

# TOWARDS AN INSTITUTIONAL CHALLENGE OF IMPRISONMENT FOR LEGAL FINANCIAL OBLIGATION NONPAYMENT IN WASHINGTON STATE

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*Abstract:* Imprisonment for debt is resurfacing in the United States, primarily in the form of contempt proceedings for failure to pay court judgments. Although Washington’s Constitution prohibits imprisonment for debt, the State repeatedly jails individuals for failing to pay legal financial obligations. This Comment explores the adverse consequences of this de facto debtors’ prison system, describes the strong prohibition on imprisonment for debt found in article I, section 17 of the Washington Constitution, and argues that imprisonment for failing to pay legal financial obligations violates that strong prohibition. It then discusses how case law has degraded article I, section 17, making systemic constitutional challenges to the practice impractical. This Comment attempts to provide litigants with a comprehensive overview of strategies that can be used to challenge the current jurisprudence and the validity of imprisoning individuals for failing to pay legal financial obligations.

## INTRODUCTION

Jane Doe<sup>1</sup> is going back to jail. Years ago, Jane was incarcerated for a felony offense committed in Washington State. She left prison owing the state \$2500 in Legal Financial Obligations (“LFOs”).<sup>2</sup> Although she fully intended to satisfy her LFO debts as soon as possible, Jane faced serious difficulties reintegrating into society. She was unable to secure gainful employment after losing her job for being unable to work while incarcerated.<sup>3</sup> She had a hard time securing steady housing and had

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1. Jane is a hypothetical, statistically average low-income felony offender in Washington State.

2. Two thousand, five-hundred dollars of LFO debt upon release (including restitution) is just below the average assessment in Washington State. AM. CIVIL LIBERTIES UNION OF WASH. & COLUMBIA LEGAL SERVS., MODERN-DAY DEBTORS’ PRISONS: THE WAYS COURT-IMPOSED DEBTS PUNISH PEOPLE FOR BEING POOR 3 (2014), available at <https://acluwa.org/sites/default/files/attachments/Modern%20Day%20Debtor%27s%20Prison%20Final%20%283%29.pdf> [hereinafter MODERN-DAY DEBTORS’ PRISONS] (“The average amount of LFOs imposed in a felony case is \$2540.”); KATHERINE BECKETT ET AL., THE ASSESSMENT AND CONSEQUENCES OF LFOs IN WASHINGTON STATE 15 (2008) (report prepared for the Washington State Minority Justice Commission).

3. See BECKETT ET AL., *supra* note 2, at 4; MODERN-DAY DEBTORS’ PRISONS, *supra* note 2 (“[U]p to 60% of former inmates remain unemployed one year after release from prison.”); Alicia Bannon et al., *Criminal Justice Debt: A Barrier to Reentry*, BRENNAN CTR. FOR JUSTICE 27–28 (2010), [http://brennan.3cdn.net/c610802495d901dac3\\_76m6vqhpy.pdf](http://brennan.3cdn.net/c610802495d901dac3_76m6vqhpy.pdf) (noting that because employment background checks are increasingly including credit checks, LFO debts can both hinder job prospects and serve as a “back-door” method for employers to identify individuals with

barely begun to confront the social costs arising from state custody.<sup>4</sup> The deterioration of her social supports, combined with the economic costs of reentry, as well as costs imposed by the state made her situation bleak indeed. Ironically, the cost of her past incarceration is the very thing that is sending her back to jail. Since her first release, she has paid ten dollars per month without fail toward her account—a typical minimum payment expected of low-income felons.<sup>5</sup> Despite adhering to her self-imposed payment schedule, yearly interest and surcharges have nearly tripled her LFO debts in ten years:

<b>Year</b>	<b>Amount Reduced<sup>6</sup></b>	<b>Amount Increased<sup>7</sup></b>	<b>Total Owed at Year End<sup>8</sup></b>
0 <sup>9</sup>	\$0	\$2500 <sup>10</sup>	\$2500
1	\$120	\$385.60	\$2765.60
2	\$120	\$431.87	\$3077.47
3	\$120	\$454.89	\$3412.36
4	\$120	\$495.08	\$3787.44
5	\$120	\$540.09	\$4207.53
6	\$120	\$590.50	\$4678.03
7	\$120	\$646.96	\$5204.99
8	\$120	\$710.20	\$5795.19
9	\$120	\$781.02	\$6456.21
10	\$120	\$760.35	\$7096.56

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criminal records).

4. See BECKETT ET AL., *supra* note 2, at 10–11; Bannon et al., *supra* note 3, at 27–28 (stating that criminal justice debt affects housing prospects by damaging credit and discouraging legitimate employment).

5. A ten-dollar monthly payment is a “typical amount” imposed on many low-income LFO debtors. Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, NAT’L PUB. RADIO (May 19, 2014, 4:02 PM), <http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor>.

6. This hypothetical schedule of LFO debt is based on the debtor religiously making a ten-dollar per month payment on her principal. The amount reduced does not include any “credits” granted by the county as required in superior court. See WASH. REV. CODE § 10.01.180(3) (2014).

7. The yearly increase is calculated by calculating a twelve percent interest assessment provided by RCW 10.82.090, RCW 4.56.110(4), and RCW 19.52.020(1) against the amount owed at prior year’s end, less the amount paid. Then, the \$100 yearly surcharge on unpaid LFOs provided by RCW 36.18.016(29) is added to the amount of interest owed, determining the yearly increase.

8. The amount owed at year-end is calculated by subtracting the amount reduced from the amount owed for the prior year, then adding the amount increased.

9. Time of Jane’s release.

10. Jane’s LFO assessment is based on the Washington State average. BECKETT ET AL., *supra* note 2, at 15 (noting the mean felony LFO assessment in 2008 was \$2540).

The State, finally fed up with her growing debt, is now imprisoning Jane for failing to pay.<sup>11</sup> Her debt feels insurmountable.<sup>12</sup> Maybe, rather than throw away \$120 per year at an ever-growing debt, she will just do her time and stop making payments.<sup>13</sup> After all, she can be imprisoned for nonpayment regardless of her good faith attempts to contribute.<sup>14</sup>

Jane's case, while hypothetical,<sup>15</sup> is representative of the difficulties faced by many low-income felony offenders in Washington State.<sup>16</sup> Washington courts impose LFOs on felony offenders<sup>17</sup> in order to help fund the criminal justice system and, in some cases, accumulate revenue.<sup>18</sup> When individuals fail to pay their LFOs, they can be<sup>19</sup> and often are imprisoned.<sup>20</sup> Many scholars are decrying Washington's and other states' LFO collection tactics as resurging debtors' prisons.<sup>21</sup>

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11. Imprisonment for failing to pay LFO debts is authorized by RCW 10.01.180(5). Under that section, "[a] default in the payment of a fine or costs or any installment thereof may be collected by any means authorized by law for the enforcement of a judgment." WASH. REV. CODE § 10.01.180(5).

12. See BECKETT ET AL., *supra* note 2, at 39 (describing the insurmountable nature of study participants' LFO assessments).

13. *Id.* (explaining how, when study participants' debts became so insurmountable, they ultimately decided to cease making contributions).

14. This is the reasoning underlying some individuals' decisions to cease paying monthly installment toward their LFO debts. *Id.* at 3, 39.

