000 people over last year. More than 22,000 people were counted in shelters and on the streets in Washington on a single night in 2018. The state also had one of the highest rates of people living outside.”); Vernal Coleman, *Washington State Homeless Numbers Grew Last Year*, SEATTLE TIMES (Oct. 12, 2017, 3:06 PM), <https://www.seattletimes.com/seattle-news/washington-state-homeless-numbers-grew-last-year/> [https://perma.cc/N8ZT-HSB8] (“Washington’s homeless population rose by 3.5 percent over last year despite increasing efforts to place more people living without shelter into permanent housing.”).

131. Peter Tarr, *Homelessness and Mental Illness: A Challenge to Our Society*, BRAIN & BEHAV. RSCH. FOUND. (Nov. 19, 2018), <https://www.bbrfoundation.org/blog/homelessness-and-mental-illness-challenge-our-society> [https://perma.cc/2DRG-KJBH].

eligible for SSI, but the program's limits on recipients' asset acquisition hampers their ability to retain a personal safety net.¹³² Because of SSI asset limits, even a \$250 VPA for a misdemeanor will consume a significant portion of the recipient's savings—if they have any at all—potentially eviscerating their ability to eat or pay rent.¹³³ Even if a recipient has only mandatory LFOs that are immediately suspended because of their SSI status, that person must still, at the very least, acquire transportation to court to demonstrate proof of their ongoing SSI status. And if their ability to pay rent is sufficiently crippled, an eviction will follow, kicking the recipient onto the street with an ongoing LFO debt burden and permanent conviction record.

The spiral will not end once the former defendant lands on the street. Homeless individuals with severe mental illness have some of the highest rates of interaction with the criminal justice system, and each new conviction triggers additional mandatory LFOs.¹³⁴ With approximately 80% of private landlords using backgrounds checks, former defendants who are disabled and cannot retire their LFOs to clear their records are even more likely to fail a background check.¹³⁵ Moreover, remitting even discretionary LFOs requires a court appearance, which presents an additional complication for those who have no address at which they can receive summons to court.¹³⁶ Programs that provide stable housing for time periods over one year can help improve mental health,¹³⁷ but such initiatives amount to a band-aid remedy for the symptoms of the underlying problem.¹³⁸

Collateral consequences of convictions abound even for able-bodied individuals with LFOs. By itself, outstanding LFO debt creates “incentives to avoid work, to return to crime, and/or to hide from the

132. *Spotlight on Resources—2019 Edition*, *supra* note 76.

133. *See supra* section II.A.

134. Tarr, *supra* note 131.

135. *See* VALLAS, *supra* note 116, at 15.

136. Erasmus Baxter, *Despite Reform Attempts, Court-Imposed Costs Burden Low-Income Defendants*, SEATTLE TIMES (July 14, 2019, 6:00 AM), <https://www.seattletimes.com/seattle-news/homeless/despite-reform-attempts-court-imposed-costs-burden-low-income-defendants/> [<https://perma.cc/U6UA-ED5K>].

137. Tarr, *supra* note 131.

138. For example, Ms. Conway has worked with a housing support organization, Share A.S.P.I.R.E., for several years, but was still struggling to find stable housing throughout her appeal. Brief for ACLU et al. as Amici Curiae Supporting Petitioner at 2, *State v. Conway*, 194 Wash. 2d 1010, 452 P.3d 1240 (2019) (No. 50032-9-II); *see* Jessica Lightheart, *Share Housing Programs*, SHARE (Oct. 21, 2013), <https://www.sharevancouver.org/2013/10/21/share-housing-programs/> [<https://perma.cc/J4CY-NCKX>] (explaining that Share A.S.P.I.R.E. provides housing support for families, veterans, and people with disabilities).

authorities.”¹³⁹ In conjunction with unshakeable debt, a permanent conviction history impedes defendants’ ability to reintegrate into society. Thus, LFOs trap defendants who are indigent and disabled under ever-growing collateral consequences, with no end in sight.

III. JUSTICE ON THE HORIZON: CHANGING TIDES IN THE COURTS AND LEGISLATURE

Washington courts have recently begun to push back against partially funding the criminal justice system out of the pockets of defendants who are indigent. The legislature responded in kind, and the two branches have spent the last few years incrementally limiting the situations in which courts must impose certain LFOs.

A. *State v. Blazina Starts to Shift the Balance*

For almost a decade, RCW 10.01.160, one of the major statutes governing discretionary LFOs in Washington, required courts to consider defendants’ financial status before imposing discretionary LFOs. However, the statute provided an extremely vague standard for courts to measure defendants’ financial standing:

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.¹⁴⁰

For many years, courts fulfilled their obligation to consider defendants’ resources and the prospective burden of LFOs by signing pre-printed judgment and sentences with boilerplate language declaring that the court had performed the requisite inquiry.¹⁴¹ The courts rarely, if ever, solicited information about defendants’ incomes or assets.¹⁴²

In *State v. Blazina*,¹⁴³ a sentencing court used a boilerplate judgment and sentence to order two defendants to pay discretionary LFOs without making any on-the-record assessment of their ability to pay.¹⁴⁴ On appeal, the defendants “argued that a trial judge must make an individualized

139. BECKETT ET AL., *supra* note 38, at 68.

140. 2007 Wash. Sess. Laws 1656.

141. *State v. Blazina*, 182 Wash. 2d 827, 831, 344 P.3d 680, 681 (2015); *see also* *State v. Ramirez*, 191 Wash. 2d 732, 739, 426 P.3d 714, 718 (2018) (“[LFOs] are often imposed with very little discussion.”).

142. *See Blazina*, 182 Wash. 2d at 837–38, 344 P.3d at 685.

143. 182 Wash. 2d 827, 344 P.3d 680 (2015).

144. *Id.* at 830, 344 P.3d at 681.

inquiry into a defendant's ability to pay" on the record before imposing discretionary LFOs, and that the failure to make such an inquiry mandated resentencing.¹⁴⁵ The Supreme Court of Washington agreed with the defendants, remanded for new sentencing hearings, and held that a trial court "must consider the defendant's current or future ability to pay [discretionary] LFOs based on the particular facts of the defendant's case."¹⁴⁶ Further, trial courts must consider factors such as the defendant's incarceration and other debts when weighing an individual's ability to pay.¹⁴⁷

In its reasoning, the *Blazina* decision listed several nationwide issues that stem from courts imposing LFOs on defendants who are indigent, including such defendants' "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration" of those LFOs.¹⁴⁸ In particular, the Court noted that those inequities result in scenarios where collection fees and interest drown indigent defendants in debt that individuals with thicker wallets easily avoid:

Consequently, indigent offenders owe higher LFO sums than their wealthier counterparts because they cannot afford to pay. . . . The inability to pay off the LFOs means that courts retain jurisdiction over impoverished offenders long after they are released from prison. . . . This active record can have serious negative consequences on employment, on housing, and on finances.¹⁴⁹

The *Blazina* Court determined that the "legislature did not intend LFO orders to be uniform among cases of similar crimes. Rather, it intended each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual defendant's circumstances."¹⁵⁰ Now, a sentencing court "must do more than sign a boilerplate judgment and sentence stating that it engaged in the required inquiry"; the judge must consider factors "such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay" discretionary LFOs.¹⁵¹

145. *Id.*

146. *Id.* at 834, 344 P.3d at 683 (citing WASH. REV. CODE § 10.01.160(3) (2015)).

147. *Id.* at 838, 344 P.3d at 685.

148. *Id.* at 835, 344 P.3d at 683.

149. *Id.* at 836–37, 344 P.3d at 684 (first citing BECKETT ET AL., *supra* note 38, at 9–11, 21–22; and then citing ACLU, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS 68–69 (2010), https://www.aclu.org/files/assets/InForAPenny_web.pdf [<https://perma.cc/A5NE-DPRE>]).

150. *Blazina*, 182 Wash. 2d at 834, 344 P.3d at 683.

151. *Id.* at 838, 344 P.3d at 685.

The *Blazina* Court specifically referred judges to Washington State Courts General Rule 34,¹⁵² which allows individuals to obtain waivers of filing fees and surcharges due to indigency.¹⁵³ The GR 34 standard is analogous to the current standard for indigence found in RCW 10.101.010 and discussed above.¹⁵⁴ The *Blazina* Court summarized the weight of the indigency standard: “if someone does meet the GR 34 standard for indigency, courts should seriously question that person’s ability to pay LFOs.”¹⁵⁵ Several years later, the legislature agreed and HB 1783 was born.

B. A Bill Concerning Legal Financial Obligations: HB 1783

Washington’s legislature followed the *Blazina* Court’s lead on LFOs in 2018. HB 1783 amended a slew of statutes governing LFOs, almost universally to the benefit of indigent and near-indigent defendants.¹⁵⁶

HB 1783’s sponsors expressed extreme concern about how the bill would affect both defendants and victims. During one hearing, primary sponsor Representative Roger Goodman emphasized the 23.8% rate of return on LFOs.¹⁵⁷ He argued that this low return rate interfered with the primary goals of imposing LFOs: aiding victims through restitution payments, prompting defendants to meet their obligations, and helping to fund the criminal justice system.¹⁵⁸ Goodman also noted that interest impedes many defendants from paying their LFOs because the 12% interest rate escalates the total cost far beyond the defendant’s ability to pay.¹⁵⁹ The other primary sponsor, police-officer-turned-Representative Jeff Holy, raised concerns about ongoing debt burdens suppressing defendants’ ability to “come back to the right side” of the law, thus inadvertently forcing them into recidivism.¹⁶⁰

One of the major components of HB 1783 is that “penalties, fines, bail

152. WASH. CT. GEN. R. 34.

153. *Id.*

154. Compare WASH. CT. GEN. R. 34, with WASH. REV. CODE § 10.101.010(3)(a)–(c) (2020). See also *supra* section I.B.

155. *Blazina*, 182 Wash. 2d at 839, 344 P.3d at 685.

156. Legal Financial Obligations, H.B. 1783, 65th Leg., Reg. Sess. (Wash. 2018).

157. *H. Judiciary Comm. Hearing*, *supra* note 105, at 26:40; see *Legislature Passes Bill*, *supra* note 49.