15. For real life stories highlighting the consequences of LFOs and imprisonment for nonpayment, see MODERN-DAY DEBTORS' PRISONS, *supra* note 2, at 11–18 (stories of Virginia Dickerson, David Ramirez, Angela Albers, C.J., and D.Z.).

16. See BECKETT ET AL., *supra* note 2, at 9–10 (discussing rising felony incarceration rates in Washington State as well as the reintegration difficulties experienced by rehabilitated felons); Shapiro, *supra* note 5. Although this news story was a national exposé on LFO incarceration, the report significantly focused on the plight of individuals in Benton County, Washington. *Id.*

17. See, e.g., WASH. REV. CODE § 38.52.430 (2014) (imposing the costs of emergency response on individuals who are convicted of or have had their prosecution deferred for driving under the influence).

18. See Shapiro, *supra* note 5 (noting that Benton County's LFO collections practices make "it one of the state's top revenue producers").

19. WASH. REV. CODE § 10.01.180(5) ("A default in the payment of a fine or costs or any installment thereof may be collected by any means authorized by law for the enforcement of a judgment.").

20. See BECKETT ET AL., *supra* note 2, at 42–46 (interviewing individuals who have been imprisoned for failing to pay LFO debts).

21. See, e.g., AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS 5 (2010) [hereinafter IN FOR A PENNY], available at <https://www.aclu.org/prisoners-rights-racial-justice/penny-rise-americas-new-debtors-prisons> (describing LFO systems as modern-day 'debtors' prisons); MODERN-DAY DEBTORS' PRISONS, *supra* note 2, at 3 ("[Imprisonment for LFO nonpayment is] a modern version of the despised debtors' prison."); John B. Mitchell & Kelly Kunsch, *Of Driver's Licenses and Debtor's Prison*, 4

Public sentiment is largely critical of LFOs, fueled in part by the discussion surrounding Ferguson, Missouri.<sup>22</sup>

The Washington State Supreme Court has been active in this area of the law, handing down rulings that champion the rights of individual offenders. For example, the Court recently invalidated Spokane's "auto-jail" policy, which mandated imprisonment upon LFO default.<sup>23</sup> Even when the litigants fail to timely raise arguments challenging their LFOs, the Supreme Court is willing to accept discretionary review and overturn and remand LFO assignments.<sup>24</sup> Although the validity of imprisonment for LFO default was arguably irrelevant to the individual litigants' claims in *State v. Blazina*,<sup>25</sup> the Court devoted a large portion of its opinion to describing problems within Washington's LFO system.<sup>26</sup> The Court is sensitive to the mechanisms used to fund the criminal justice system and the negative impacts those funding mechanisms have on

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SEATTLE J. SOC. JUST. 439, 443 (2005) ("[I]mprisonment for unpaid LFOs] cannot help but conjure up images of debtors' prisons from Dickens."); Bannon et al., *supra* note 3, at 5 ("LFOs] leave debtors vulnerable for violations that result in a new form of debtors' prison.").

22. On August 9, 2014, Officer Darren Wilson shot and killed Michael Brown in Ferguson, Missouri. Larry Buchanan et al., *What Happened in Ferguson*, N.Y. TIMES (Nov. 25, 2014), [http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html?\\_r=0](http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html?_r=0). A Missouri grand jury declined to indict the officer on criminal charges, sparking waves of national interest and protests. *Id.* Although the Department of Justice declined to prosecute Officer Wilson, it conducted a thorough investigation into the state of criminal justice affairs in Ferguson. Taking a critical approach to Ferguson's use of LFOs and police officers as collections agents, the report states:

Ferguson's law enforcement practices are shaped by the City's focus on revenue rather than by public safety needs. This emphasis on revenue has compromised the institutional character of Ferguson's police department, contributing to a pattern of unconstitutional policing, and has also shaped its municipal court, leading to procedures that raise due process concerns and inflict unnecessary harm on members of the Ferguson community. Further, Ferguson's police and municipal court practices both reflect and exacerbate existing racial bias, including racial stereotypes.

U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (2015); *see also* Eric Scigliano, *Reforming Ferguson-Style "Debtors Prisons" Here in Washington State*, CROSSCUT.COM (Apr. 10, 2015), <http://crosscut.com/2015/04/ferguson-style-debtors-prisons-here-in-washington-state/> (discussing "Ferguson-style 'debtors' prisons" in the form of imprisonment for LFO default in Washington State).

23. *State v. Nason*, 168 Wash. 2d 936, 948, 223 P.3d 848, 853 (2010) (holding Spokane, Washington's "auto-jail provision" violated due process because individuals were automatically jailed for LFO nonpayment without a determination of willfulness).

24. *See State v. Blazina*, 182 Wash. 2d 827, 833-34, 344 P.3d 680, 683 (2015) (en banc) (stating that although the parties failed to preserve the issue and the lower court declined to review the issue, the Washington State Supreme Court reached the merits of Mr. Blazina's case, ultimately overturning his LFO assessment).

25. 182 Wash. 2d 827, 344 P.3d 680 (2015) (en banc).

26. *Id.* at 835-37, 344 P.3d at 683-85 ("These problems include increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.").

low-income individuals.<sup>27</sup> It has granted review in multiple cases adjudicating the validity of imprisoning individuals for LFO nonpayment on a case-by-case basis.<sup>28</sup> However, litigants have not yet presented the Court with a case in which it can strike down, or at least severely abrogate, the LFO imprisonment system as a whole.<sup>29</sup>

Relying on the Washington Constitution,<sup>30</sup> this Comment provides litigants with the tools necessary to begin building that case, challenging

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27. Recently, the Court voted to increase traffic fines by twelve dollars. *In re* Adoption of the Amendment to IRLJ 6.2, No. 25700-A-1103 (May 12, 2015). “Chief Justice Barbara Madsen said in a news release Monday that raising the cost of the tickets was a tough decision, because the operations of the court system should not depend on fees and fines, which disproportionately hurt low-income people.” Gene Johnson, *Washington Supreme Court Boosts Costs of Traffic Tickets*, SEATTLE TIMES (May 18, 2015), <http://www.seattletimes.com/seattle-news/washington-supreme-court-boosts-cost-of-traffic-tickets/>. The decision was met with two vigorous dissents which pointed out the disproportionate impact increased fines would have on low income and minority individuals. *In re* Adoption of the Amendment to IRLJ 6.2, No. 25700-A-1103 (May 12, 2015) (McCloud, J., dissenting).

The data shows that the majority of fees generated from infractions come not from the base infraction fee or even from the several additional, mandatory fees that the governing statutes tack on. Instead, the majority of those fees come from penalties imposed when a payment is missed, for whatever reason. In other words, the people who are least able to pay up front, all at once, are the ones who end up paying the most. That was not fair in *Blazina*, and it’s still not fair here.

*Id.* Referencing the Department of Justice report explaining LFOs in Ferguson, Missouri, Justice McCloud calls into question whether or not Washington courts should actually be funded through “user fees that disproportionately burden those who can least afford it.” *Id.* “The majority’s position is consistent with best practice and the national standard. But that system is broken.” *Id.*

28. *Nason*, 168 Wash. 2d 936, 223 P.3d 848; *Blazina*, 182 Wash. 2d 827, 344 P.3d 680.