158. *H. Judiciary Comm. Hearing*, *supra* note 105, at 26:30; see also BECKETT ET AL., *supra* note 38, at 74 (explaining that Washington imposes LFOs to hold defendants accountable for misbehavior).

159. *H. Judiciary Comm. Hearing*, *supra* note 105, at 26:30 (statement of Rep. Roger Goodman, Chair, H. Comm. on Pub. Safety).

160. *Id.* at 26:11 (statement of Rep. Jeff Holy, Sen. L. & Just. Comm.).

forfeitures, fees, . . . costs imposed against a defendant in a criminal proceeding,” and other “non-restitution legal financial obligations” no longer accrue interest.¹⁶¹ This marked the end of the 12% interest rate that previously crippled many defendants’ ability to pay.¹⁶²

HB 1783 amended many RCWs to shorten the length of interactions with the criminal justice system for defendants who a court has found indigent.¹⁶³ For example, a defendant who is indigent may now pay all of their discretionary LFOs in installments.¹⁶⁴

Once a court finds a defendant indigent, HB 1783 sets in place several additional protections. Courts can no longer order defendants who a court has found indigent to pay RCW 10.01.160 costs: “expenses specially incurred by the state in prosecuting the defendant,” administering a deferred prosecution, or pretrial supervision.¹⁶⁵ HB 1783 added language to several statutes to require a hearing to find a defendant’s failure to pay LFOs willful before the defendant may be sanctioned for contempt; these statutes also acquired provisions indicating that defendants who are indigent are “presumed to lack the current ability to pay” those LFOs.¹⁶⁶ A court that finds a defendant to be homeless or have mental illness now cannot consider that defendant’s failure to pay LFOs as willful contempt; therefore, such defendants may not be subjected to penalties for failure to pay.¹⁶⁷ And most importantly, HB 1783 removed section 10.01.160 of the Revised Code of Washington’s language, “[t]he court shall not order a defendant to pay costs *unless the defendant is or will be able to pay them*,” and replaced it with, “[t]he court shall not order a defendant to pay costs *if the defendant at the time of sentencing is indigent* as defined in RCW 10.101.010(3)(a) through (c).”¹⁶⁸

Finally, HB 1783 spared indigent defendants from another mandatory LFO: the bill confined the DNA collection fee to a single instance, instead of requiring additional collections for each new felony conviction.¹⁶⁹

However, HB 1783 left the VPA functionally untouched.¹⁷⁰

161. Wash. H.B. 1783, §§ 1–5.

162. *Questions and Answers*, *supra* note 50.

163. *See* Wash. H.B. 1783 (“[A]mending RCW 110.82.090, 3.50.100, 3.62.040, 35.20.220, 10.01.160, 10.01.170, 210.01.180, 10.46.190, 10.64.015, 9.92.070, 10.73.160, 9.94A.6333, 39.94A.760, 9.94B.040, 3.62.085, 36.18.020, 43.43.7541, and 7.68.035; reenacting and amending RCW 3.62.020; and creating new sections.”).

164. *Id.* § 11.

165. *Id.* §§ 6, 14.

166. *Id.* §§ 8, 13, 15.

167. *Id.* §§ 8, 13–15.

168. *Id.* § 6 (emphasis added).

169. *Id.* §§ 16–18.

170. *Id.* § 19(4).

RCW 7.68.035 codifies the VPA—Washington’s only remaining universally mandatory LFO for criminal defendants—as “[w]hen any person is found guilty in any superior court of having committed a crime . . . there shall be imposed by the court upon such convicted person a penalty assessment” of \$500 for any case including a felony or gross misdemeanor and \$250 for any case including only misdemeanors.¹⁷¹

Nevertheless, HB 1783 demonstrated the Washington legislature’s interest in speeding defendants’ reintegration. The back-and-forth progress between the courts and legislature continued immediately after the passage of HB 1783 when *State v. Ramirez*¹⁷² arrived in the Supreme Court of Washington.

C. *State v. Ramirez Requires Judicial Consideration of Defendant Finances*

Blazina barred courts from using boilerplate language to claim that they had performed an individualized inquiry into defendants’ finances. However, the exact applicable standard eluded courts for several more years, and judges often continued to impose discretionary LFOs with little or no discussion.¹⁷³ *State v. Ramirez* brought the issue to the forefront when David Ramirez appealed the imposition of \$2,900 in LFOs—including \$2,100 in discretionary LFOs.¹⁷⁴ Mr. Ramirez argued that the court failed to adequately inquire into his ability to pay before imposing the LFOs, because the judge’s inquiry consisted of asking the prosecutor, “[a]nd when he is not in jail, he has the ability to make money to make periodic payments on his LFOs, right?”¹⁷⁵

The Supreme Court of Washington granted review to address only the imposition of Mr. Ramirez’s discretionary LFOs.¹⁷⁶ Part of the Court’s rationale for granting review was the recent passage of HB 1783, which the Court described as “addressing some of the worst facets of the system that prevent offenders from rebuilding their lives after conviction.”¹⁷⁷ The Court also referred back to language from *Blazina* and *Wakefield* to highlight the importance of the individualized inquiry into a defendant’s

171. WASH. REV. CODE § 7.68.035(1)(a) (2020).

172. 191 Wash. 2d 732, 426 P.3d 714 (2018).