29. As of the publishing of this Comment, most litigants challenging imprisonment for LFO default have argued that a single individual’s—rather than all affected individuals’—due process rights were violated. *See, e.g., Nason*, 168 Wash. 2d at 940, 233 P.3d at 849; *Blazina*, 182 Wash. 2d at 837–39, 344 P.3d at 685. Even cases that have not yet made it to the Washington State Supreme Court bring due process claims. *See, e.g., Rucker v. Spokane Cnty.*, No. CV-12-5157-LRS, slip op. at \*1 (E.D. Wash. Nov. 26, 2013) (granting partial summary judgment for defendants on an aspect of plaintiff’s federal due process claim); *State v. Nash*, No. 38514-7-II, 2011 WL 198695 at \*1, \*3–4 (Wash. Ct. App. Jan. 6, 2011). Although the trial court determined that Mr. Nash could not be assessed any monthly payment, the Court of Appeals refused to use the Due Process Clause to invalidate his LFO obligations. *Id.* Obligations that, due to interest charges, had ballooned from his initial assessment of \$3,976.00 to \$8,138.58. *Id.* Due process is not violated unless the state imprisons the individual for default without making an individualized determination as to whether that person had the ability to pay. *Bearden v. Georgia*, 461 U.S. 660, 668 (1983). As exemplified by the cases discussed above, unless the system violates everyone’s due process rights by failing to determine if *everyone’s* nonpayment was willful (as was the case in *Nason*), it cannot be invalidated systemically using due process—it can only be examined on an individual level. Washington’s current LFO system does not, in itself, violate due process *per se* as it does provide an individual assessment of indigence. *See Bearden v. Georgia*, 461 U.S. at 668. Although the *Bearden* court held an indigent individual could not be imprisoned by the state for failing to pay, it explained “[i]f the probationer has willfully refused to pay the fine or restitution when he has the means to pay, the State is perfectly justified in using imprisonment as a sanction to enforce collection.” *Id.*

30. WASH. CONST. art. I, § 17 (imprisonment for debt).

imprisonment for LFO default on a systemic level. This Comment argues that modern courts should return to the original, robust understanding of citizens' rights against imprisonment for debt—an understanding that would invalidate much of the current LFO imprisonment system. Part I provides a brief history of imprisonment for debt in the United States. Part II sets forth the current system of imprisonment for LFO default, focusing primarily on Washington State, and highlights the policy arguments against imprisoning individuals for failing to pay. Part III explains why imprisonment for LFO nonpayment violates the state constitution, examining the original purpose of article I, section 17 as well as the provision's more recent judicial degradation. It separates the case law into three eras, highlighting the cases that incrementally deviated from the foundational doctrine: Modern jurisprudence (the Third Era) deviates from the foundational principles (set forth in the First Era) by applying inaccurate precedent (created in the second Era). Finally, Part IV argues that the statutory scheme enabling imprisonment for failing to pay LFOs violates article I, section 17's foundational jurisprudence.

## I. IMPRISONMENT FOR DEBT IS PROHIBITED IN THE WESTERN WORLD

History has borne continuous witness to rises and falls in imprisonment for debt.<sup>31</sup> Although the practice has had its moments of popularity throughout history, those moments have been stymied by peoples such as the Romans,<sup>32</sup> feudal lords,<sup>33</sup> the Normans,<sup>34</sup> the English,<sup>35</sup> and the Americans. Historical arguments calling imprisonment for debt into question are still relevant today.

Debtors' prisons were rampant in eighteenth century England.<sup>36</sup>

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31. See Richard E. James, Note, *Putting Fear Back into the Law and Debtors Back into Prison: Reforming the Debtors' Prison System*, 42 WASHBURN L.J. 143, 145–49 (2002).

32. See, e.g., JOHN A. CROOK, *LAW AND LIFE OF ROME 172–73* (1967); Becky A. Vogt, *State v. Allison: Imprisonment for Debt in South Dakota*, 46 S.D. L. REV. 334, 339 (2001).

33. See Mitchell & Kunsch, *supra* note 21, at 445 (“Feudal lords simply could not have their vassals, who were fodder in the Lord’s army, unavailable for military service because they were languishing in some debtor’s prison.”).

34. See Vogt, *supra* note 32, at 340.

35. See Stephen J. Ware, *A 20th Century Debate About Imprisonment for Debt*, 54 AM. J. LEGAL HIST. 351, 376–77 (2014) (noting that imprisonment for debt was not formally abolished by parliament until 1970).

36. See *id.* at 352–53 (2014). Using a writ of *capias ad respondendum*, the creditor would swear the debt was overdue or the debtor intended to hide, flee, or conceal property. PETER J. COLEMAN, *DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND*

Although creditors could seize a person's property in lieu of imprisonment,<sup>37</sup> most preferred to first jail the debtor in hopes of compelling payment, turning to forced property sale only if debtors' prison failed to shake loose the coin owed.<sup>38</sup>

In English America, early settlers brought with them the concept of imprisonment for debt<sup>39</sup> and by the end of the seventeenth century debtors' prisons pervaded the English colonies.<sup>40</sup> However, the colonists soon realized that imprisoning debtors was not the ideal method to compel payment: Debtors' prisons exposed all borrowers, including honest ones, to potential imprisonment in the hopes of protecting creditors from "the tiny minority of scoundrels."<sup>41</sup> "Though the threat of incarceration must have kept some borrowers honest, imprisonment rarely pried loose concealed property and only sometimes prompted friends or relatives to pay off the debt."<sup>42</sup> Imprisonment for debt locked up valuable labor and forced the public to front the costs of supporting many defaulters' dependents.<sup>43</sup> Some debtors' prisons were notoriously inhumane, a fact that, combined with the new Jeffersonian social reform movement,<sup>44</sup> fueled arguments in favor of abolishing debtors' prisons.<sup>45</sup>

In the late eighteenth century, advocates began employing legal, moral, and efficiency-based arguments to challenge debtors' prisons in England.<sup>46</sup> They described imprisonment for debt as inhumane, arbitrary, and inefficient.<sup>47</sup> Legislators discussed alternatives to imprisonment, such as executions of property, wage arrestment, and bankruptcy.<sup>48</sup> They recognized that debtors' prisons, which caused "barbarity to the poor

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BANKRUPTCY, 1607–1900, at 5 (1974). The court would then order the sheriff seize the debtor and jail him or her until the principal was satisfied. *Id.* Alternatively, the creditor could employ a writ of *capias ad satisfaciendum*, causing the debtor to be jailed immediately and to remain in prison until the debt was paid. Vogt, *supra* note 32, at 341.

37. See Vogt, *supra* note 32, at 342.

38. See *id.*

39. See COLEMAN, *supra* note 36, at 6.

40. See *id.* at 249.

41. *Id.* at 250.

42. *Id.*

43. See *id.*

44. See JOHN B. MCMASTER, THE ACQUISITION OF POLITICAL, SOCIAL AND INDUSTRIAL RIGHTS OF MAN IN AMERICA 52 (1903).

45. See COLEMAN, *supra* note 36, at 254–55.

46. See, e.g., JAMES STEPHEN, CONSIDERATIONS ON IMPRISONMENT FOR DEBT (London, T. Evans 1770).

47. See *id.* at 5–6.

48. See Ware, *supra* note 35, at 373–75.

unhappy class of people, who now breathe out their miserable lives in loathsome prisons on civil actions,<sup>49</sup> were more likely to imprison honest but unfortunate debtors than the dishonest men who were more deserving of punishment.<sup>50</sup> Such practice harmed both the honest debtors and the spurned creditors by destroying the borrower's estate without the benefit of punishing those who maliciously abused commercial debt.<sup>51</sup> The British critics' American counterparts made similar arguments, explaining that imprisonment for debt only worked in "barely a tenth of the cases and . . . complained that the fear of imprisonment encouraged deceit and fraud, and that honest defaulters went to jail while rogues often went free."<sup>52</sup>

In 1869, British Parliament began taking steps to strike down debtors' prisons, starting with statutes prohibiting imprisonment for debt except in limited situations such as contempt of court, defaulting on bankruptcy orders, and debts owed to non-commercial creditors.<sup>53</sup> However, by maintaining creditors' rights to use contempt to imprison individuals who had failed to pay, Parliament undermined its credible attempt to remedy the debtors' prison problem. In response, Parliament gradually narrowed its laws, eventually abolishing the practice entirely.<sup>54</sup>

Debtors' prisons continued in America until the early 1800s when states began abolishing the practice.<sup>55</sup> By 1811, many eastern states had abolished imprisonment for debt, and by the 1870s, most of the remaining states and territories had followed suit.<sup>56</sup> Imprisonment for debt is currently prohibited by forty-one state constitutions.<sup>57</sup>

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49. STEPHEN, *supra* note 46, at 45.

50. *Id.* at 55 ("It may seem a rash declaration, but it is strictly true, that a rogue has a much better chance to obtain a certificate than an honest man; and the person who has little or nothing to give up, than one who can make a good dividend.").

51. *Id.*

52. COLEMAN, *supra* note 36, at 255.

53. See The Debtors Act, 1869, 32 & 33 Vict., c. 62 (Eng.); Ware, *supra* note 35, at 354–55.

54. Ware, *supra* note 35, at 376–77.

55. COLEMAN, *supra* note 36, at 256; James, *supra* note 31, at 147.

56. COLEMAN, *supra* note 36, at 256.

57. ALA. CONST. art. I, § 20; ALASKA CONST. art. I, § 17; ARIZ. CONST. art. II, § 18; ARK. CONST. art. II, § 16; CAL. CONST. art. I, § 15; COLO. CONST. art. II, § 12; FLA. CONST. art. I, § 11; GA. CONST. § I, ¶ XXIII; HAW. CONST. art. I, § 19; IDAHO CONST. art. I, § 15; ILL. CONST. art. I, § 14; IND. CONST. art. I, § 22; IOWA CONST. art. I, § 19; KAN. CONST. bill of rights, § 16; KY. CONST. § 18; MD. CONST. art. III, § 38; MICH. CONST. art. I, § 21; MINN. CONST. art. I, § 12; MISS. CONST. art. III, § 30; MO. CONST. art. I, § 11; MONT. CONST. art. III, § 12; NEB. CONST. art. I, § 20; NEV. CONST. art. I, § 14; N.J. CONST. art. I, § 13; N.M. CONST. art. II, § 21; N.C. CONST. art. I, § 28; N.D. CONST. art. I, § 15; OHIO CONST. art. I, § 15; OKLA. CONST. art. II, § 13; OR. CONST. art. I, § 19; PA. CONST. art. I, § 16; R.I. CONST. art. I, § 11; S.C. CONST. art. I, § 19; S.D. CONST. art. VI,

The fall of debtors' prisons in both England and the early United States was largely due to the fact that that imprisonment for debt failed to accomplish repayment, caused negative social effects, and was outweighed by adequate alternatives.<sup>58</sup> These arguments still command merit today.

## II. DEBTORS' PRISONS ARE RESURGING IN THE UNITED STATES IN THE FORM OF IMPRISONMENT FOR UNPAID LEGAL FINANCIAL OBLIGATIONS

De facto debtors' prisons exist in contemporary America.<sup>59</sup> Because they run contrary to federal<sup>60</sup> and state law, they are "implemented through the 'smokescreen of civil contempt'"<sup>61</sup>: courts jail individuals for willfully failing to pay a court-ordered judgment.<sup>62</sup> While only about one-third of states imprison individuals for contemptuous failure-to-pay, a sanction intended to coerce payment,<sup>63</sup> nearly all states continue to sanction debtors for failing to appear.<sup>64</sup>

Perhaps the most compelling example of modern imprisonment for debt in the guise of contempt is the practice of imprisoning individuals for failing to pay LFOs. Many formerly incarcerated individuals re-enter society owing the State fines, restitution, fees, and costs.<sup>65</sup> Individuals are often saddled with exorbitant interest rates, quickly transforming

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§ 15; TENN. CONST. art. I, § 18; TEX. CONST. art. I, § 18; UTAH CONST. art. I, § 16; VT. CONST. c. 2, § 40; WASH. CONST. art. I, § 17; WIS. CONST. art. I, § 16; WYO. CONST. art. I, § 5.

58. James, *supra* note 31, at 148.

59. *Id.* at 149.

60. As early as 1896 there was a federal statute limiting imprisonment for debt. *Id.* at 154 (discussing §§ 990–992 of the Revised Statutes of the United States).

61. *Id.* at 165.

62. *See, e.g.*, WASH. REV. CODE § 7.21.030(2)(a) (2014) (allowing Washington courts to imprison an individual for contempt of court when the individual fails to complete a court ordered act that is within her power).

63. Lea Shepard, *Creditors' Contempt*, 2011 BYU L. REV. 1509, 1543 (2011).

64. *Id.* at 1544–45. Although there is a legal distinction between imprisonment for failing to appear (a punitive action) and imprisonment for failing to pay (a coercive action), Shepard argues that in practical application it is a distinction without a difference. *Id.* at 1545–48. She explains the concept of "contempt confusion"—because failing to pay and failing to appear are inextricably intertwined, "a court's threat to imprison a debtor for failure to appear in court can put direct pressure on the debtor to pay the creditor." *Id.* at 1547. "Once a 'no-show' debtor is arrested or threatened with arrest, she may find it difficult to distinguish between the immediate source of the arrest threat, her failure to appear in court, and the proximate cause of the threat of incarceration: the debt default itself." *Id.* at 1546. In essence, imprisonment for failing to pay and imprisonment for failing to appear are indistinguishable to the debtor.

65. Shapiro, *supra* note 5.

even minor LFO debts into obligations that are difficult or impossible to satisfy.<sup>66</sup> Those who defy a court order to cure LFO nonpayment can be held in contempt and jailed for default.<sup>67</sup>

The LFO system is closely tied to the “offender-funded” model of criminal justice—financing the criminal justice system out of the pockets of those who are entangled in it.<sup>68</sup> Since the “tough-on-crime era”<sup>69</sup> when the offender-funded model was conceptualized, the criminal-justice system has dramatically expanded.<sup>70</sup> LFOs have grown accordingly.<sup>71</sup> What may have started as a workable solution to funding problems has grown to impose impractical, even counterproductive burdens on low-income offenders.