173. *Id.* at 739, 426 P.3d at 718.

174. *Id.* at 736, 426 P.3d at 716.

175. *Id.* at 737, 426 P.3d at 717.

176. *Id.* at 738, 426 P.3d at 717.

177. *Id.* at 747, 426 P.3d at 721.

ability to pay.¹⁷⁸

The Court identified the financial statement section of a motion for indigency as providing “a reliable framework for the individualized inquiry that *Blazina* and RCW 10.01.160(3) require.”¹⁷⁹ The financial statement asks for information regarding a defendant’s income, employment history, “assets and other financial resources,” living expenses, and “other debts.”¹⁸⁰ The Court described each of those categories as “equally relevant to determining a defendant’s ability to pay discretionary LFOs.”¹⁸¹ As a result, the financial statement serves as the perfect vehicle for a sentencing court’s analysis of a defendant’s ability to pay.

Ramirez ultimately held that a trial court must make an on-the-record inquiry into a defendant’s present and future ability to pay LFOs.¹⁸² Courts can no longer merely draw from statements made at trial when the defendant is attempting to appear in the best light possible to a jury for the purposes of proving their innocence.¹⁸³

D. *State v. Conway: Justice, Attempted*

Although courts weighing whether to impose discretionary LFOs must now explicitly consider a defendant’s financial status, mandatory LFOs have no such gatekeeping test. Karen Conway’s case exemplifies the problems that arise from protecting defendants who are indigent from only *some* LFOs.

When Ms. Conway pleaded guilty to one count of maintaining a dwelling for controlled substances in 2007, the Clark County Superior Court assessed her a \$500 VPA, a \$200 filing fee, a \$700 fee for a court-appointed attorney, a \$1,000 “Drug Fund fee,” a \$100 “Crime Lab fee,” a \$100 DNA sample collection fee, and an unlabeled \$500 fine for a total bill of \$3,100.¹⁸⁴ Despite her only source of income being SSI, Ms. Conway made monthly payments of between \$5 and \$25 to Clark County starting in 2007.¹⁸⁵ Ms. Conway had paid \$1,105 towards her legal debt by 2019, but interest rates and collection agency fees ate up the bulk of

178. *Id.* at 743, 426 P.3d at 720 (first citing *City of Richland v. Wakefield*, 186 Wash. 2d 596, 606, 380 P.3d 459, 465 (2016); and then citing *State v. Blazina*, 182 Wash. 2d 827, 838–39, 344 P.3d 680, 685 (2015)).

179. *Id.* at 744, 426 P.3d at 720.

180. *Id.*

181. *Id.*

182. *Id.* at 745–46, 426 P.3d at 721.

183. *Id.*

184. Petition for Review, *supra* note 2, at 2 n.1.

185. *Id.* at 3.

her payments instead of reducing the principal debt.¹⁸⁶

Ms. Conway filed a motion to remit the remaining balance of her LFOs except for the VPA and the filing fee in 2016.¹⁸⁷ She also sought a certificate of discharge to vacate her conviction under RCW 9.94A.637.¹⁸⁸ Ms. Conway pointed out that she had completed all of her non-LFO sentencing conditions and that the Department of Corrections had ended supervision of her case in October of 2008, leaving her LFOs as the only barrier to clearing her conviction record.¹⁸⁹

The Superior Court found that Ms. Conway was indigent and had received SSI for twenty-seven years.¹⁹⁰ The court issued an order remitting all of the requested LFOs and the balance of interest owed, leaving Ms. Conway with a balance of \$493.55 on the VPA and \$197.41 on the criminal filing fee, nine years after she had begun paying down the debt.¹⁹¹

On her direct appeal, Ms. Conway also challenged the VPA and filing fee on equal protection and substantive due process grounds, which the court rejected.¹⁹² The Court of Appeals highlighted that the legislature could correct judicial interpretation of statutes but had not done so with regard to mandatory LFOs.¹⁹³

When Ms. Conway appealed again, seeking review from the Supreme Court of Washington, the State relied heavily on the trial judge's statement that they "could conceive of circumstances where Conway may be able to pay the fines in the future."¹⁹⁴ The State also argued that assessing the VPA against all criminal defendants "is a rational means of

186. *Id.*

187. *State v. Conway*, 8 Wash. App. 2d 538, 542, 438 P.3d 1235, 1238 (2019).

188. Petition for Review, *supra* note 2, at 3–4.

189. *Id.*

190. *Conway*, 8 Wash. App. 2d at 542, 438 P.3d at 1238.

191. *Id.* at 542–43, 438 P.3d at 1238–39.