### III. DE FACTO DEBTORS’ PRISONS IN WASHINGTON STATE

Washington State’s legislative branch has firmly embraced the “offender-funded” model of criminal justice. Washington State contributes a mere 10.6% of the total cost of trial courts and indigent defense—leaving local governments to come up with nearly ninety percent of the total cost of Washington’s criminal justice system.<sup>72</sup> Out of every state in the nation, Washington ranks absolute last in funding

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66. *Id.*; see also BECKETT ET AL., *supra* note 2, at 2 (“As a result of high rates of non-payment and the accrual of interest, the legal debt of most of those sentenced . . . had grown rather than shrunk [in three years].”).

67. BECKETT ET AL., *supra* note 2, at 58 (“Indeed, it appears that non-payment not uncommonly leads to the issuance of a warrant, re-arrest, and re-incarceration in some Washington State counties.”).

68. See HUMAN RIGHTS WATCH, PROFITING FROM PROBATION: AMERICA’S “OFFENDER-FUNDED” PROBATION INDUSTRY 1–6 (2014), available at <http://www.hrw.org/reports/2014/02/05/profitting-probation-0> (describing various modes of the offender funded model of criminal justice as well as problems with its privatization).

69. See Shapiro, *supra* note 5 (noting the tough-on-crime policies began in the 1970s).

70. BECKETT ET AL., *supra* note 2, at 9; BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 243920, PRISONERS IN 2012: TRENDS AND ADMISSIONS AND RELEASES, 1991–2012, at 1 (2013) (“Between 1978 and 2009, the number of prisoners held in federal and state facilities in the United States increased almost 430% from 294,400 on December 31, 1978, to 1,555,600 on December 31, 2009.”).

71. Bannon ET AL., *supra* note 3, at 7 (“Criminal justice debt is growing at an alarming rate across the country.”).

72. BD. FOR JUDICIAL ADMIN., JUSTICE IN JEOPARDY: THE COURT FUNDING CRISIS IN WASHINGTON STATE 5 (2004) [hereinafter JUSTICE IN JEOPARDY]. Since this report, the legislature revised trial court funding procedures, hoping to ease the burden of the underfunded criminal justice system. Act of May 13, 2005, ch. 457, 2005 Wash. Sess. Laws 1948. While this legislation has helped, it has not alleviated much of the burden imposed on local governments. BD. FOR JUDICIAL ADMIN., TRIAL COURT IMPROVEMENT ACCOUNT USE REPORT FOR 2013, at 11 (2014) (“In the aggregate, TCIA funds account for a very small percentage of a court’s total budget.”).

judicial and legal services.<sup>73</sup> It is hard to blame legislators for turning to the offender funded model to keep the system afloat—the money has to come from somewhere. This Comment recognizes the State’s funding crisis and does not mean to challenge the LFO system in its entirety. LFOs that are timely paid do provide much needed funding for the state criminal justice system. The Washington Legislature embraces them as “an important part of taking personal responsibility for one’s actions.”<sup>74</sup>

However, as the subsequent sections explain, there are serious problems with funding the criminal justice system by *imprisoning* individuals for unpaid LFOs. Individuals who can easily understand and pay their LFOs often satisfy their entire obligation right away, just as you or I might pay a large traffic fine or IRS penalty. In such cases, imprisonment is not required and the criminal justice system gets its funding with arguably little expense. However, less fortunate individuals are less likely to make timely LFO payments and thus more likely to face imprisonment.<sup>75</sup> Those that can and will pay their LFOs do so with little state prodding while those that believe they cannot or are unwilling to pay their LFOs face imprisonment—imprisonment that drains government coffers and does not effectively compel payment.<sup>76</sup>

Doing away with imprisonment for LFO default would not do away with the LFO funding mechanism. Those who can easily pay their LFOs will still do so in a timely manner. Those that feel they cannot or are unwilling to pay their LFOs will still go into default. Removing imprisonment for debt would merely require the system to use different existing—and perhaps more effective—methods such as wage garnishment<sup>77</sup> to compel LFO payment. Imprisoning defaulting

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73. JUSTICE IN JEOPARDY, *supra* note 72, at 4.

74. Legal Financial Obligations—Collection, ch. 106, 2011 Wash. Sess. Laws 943, § 1 (codified at WASH. REV. CODE § 10.82.090 (2014)).

75. Although *Bearden v. Georgia*, 461 U.S. 660 (1983), prohibits states from assessing LFOs against indigent offenders (requiring a case-by-case determination), the process by which ability to pay is determined by some Washington courts appears “to be standardized rather than based on an assessment of the particular circumstances faced by defendants.” BECKETT ET AL., *supra* note 2, at 65; Brief for the American Civil Liberties Union and the Washington Defender Association as Amicus Curiae at 5, *State v. Nash*, No. 38514-7-II at \*1, \*3–4 (2011); *see also* Bannon et al., *supra* note 3, at 13 (“[N]one of the fifteen examined states pay adequate attention to whether individuals have the resources to pay . . .”).

76. *See infra* notes 117–39 and accompanying text.

77. Wage garnishment might be a viable alternative in part because of the additional protections already in place. An employer may not terminate an employee for having their wages garnished. WASH. REV. CODE § 6.27.170 (2014) (an employee may not be discharged for having two or fewer wage garnishments per year). There is no such protection for employees who are imprisoned for failing to pay LFOs. Furthermore, Washington has statutory protections in place to ensure that garnishments are not overly-onerous on low income individuals. *Id.* § 6.27.150. The current wage

offenders, although intended to help fund the criminal justice system, imposes serious consequences that are not counterbalanced by program success.<sup>78</sup> Compared to other states, Washington's LFO system imposes one of the highest fees, costs, and interest<sup>79</sup> bills on offenders.<sup>80</sup> Washington imposes mandatory and discretionary LFOs, billing offenders for the costs of and fees related to court-appointed attorneys,<sup>81</sup> restitution,<sup>82</sup> defense,<sup>83</sup> fines,<sup>84</sup> confinement,<sup>85</sup> guilty convictions or pleas,<sup>86</sup> deferred prosecution,<sup>87</sup> warrants for failing to appear,<sup>88</sup> pretrial supervision,<sup>89</sup> impaneling a jury,<sup>90</sup> extradition,<sup>91</sup> electronic monitoring,<sup>92</sup> emergency response,<sup>93</sup> crime laboratory analysis,<sup>94</sup> biological sample

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garnishment structure already has provisions in place that could help compel LFO payment while avoiding some of the negative effects of imprisonment.

78. For an examination of a similar problem with contempt proceedings and the offender-funded model of criminal justice in the context of traffic fines and driver's license suspensions in Washington, see generally Mitchell & Kunsch, *supra* note 21.

79. Currently, the 2015 Washington Legislature is considering two bills intended to reform the LFO imprisonment system. The bills as proposed would eliminate interest on non-restitution LFOs and make it easier for judges to reduce or waive LFO debt. The bills also attempt to better define willfulness in the context of indigent individuals' failure to pay. H.R. REP. NO. 64-1390, Reg. Sess., at 3 (Wash. 2015); S. REP. NO. 64-5713, Reg. Sess. (Wash. 2015). However, the bills being considered by the legislature still allow imprisonment for "willful" nonpayment of LFOs in the form of civil contempt. H.R. REP. NO. 64-1390, Reg. Sess., at 3 (Wash. 2015) (report by H. Comm. on Judiciary Appropriations); *see also* S. REP. NO. 64-5713, Reg. Sess., at 2 (Wash. 2015) (report by S. Comm. on Law and Justice, Feb. 17, 2015). Although House Bill 1390 passed the House by an astounding margin of ninety-four to four, it seems to have died on the Senate floor. S. REP. NO. 64-5713, Reg. Sess. (Wash. 2015); WASH. STATE LEG., SB 5713 – 2015-16 (Sept. 22, 2015), <http://app.leg.wa.gov/billinfo/summary.aspx?bill=5713&year=20150>.

80. Michael L. Vander Giessen, Note, *Legislative Reforms for Washington State's Criminal Monetary Penalties*, 47 GONZ. L. REV. 547, 549 (2012).

81. WASH. REV. CODE § 9.94A.030(30) (2014).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* § 9.94A.760(2) (imposing a cost of \$50 per day for incarceration in prison and up to \$100 per day for incarceration in county jail).

86. *Id.* § 36.18.020(2)(h) (2014) (imposing a cost of \$200).

87. *Id.* § 10.01.160(2) (2014) (imposing a cost up to \$250).

88. *Id.* (imposing a cost up to \$100).

89. *Id.* (imposing a cost up to \$150).

90. *Id.* § 36.18.016(3)(b) (imposing costs of \$125 for six-person juries, and \$250 for twelve-person juries).

91. *Id.* § 9.95.210(2).

92. *Id.*

93. *Id.*

94. *Id.* § 43.43.690(1) (2014) (imposing a mandatory fee of \$100 for each offense).

collection,<sup>95</sup> interlocal drug funds,<sup>96</sup> and “any other financial obligation that is assessed to the offender as a result of a felony conviction.”<sup>97</sup> The municipal governments levy annual surcharges against unpaid LFOs<sup>98</sup> and impose a twelve percent interest rate,<sup>99</sup> the second highest in the nation.<sup>100</sup> Washington courts can<sup>101</sup> and do<sup>102</sup> utilize contempt to imprison individuals for failing to pay LFOs. In superior court, individuals must be credited a sum of money towards their obligations each day they are imprisoned for default.<sup>103</sup>

A. *De Facto Debtors’ Prisons Have Adverse Consequences in Washington*

Imprisonment for failing to pay LFOs is not uncommon in Washington.<sup>104</sup> The practice has adverse consequences for defaulting offenders as well as the public.<sup>105</sup> Recent research suggests that imprisonment does not efficiently compel LFO payment.<sup>106</sup> Imposing a

95. *Id.* § 43.43.7541 (imposing a mandatory fee of \$100 for each sentence imposed).

96. *Id.* § 9.94A.030(30).

97. *Id.*

98. *Id.* § 36.18.016(29) (limiting fees to \$100 annually).

99. *Id.* § 10.82.090(1); *id.* § 4.56.110(4); *id.* § 19.52.020(1) (imposing an interest rate consisting of the greater between twelve percent and four points above the Treasury Bill rate); H.R. REP. NO. 58-2485, Reg. Sess., at 2 (Wash. 2004) (finding that twelve percent has generally exceeded the Treasury Bill, making twelve percent the interest rate on judgments for at least the prior decade).

100. Alison Warren, *Support LFO Bills*, THE SPOKESMAN REVIEW at B5 (Feb. 14, 2015).

101. Imprisonment for failing to pay LFO debts is authorized by WASH. REV. CODE § 10.01.180(5) (2014) (“A default in the payment of a fine or costs or any installment thereof may be collected by any means authorized by law for the enforcement of a judgment.”).

102. *See, e.g.*, State v. Nason, 168 Wash. 2d 936, 941, 223 P.3d 848, 849 (2010) (examining the trial court’s decision ordering the defendant serve ninety-five days in jail for falling behind on LFO payments); BECKETT ET AL., *supra* note 2, at 58.

103. WASH. REV. CODE § 10.01.180(3) (“If a term of imprisonment for contempt for nonpayment of a fine or costs is ordered, the term of imprisonment shall be set forth in the commitment order . . . . A person committed for nonpayment of a fine or costs shall be given credit toward payment for each day of imprisonment at the rate specified in the commitment order.”). This act of crediting individuals for their incarceration is conceptually similar to “peonage,” a practice Congress outlawed early in United States history. Peonage Abolition Act, ch. 187, 14 Stat. 546 (1867) (codified at 18 U.S.C. § 1581 (2012) and 42 U.S.C. § 1994 (2012)). The United States Supreme Court upheld this prohibition. *Clyatt v. U.S.*, 197 U.S. 207, 215 (1905) (explaining peonage).

104. BECKETT ET AL., *supra* note 2, at 58.

105. *See* Bannon et al., *supra* note 3, at 5 (“What at first glance appears to be easy money for the state can carry significant hidden costs—both human and financial—for individuals, for the government, and for the community at large.”).

106. *See, e.g.*, James, *supra* note 31, at 166–67 (arguing that because the current use of debtors’ prisons is not transparent, modern debtors are unaware they risk imprisonment for failing to pay and

punishment with such adverse consequences, absent evidence of effectiveness, conflicts with the stated goals of the Washington Sentencing Reform Act of 1981,<sup>107</sup> including the enumerated commitment to reducing recidivism.<sup>108</sup>

Warrants and arrests for failing to pay impose adverse consequences on rehabilitated offenders. Contempt proceedings label defaulters as “fleeing felons,” automatically disqualifying them from government benefits designed to help provide the necessities of life.<sup>109</sup> Imprisonment has significant negative consequences for individuals, impacting education, occupation, family life, credit scores, and ability to afford child support.<sup>110</sup> Individuals cannot vote until they have satisfied their court-ordered LFOs.<sup>111</sup> Many who are incarcerated for unpaid LFOs fall below federal poverty guidelines.<sup>112</sup> Often, they are trying to support families and children while they pay, or fall behind, on their LFO debt.<sup>113</sup> Furthermore, LFOs affect minorities and the poor disproportionately and exacerbate recidivism.<sup>114</sup>

Although the United States Supreme Court held it unconstitutional to imprison indigent defendants for failing to pay,<sup>115</sup> some scholars have begun to question courts’ abilities to determine when an individual is indigent and thus constitutionally protected.<sup>116</sup> Washington’s current practice risks incarcerating individuals who truly cannot pay.

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thus are not deterred by the practice).

107. Sentencing Reform Act of 1981, ch. 137, 1981 Wash. Sess. Laws 519 (codified as amended at WASH. REV. CODE § 9.94A (2014)).

108. WASH. REV. CODE § 9.94A.010 (“The purpose of [the Sentencing Reform Act] is to . . . (7) [r]educe the risk of reoffending by offenders in the community.”); BECKETT ET AL., *supra* note 2, at 4 (“[W]e conclude that the legislature’s goal of holding offenders financially accountable for the consequences of their criminal behavior is in tension with its efforts to reduce recidivism by facilitating the successful reintegration of Washington State residents with a felony conviction.”).

109. BECKETT ET AL., *supra* note 2, at 3 (noting that “fleeing felons” are ineligible for Temporary Assistance for Needy Families, Social Security Insurance, assisted housing, and food stamp programs).

110. *Id.* at 10; *see also* Bannon et al., *supra* note 3, at 27–29.