192. *Id.* at 543, 438 P.3d at 1238–39. The parties agreed that the HB 1783 legislative changes did not apply to Ms. Conway's case, so Division II of the Court of Appeals avoided discussing the amendments when it affirmed the superior court's refusal to remit Ms. Conway's remaining LFOs. *Id.* at 541 n.2, 438 P.3d at 1238. Additionally, the court rejected Ms. Conway's request to extend *Fuller v. Oregon* to prevent courts from imposing mandatory LFOs on indigent defendants. *Id.* at 549, 438 P.3d at 1241 (citing *State v. Mathers*, 193 Wash. App. 913, 926, 376 P.3d 1163, 1170 (2016)). In doing so, the court pointed to a previous case where the same division had recognized that for "an indigent defendant saddled with [LFOs], it does not matter if the LFOs are labeled mandatory or discretionary. . . . However, until there are legislative amendments or Supreme Court changes in precedent, [courts] must recognize these distinctions and adhere to the principles of stare decisis." *Mathers*, 193 Wash. App. at 916, 376 P.3d at 1165.

193. *Conway*, 8 Wash. App. 2d at 544–48, 438 P.3d at 1239–41 ("Where the legislature has had time to correct a court's interpretation of a statute and has not done so, we presume the legislature approves of our interpretation." (citing *Mathers*, 193 Wash. App. at 918, 376 P.3d at 1166)).

194. Answer to Petition for Review, *supra* note 96, at 2.

achieving the governmental objectives” of funding programs for victims and compensating court clerks.¹⁹⁵ Because some defendants will be able to pay right away, or will eventually acquire gainful employment, the State argued that “the imposition of these fees on all offenders serves to create funding for these purposes.”¹⁹⁶ The State also argued that “[i]t is easy to conceive of situations in which an offender who is indigent at the time of sentencing and even after sentencing will be able to pay the fees and assessments in the future.”¹⁹⁷ The State further argued that “Conway’s case is not representative of all indigent defendants and is not a case in which the public would have a substantial interest.”¹⁹⁸

The Supreme Court of Washington denied Ms. Conway’s Petition for Review on December 3, 2019, confining her to a purgatory of debt, ruined credit, and an unstable housing situation for the foreseeable future.¹⁹⁹ Justice, it seems, was in short supply.

Karen Conway is not the only disabled defendant to struggle with mandatory LFOs. Several cases posing near-identical questions reached the Courts of Appeals in 2019. All met the same fate as *Conway* because Washington’s Courts of Appeals lack the authority to make any substantive alterations to the controlling statutes.²⁰⁰ Until another analogous case makes its way up to the Washington Supreme Court, the legislature is the only institution with the ability to liberate Ms. Conway and her fellows from purgatory.

195. *Id.* at 7–8 (first citing WASH. REV. CODE § 7.68.035 (2018); then citing *State v. Brewster*, 152 Wash. App. 856, 860, 218 P.3d 249 (2009); and then citing *State v. Seward*, 196 Wash. App. 579, 584–85, 384 P.3d 620, 623 (2016)).

196. *Id.*

197. *Id.* (first citing WASH. REV. CODE § 7.68.035; then citing *Brewster*, 152 Wash. App. at 860, 218 P.3d at 251; and then citing *Seward*, 196 Wash. App. at 584–85, 384 P.3d at 623). The government referred to *Seward*, which produced arguments in favor of *imposing* mandatory LFOs on indigent defendants under the theory that some will eventually acquire the ability to pay, and sought to apply the same logic to barring remission:

[t]he reasoning in *Seward* is applicable to this case, because preventing remission of mandatory LFOs serves the same legitimate state interests as requiring their imposition. Preventing remission of mandatory LFOs for all offenders creates funding for the purposes behind the fees and assessments because the offenders may be able to pay in the future. When an offender files a motion to remit their mandatory LFOs while they are currently indigent, and if there are conceivable situations where they could pay in the future, then they are in the same situation as when the mandatory LFOs were imposed.

Id. at 12 (citing *Seward*, 196 Wash. App. at 585, 384 P.3d at 620).

198. *Id.* at 20.

199. *State v. Conway*, 194 Wash. 2d 1010, 452 P.3d 1240 (2019) (denying review).

200. *See, e.g.*, *State v. Bush-Ford*, No. 50731-5-II, 2019 Wash. App. LEXIS 1544 (June 18, 2019) (upholding imposition of VPA on disabled defendant reliant on SSI); *State v. Lacy*, No. 50738-2-II, 2019 Wash. App. LEXIS 1342 (May 29, 2019) (holding that the trial court did not have the authority to revoke VPA imposed on an indigent defendant).

IV. A PLEA FOR JUSTICE: RECOMMENDATIONS TO STEM THE TIDE

Ms. Conway's case—that of a disabled elderly citizen pushed into homelessness as a result of her conviction—demonstrates the dire consequences of Washington's incomplete LFO framework. Although the Supreme Court of Washington did not review *Conway*, it remains one of only two institutions capable of altering the LFO laws and resolving her predicament. The legislature is the only other entity that can adjust Washington's laws to protect defendants who are indigent and disabled from mandatory LFOs.

Eternally suspended LFO debt prevents chronically disabled defendants whose only source of income is Social Security benefits from vacating their convictions.²⁰¹ The combination of debt and a permanent conviction record affects credit scores and background checks.²⁰² Stable housing opportunities dwindle, and employment opportunities evaporate. The ripple effects escalate, and still the debt lingers.