111. *Madison v. State*, 161 Wash. 2d 85, 110–11, 163 P.3d 757, 773 (2007) (holding that Washington’s felon disenfranchisement scheme prohibiting felons from voting until they have satisfied all LFOs is constitutional); *see also* Bannon et al., *supra* note 3, at 29 (characterizing criminal justice debt as a “poll tax”).

112. BECKETT ET AL., *supra* note 2, at 2–3.

113. *Id.* at 3, 32.

114. *Id.* at 57–59; Giessen, *supra* note 80, at 552–53.

115. *Bearden v. Georgia*, 461 U.S. 660, 672–73 (1983).

116. BECKETT ET AL., *supra* note 2, at 65; Brief for the Washington Defender Association, et al. as Amici Curiae at 5, *State v. Nash*, 2011 WL 198695 (Wash. Ct. App. Jan. 6, 2013) (No. 38514-7-II); Bannon et al., *supra* note 3, at 13.

*B. Imprisonment for Failing to Pay LFOs Is Ineffective*

Washington's system adversely affects individuals and risks incarcerating—and re-incarcerating—the indigent. Arguably those downsides might be counterbalanced if the policy effectively accomplished its goals. However, there is little evidence that imprisonment compels LFO payment or deters default: “The threat of criminal justice intervention create[s] an incentive for those who ha[ve] not made regular LFO payments to hide from the authorities, but nonetheless ma[kes] it difficult for those same persons to disentangle themselves from the criminal justice system.”<sup>117</sup> In a study examining the consequences of LFO debt, some participants described the overwhelming nature and sheer magnitude of their debt, and their resulting decision to “ignore it entirely”:

Cause in all reality there's no way I can pay it, so, I don't worry about it. If it came down to it, they put me in jail, I'd serve time to pay off the fines, that would be fine with me, either way. I mean, it's impossible to pay. I only make \$180 a month anyway.<sup>118</sup>

Another participant lamented:

I mean, even if you have a normal job, you can't really gain no headway. I mean, the bottom line is if I go pay on it, and \$50 a month ain't covering it, and I'm still, you know I'm still toiling forward, then why would you want to pay on something without seeing any deduction in the debt that you owe?<sup>119</sup>

Despite offenders being aware of their debts, there is little evidence that the current LFO system adequately deters nonpayment. Many individuals stop making payments because of the perceived insurmountable barriers imposed by the system.<sup>120</sup>

Furthermore, when debtors do not understand the consequences of nonpayment, they logically cannot be deterred from default. Individuals lack clarity regarding their LFO obligations and rights<sup>121</sup> and “the public views the risk of imprisonment for debt to be either non-existent or very small.”<sup>122</sup> The likelihood that individuals will be deterred by the very

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117. BECKETT ET AL., *supra* note 2, at 3–4.

118. *Id.* at 39.

119. *Id.*

120. *Id.* at 4–5, 39–40.

121. *Id.* at 47–52 (“[R]espondents described a profound sense of uncertainty about the rules governing assessment and collection of their LFOs.”).

122. James, *supra* note 31, at 167.

real—but little known—threat of imprisonment for LFO nonpayment is proportionally small.<sup>123</sup> Arguably, the Legislature’s “stealthy” use of contempt to circumvent the constitutional prohibition on imprisonment for debt has undone any chance of significant deterrence.<sup>124</sup>

Meanwhile, Washington counties are collecting barely a fraction of total debts owed.<sup>125</sup> According to analyses completed by Washington State Representative Ross Hunter, more than eighty percent of LFOs are “uncollectible.”<sup>126</sup> When a county imprisons an LFO debtor, it pays for that debtor’s incarceration costs, as well as a daily “credit” to the debtor’s LFO account.<sup>127</sup> For example, it costs Benton County, Washington \$65 per day to house and feed one inmate.<sup>128</sup> The County credits inmates \$50 for every day they spend in jail.<sup>129</sup> Each day Benton County keeps an LFO defaulter in jail, its taxpayers lose at least \$115.<sup>130</sup> This calculation does not take into account the costs of police action, prosecuting and defense attorneys, jail overcrowding, and opportunity costs, all of which affect the extent of the system’s burden on taxpayers.<sup>131</sup> Imprisonment for failing to pay LFOs also diverts public servants and officers from fulfilling their public safety and rehabilitation purposes.<sup>132</sup> In Ferguson, Missouri, the local government’s emphasis on using police officers and courts to generate revenue exacerbated community distrust, degrading citizens’ respect for the criminal justice institution.<sup>133</sup>

Furthermore, when individuals are incarcerated, they are unable to work and pay down their LFO debts. What was true in the nineteenth

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123. *Id.*

124. *Id.* at 167–69.

125. Shapiro, *supra* note 5.

126. Ross Hunter, *Debtors Prisons—Legal Financial Obligations*, ROSSHUNTER.INFO (Mar. 11, 2015), [http://www.rosshunter.info/2015/03/debtors\\_prisons/#\\_ftn1](http://www.rosshunter.info/2015/03/debtors_prisons/#_ftn1); see also BECKETT ET AL., *supra* note 2, at 4 (“[Z]ero percent of the fees, fines and restitution orders assessed in 2004 were paid for approximately half of the convictions three years post-sentencing.”).

127. WASH. REV. CODE § 10.01.180(3) (2014).

128. Shapiro, *supra* note 5.

129. Kristin M. Kraemer, *Paying Fines with Jail Time Being Debated*, TRI-CITY HERALD, Nov. 3, 2013, A1.

130.  $\$65 + \$50 = \$115$ .

131. See Bannon et al., *supra* note 3, at 25–26 (calling imprisonment for LFO nonpayment “penny-wise and pound-foolish” and explaining that “[w]hile states focus on the income such collection practices bring in, they generally fail to look at the other side of the balance sheet, including costs imposed on sheriffs’ offices, local jails and prisons, prosecutors and defense attorneys, and the courts themselves”).

132. See Bannon et al., *supra* note 3, at 31.

133. U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., *supra* note 22, at 2–6.

century is just as true today: “Debtor’s prison does not work when the debtor is impoverished. No money will be collected while the debtor is incarcerated, and he or she likely will be poorer when released.”<sup>134</sup> Expending public funds on a system that has not been shown to effectively deter nonpayment, combined with the fact that individuals are not making actual payments when they are imprisoned, is inconsistent with one of the purposes of the Washington Sentencing Act of 1981: to “[m]ake frugal use of the state’s and local governments’ resources.”<sup>135</sup>

Many scholars, researchers, and advocates criticize Washington’s LFO imprisonment system as embodying debtors’ prisons.<sup>136</sup> It is both inefficient and socially detrimental. Washington couches imprisonment for unpaid LFOs as imprisonment for contempt of court, a controversial work-around borrowed from nineteenth century Parliament.<sup>137</sup> Given the heightened litigation in this area<sup>138</sup> and authorities suggesting the LFO imprisonment system is economically inefficient, one would think the practice would currently be subject to considerable institutional challenges. However, most advocates are challenging the system using only case-by-case due process arguments.<sup>139</sup>

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134. Mitchell & Kunsch, *supra* note 21, at 460.