LFOs may serve a public interest by partially funding the criminal justice system, but they can only serve that purpose if administered against individuals who possess the ability to pay them. At least one Washington court has acknowledged that defendants who are indigent are far more likely to acquire unexpected medical debt than they are to win the lottery.²⁰³ The Washington legislature has already acknowledged the inefficacy of stacking fines and fees—especially those which collect interest—against defendants who are indigent.²⁰⁴ Chronic disabilities combine with and compound that indigency for many individuals.

The Supreme Court of Washington has not yet patched the hole in the law that ensnared Ms. Conway. But the justices of the Supreme Court and the members of the legislature are the only ones with the needle and thread

201. WASH. REV. CODE § 9.94A.637 (2020).

202. See *Who Is Allowed to Access Your Equifax® Credit Report?*, EQUIFAX, <https://www.equifax.com/personal/education/credit/report/who-is-allowed-to-access-your-credit-report/> [<https://perma.cc/5B93-5F6L>]; Adams et al., *supra* note 13, at 26.

203. See *State v. Sorrell*, 2 Wash. App. 2d 156, 183–84, 408 P.3d 1100, 1114–15 (2018) (“Someone may worry that Ernest Sorrell might win the lottery tomorrow and that remission of financial obligations does not recognize this possibility. Nevertheless, the state Supreme Court rejected a similar argument in *State v. Blazina*. The State had argued that no one knows what might lie in the defendant's future, such that discretionary legal financial obligations should always be imposed. The law does not commit to speculation. If we wish to speculate, we could also speculate that Ernest Sorrell will incur substantial medical bills for which he cannot pay. Actually, such a large unaffordable debt may be more of a probability than speculation.”).

204. See *H. Judiciary Comm. Hearing*, *supra* note 105, at 26:30 (statement of Rep. Roger Goodman, Chair, H. Comm. on Pub. Safety); see also BECKETT ET AL., *supra* note 38, at 74 (explaining that Washington imposes LFOs to hold defendants accountable for misbehavior).

capable of mending the law. To better serve the public interest, the Court and the legislature should use the momentum from HB 1783 to either bar trial courts from imposing mandatory LFOs on indigent defendants or allow remission for those who can demonstrate their financial hardship.

A. *Shut the Front Door: Ban Mandatory LFOs for Indigent Defendants*

Trial courts should no longer be able to impose any mandatory LFOs on defendants who a court finds indigent. Such defendants are already shielded from discretionary LFOs, thanks to *Wakefield* and *Catling*, but remain exposed to mandatory LFOs. Both the Washington legislature and Supreme Court of Washington have the power to make that change.

Fortunately, a template already exists in Washington LFO law. The indigency standard used for discretionary LFOs could be extended to apply to mandatory LFOs as well. This would ban courts from imposing all LFOs on people receiving certain means-tested benefits, those involuntarily committed to public mental health facilities, and those with a post-tax annual income below 125% of the federal poverty level.²⁰⁵ The statutory language could mirror that used to bar courts from imposing the criminal filing fee: “an adult defendant in a criminal case shall be liable for a fee . . . except this fee shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3)(a) through (c).”²⁰⁶

Under the current law, courts already find many individuals indigent at sentencing and waive most of their LFOs—despite the theoretical possibility that those individuals could one day win the lottery and acquire the ability to pay their LFOs.²⁰⁷ The economic impact of making mandatory LFOs such as the VPA waivable would be minimal for state and local governments but life-altering for the individual.²⁰⁸ Barring courts from imposing any and all LFOs on defendants whose financial health fails a *Ramirez* “individualized inquiry” as to their ability to pay would spare defendants across Washington a great deal of heartache (and headaches).²⁰⁹

Washington State acknowledges that Ms. Conway is disabled, indigent, and has received SSI since 1989.²¹⁰ As an individual with a disability, Ms.

205. WASH. REV. CODE § 10.101.010(3)(a)–(c) (2020).

206. WASH. REV. CODE § 36.18.020(2)(h) (2020).

207. See *Sorrell*, 2 Wash. App. 2d at 183–84, 408 P.3d at 1115 (“[T]he law does not commit to speculation.”).

208. See *supra* section III.B.

209. See *supra* section III.C.

210. Answer to Petition for Review, *supra* note 96, at 1.

Conway suffers disproportionate effects from her ongoing debt burden and conviction record. Her lead-weighted credit score and permanent criminal history have undermined her ability to find stable housing—a necessity so universally acknowledged that, under Washington law, the status of being homeless automatically exempts a defendant from contempt of court proceedings for failure to pay LFOs.²¹¹

Banning the imposition of mandatory LFOs for indigent defendants poses a political challenge because Washington overwhelmingly relies on counties and cities to fund trial courts instead of funding those courts out of the state budget like New Jersey or Florida.²¹² Although eliminating mandatory LFOs for indigent defendants may impact the state's budget,²¹³ the practical effect of eliminating these LFOs for indigent defendants would be significantly less than it may first appear. Washington courts only received a net profit of \$6 million from LFOs in 2009, despite technically collecting \$21.6 million in obligations that year.²¹⁴

The most significant obstacle to passing this kind of legislation would likely be public perception: the American public has a love-hate relationship with many of the groups who meet the statutory definition for indigence. For example, policies that criminalize conduct associated with homelessness are popular even amongst people who support homeless aid programs such as subsidized housing.²¹⁵ Consequently, any such initiative

211. *E.g.*, WASH. REV. CODE § 10.01.180(3)(c) (2020); WASH. REV. CODE. § 9.94A.6333(3)(d) (2020); *id.* § 9.94B.040(4)(d) (“If the court determines that the defendant is homeless or a person who is mentally ill, as defined in RCW 71.24.025, failure to pay a legal financial obligation is not willful contempt and shall not subject the defendant to penalties.”).

212. CARLSON ET AL., *supra* note 40, at 1.

213. *See id.* at 124–28 (“Washington provided a good example of the impacts of primarily local funding on trial court expenditures and operations. A variety of studies . . . commented about the inadequacy of trial court funding and the wide variance in available services and programs. Access to justice varied across the state While the Washington judiciary was not engaged in a transition to greater state funding at the time of this study, they were engaged in an equally intense examination of how their trial courts were funded and what the balance between state and local funding should be.”).

214. Beckett & Harris, *supra* note 55, at 527–28 (citing WASH. STATE ASS’N OF CNTY. OFFS., 2009 REPORT TO THE WASHINGTON STATE LEGISLATURE ON THE FISCAL IMPACT OF ESSB 5990 (2009)).

215. *See* Scott Clifford & Spencer Piston, *Americans Want to Help the Homeless—As Long as They Don’t Get Too Close. This Explains Why.*, WASH. POST (July 14, 2017, 4:00 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/07/14/americans-want-to-help-the-homeless-as-long-as-theyre-not-around-this-explains-why/> [https://perma.cc/8FFS-DZAS] (“On one hand, majorities support both aid (60 percent) and subsidized housing (65 percent), with only a small percentage opposing these policies—by 19 and 17 percent, respectively. On the other, a majority supports banning panhandling (52 percent) and a plurality supports banning sleeping in public (46 percent)—while only about a quarter of the public opposes these policies, by 23 and 30 percent, respectively. What’s more, the exclusionary policies are popular even among those who support aid to homeless people: 47% of those who favor aid to homeless people also support banning

requires a strong information campaign about the realities of persistent LFO debt.

Karen Conway unsuccessfully attempted to bring the issue of mandatory LFOs imposed on disabled defendants in front of the Supreme Court of Washington. Either the legislature or another defendant must now take up the issue to demand justice.

B. Open the Side Window: Allow Remission for Defendants Who Demonstrate Financial Hardship

No judicial or legislative standard outright endorses trapping individuals such as Ms. Conway in legal purgatory merely because they rely on SSI. Yet, any Social Security recipient who interacts with the criminal justice system and cannot retire their LFO debt faces a permanent conviction record—with all its collateral consequences—and a lifetime of hearings about their inability to pay.²¹⁶ Ideally, Washington courts should altogether cease imposing LFOs on defendants who are indigent. But if the courts and legislature are not willing to fully commit to such a plan of action, they could pursue other, milder alternatives. This Part offers three different standards for allowing remission of mandatory LFOs after imposition: permitting remission for either 1) SSI recipients; 2) individuals who receive means-tested benefits; or 3) any defendant who can demonstrate indigence.

1. Protecting SSI Recipients Only

As an alternative to barring the imposition of mandatory LFOs on defendants who are indigent, the courts could adopt one of several standards for remitting mandatory LFOs. For the first standard, the courts should allow remission of mandatory LFOs for defendants whose sole source of income is Social Security disability benefits. This alternative would tackle the problem faced by Ms. Conway and other SSI recipients without barring courts from imposing LFOs on all indigent defendants. This is the most politically feasible option because of its limited scope, but it would have the least impact in terms of ending cycles of poverty and incarceration due to the small number of individuals assisted.

Indeed, this approach still falls short on many fronts. SSI recipients have already been deemed “unemployable”—while technically possible, the odds of a current or former SSI recipient acquiring even a moderate

panhandling, while 44 percent support a ban on sleeping in public. Only 29 and 36 percent opposed these policies, while the rest took no position.”).

216. See *State v. Catling*, 193 Wash. 2d 252, 269, 438 P.3d 1174, 1182 (2019) (Gonzalez, J., dissenting).

income are low. Recall that Social Security asset limits mean that SSI recipients will lose their benefits as soon as they exceed \$2,000 in assets.²¹⁷ Further, remitting discretionary LFOs requires a court date. If the same approach is applied to mandatory LFOs, defendants who are homeless, have mobility issues or lack access to a vehicle will face additional challenges in terms of both receiving summons and transporting themselves to court.²¹⁸ While similar to the first proposed solution—outright barring courts from imposing mandatory LFOs on indigent defendants—this option retains a logistical hurdle for defendants, and will continue to burden the court system with additional hearings as defendants petition for remission. In contrast, barring the imposition of mandatory LFOs on defendants who a court finds indigent would clear space on dockets, as such defendants would have no need for continued interaction with the court system after their sentencing.

The legislature and Supreme Court of Washington should remember that this approach will place additional burdens on a class of individuals that the government has already deemed “unemployable.” This standard would have the most limited scope and provide the least relief to a vulnerable population; the standards below provide avenues of relief for wider classes of defendants.

2. *Protecting Means-Tested Benefits Recipients*

As a mid-range solution, the courts could consider petitions for remission from any defendant who receives means-tested benefits—not merely SSI recipients.²¹⁹ Under this approach, a defendant petitioning for remission of their mandatory LFOs should succeed if they prove that they receive a means-tested disability benefit and “it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant’s immediate family.”²²⁰

217. 42 U.S.C. § 423(d)(1)(A)–(B); *see also id.* § 423(d)(5)(A) (“An individual shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Commissioner of Social Security may require.”); WASH. L. HELP, HOW TO ASK A WASHINGTON STATE COURT TO REDUCE OR WAIVE YOUR LEGAL FINANCIAL OBLIGATIONS (2019), https://www.washingtonlawhelp.org/files/C9D2EA3F-0350-D9AF-ACAE-BF37E9BC9FFA/attachments/8627DE75-4487-42B2-9696-7DC430B66616/9913en_motion-to-change-lfo.pdf [<https://perma.cc/E2EV-GRCU>].

218. Baxter, *supra* note 136.

219. Means-tested benefits include “[t]emporary assistance for needy families, aged, blind, or disabled assistance benefits, medical care services under RCW 74.09.035, pregnant women assistance benefits, poverty-related veterans’ benefits, food stamps or food stamp benefits transferred electronically, refugee resettlement benefits, medicaid, [and] supplemental security income.” WASH. REV. CODE § 10.101.010(3)(a) (2020).

220. *Id.* § 10.01.160(4).

These defendants will have already gone through a verification process to demonstrate their financial hardship and could be required to produce further proof that they have remained in difficult monetary straits since release. Even this somewhat conservative option would provide relief to a far larger range of formerly incarcerated individuals than granting remission to only SSI recipients. At the same time, the impact on state and local budgets would be negligible because the people benefiting from remission are highly unlikely to make LFO payments anyway. This statutory language would be milder than the final remission standard, which expands the standard for remitting discretionary LFOs to cover mandatory LFOs as well.²²¹

3. *Protecting Defendants Who Demonstrate Indigence*

At the far end of the spectrum, the Washington legislature or Supreme Court could mandate that trial courts apply the “manifest hardship” standard used for discretionary LFO remissions and allow remission of mandatory LFOs for anyone who demonstrates that they meet RCW 10.101.010(3)’s standard for indigency.²²² This definition differs from the first solution because mandatory LFOs would still be imposed on all defendants. Defendants would have to proceed through the additional step of petitioning for forgiveness; but this solution still ultimately allow many defendants who are found indigent by a court to discharge their debt burdens.

This option should still soothe those fearing that eliminating LFOs will reduce the deterrence of the criminal justice system. The people who are most likely to pay LFOs are the ones who will suffer the least impact from them; removing \$500 from a bank account is a negligible punishment for a well-to-do individual. In contrast, for an individual near, at, or below the poverty line, the extreme difficulty of paying the fines and fees associated with the criminal justice system may be far more worrisome than even the threat of incarceration. Widespread inability to pay directly contributes to the 23.8% return rate on LFOs.²²³ By allowing an escape route for defendants who truly need relief, courts may reduce some of their administrative costs as they no longer have to hound defendants who simply do not have the resources to pay.

While these solutions are all acceptable, the recommendations from this section are probably far more politically feasible, given public perceptions about people who meet the statutory definition

221. *City of Richland v. Wakefield*, 186 Wash. 2d 596, 605–06, 380 P.3d 459, 464 (2016).

222. WASH. REV. CODE § 10.01.160(4).

223. *Legislature Passes Bill*, *supra* note 49.

for indigence.²²⁴

CONCLUSION

It is difficult to perceive the benefits of condemning thousands of people to society's fringes for minor criminal infractions. Yet such are the consequences of the current LFO system in Washington. Mandatory LFOs, imposed in almost every criminal case in the state, cannot currently be waived or remitted through a showing of a defendant's inability to pay the fines. But until the fines get paid, the former defendant has an open debt account to the state and cannot vacate their criminal record. Collateral consequences that hamper stable employment and housing are almost inevitable followers, frequently locking former defendants into a cycle of poverty. Washington's Supreme Court and legislature are the only institutions that can end the legal purgatory facing Ms. Conway and other indigent defendants throughout the state—especially SSI recipients.

Washington's legislature and Supreme Court should continue the work that they have already started to improve Washington's LFO system. Bills such as HB 1783 and cases such as *Blazina*, *Wakefield*, and *Catling* were a start. But they have more work to do. The optimal solution would bar trial courts from imposing any and all LFOs on indigent defendants. In the alternative, after a trial court imposes the mandatory LFOs, defendants should have the opportunity to petition for remission. Possible classes of defendants to grant remission to include only SSI recipients; any defendant receiving means-tested benefits; or any defendant who demonstrates indigence. Any of those options would provide some measure of relief, advancing public policy to protect those who are indigent, disabled, or both.

In the end, all that is left is to ask those with the power to make change, to weigh the options and rule in favor of justice.

224. See Clifford & Piston, *supra* note 215.