135. WASH. REV. CODE § 9.94A.010(6) (2014).

136. *See, e.g.*, IN FOR A PENNY, *supra* note 21, at 5 (describing LFO systems as “modern-day ‘debtors’ prisons”); MODERN-DAY DEBTORS’ PRISONS, *supra* note 2, at 3 (noting that characterizing imprisonment for LFO nonpayment in Washington as “a modern version of the despised debtors’ prison”); Mitchell & Kunsch, *supra* note 21, at 443 (noting that imprisonment for unpaid LFOs “cannot help but conjure up images of debtors’ prisons from Dickens”); Bannon et al., *supra* note 3, at 5 (characterizing imprisonment for LFO nonpayment as “a new form of debtors’ prison”).

137. When crafting laws to limit imprisonment for debt, nineteenth century Parliament retained an exception allowing imprisonment for contempt. Ware, *supra* note 35, at 355–56. The contempt exception has been criticized by more modern scholars. *Id.* at 355 n.24.

138. *See, e.g.*, Rucker v. Spokane Cnty., No. CV-12-5157-LRS, slip op. at \*6 (E.D. Wash. Nov. 26, 2013) (granting partial summary judgment for defendants on an aspect of plaintiff’s federal due process claim); State v. Nash, No. 38514-7-II, 2011 WL 198695, at \*1, \*3–4 (Wash. Ct. App. Jan. 6, 2011). Although the trial court determined that Mr. Nash could not be assessed any monthly payment, the court of appeals refused to use the Due Process Clause to invalidate his LFOs. *Id.* Obligations that, due to interest charges, had ballooned from his initial assessment of \$3,976.00 to \$8,138.58. *Id.*; *see also* State v. Nason, 168 Wash. 2d 936, 948, 233 P.3d 848, 853 (2010) (individual litigation invalidating Spokane, Washington’s “auto-jail provision” wherein individuals were automatically jailed for LFO nonpayment without a determination of willfulness); Class Action Complaint at 1–2, Cavnar v. Bounceback, Inc., No. 2:14-cv-00235-RMP, 2015 WL 4429095 (E.D. Wash. July 18, 2014) (class action challenging a private debt collector’s practice using the county prosecutor’s letterhead to compel payment of court fees and fines).

139. None of the cases cited *supra*, note 138 made any citation to WASH. CONST. art. I, § 17 (prohibiting imprisonment for debt). According to WestlawNext, only seventy-eight cases have ever cited the Washington constitutional prohibition on imprisonment for debt. The most recent case to

The subsequent sections set forth the tools necessary to attack imprisonment for LFO nonpayment on a systemic level. This Comment recognizes that case law has substantially abrogated the once robust Washington constitutional prohibition on imprisonment for debt, making a systemic challenge unrealistic. However, the current jurisprudence is rife with inconsistencies, and this Comment argues that the Washington State Supreme Court should revise its interpretation and return to the foundational doctrine.

#### IV. IMPRISONING INDIVIDUALS FOR LFO NONPAYMENT VIOLATES THE WASHINGTON CONSTITUTION

Imprisoning individuals for failing to pay LFOs runs contrary to both the spirit and the letter of Washington's Constitution. However, the Washington State Supreme Court has not yet declared this practice unconstitutional. Over time, the jurisprudence expounding article I, section 17 has become muddled, generating confusion and resulting in doctrines that failed to respect foundational courts' decisions and the constitutional delegates' original intent. This Comment clarifies the meaning of article I, section 17 and explains how the provision's plain language and the strong populist ideals embodied in Washington's bill of rights conflict with the current LFO system. This Comment provides a foundation that can be used to challenge the modern jurisprudence by describing the evolution of article I, section 17 interpretations over time. Modern case law misinterprets the precedent and fails to respect the foundational doctrine set forth by the state's first courts.

##### A. *The Plain Language of Washington's Constitution Unambiguously Prohibits Jailing Individuals for Failing to Pay LFOs*

Washington's LFO system and its resulting imprisonment for debt is not the product of a weak constitutional provision. In fact, article I, section 17 might be best described as strongly worded and "no-nonsense":

There shall be no imprisonment for debt, except in cases of

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cite the provision more than in passing is *Britannia Holdings Ltd. v. Greer*, 127 Wash. App. 926, 930–31, 113 P.3d 1041, 1043 (2005) (applying section 17 to a judgment for contract breach between two individual litigants). The last time the Washington State Supreme Court cited this provision was in *State v. Curry*, 118 Wash. 2d 911, 918, 829 P.2d 166, 169 (1992) (remarking offhandedly that the provision would likely prohibit imprisoning individuals for being unable to pay their debts).

absconding debtors.<sup>140</sup>

This provision has not changed since its adoption at the Washington Constitutional Convention in 1889.<sup>141</sup> On its face, it appears to be absolute: No person may be imprisoned for debt unless he or she is absconding. “An absconding debtor is one who leaves, or is about to leave, the jurisdiction, or who conceals himself within the jurisdiction, for the purpose of avoiding the process of the courts . . . .”<sup>142</sup> Facially, article I, section 17 requires that absolutely no person be imprisoned for failing to pay a debt unless that person is fleeing from his creditors.<sup>143</sup>

This Comment addresses only non-absconding LFO debtors—individuals who have not tried to flee the state’s jurisdiction or conceal themselves in order to avoid paying their LFO debt. The systemic challenge to the LFO system levied by this Comment pertains to those “honest but unfortunate” individuals who remain in the state and cannot—or have chosen not to—make payments on their LFO obligations. Likely, the vast majority of imprisoned LFO debtors are non-absconding.<sup>144</sup> To the extent the current system risks imprisoning non-absconding LFO debtors, it is unconstitutional. A system that no longer risks imprisoning non-absconding individuals—such as a garnishment-based system allowing imprisonment only after the individual flees or hides from valid garnishment—would not offend article I, section 17.

### 1. *Imprisoning People for Failing to Pay Is “Imprisonment” Within Article I, Section 17*

By using contempt proceedings to imprison individuals for failing to pay LFOs, Washington is imprisoning non-absconding individuals for debt, violating the unambiguous plain language of article I, section 17. Under the conventional approach to constitutional interpretation in Washington, this should be the end of the matter:

[I]t is a cardinal rule of construction that the language of a state

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140. WASH. CONST. art. I, § 17.

141. *Compare* WASH. CONST. art. I, § 17 (1889), *with* WASH. CONST. art. I, § 17.

142. *Burrichter v. Cline*, 3 Wash. 135, 136, 28 P. 367, 368 (1891).

143. BLACK’S LAW DICTIONARY 490 (10th ed. 2014) (defining “absconding debtor” as “[a] debtor who flees from creditors to avoid having to pay a debt”).

144. As the vast majority of imprisoned LFO debtors are low-income, many could not flee the state to avoid their obligations even if they wished to do so. *See* BECKETT ET AL., *supra* note 2, at 27–41 (examining the financial and social consequences of LFOs in Washington); COLEMAN, *supra* note 36, at 255 (noting that historically, honest but unfortunate, non-absconding debtors were imprisoned while the rogues went free).

Constitution, more than that of any other of the written laws, is to be taken in its general and ordinary sense. The reason for the rule lies in the fact that its makers are the people who adopt it. . . . “Every word employed in the Constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it.”<sup>145</sup>

Contrary to the plain language of its provision, Washington is imprisoning non-absconding individuals.

## 2. *Non-Fine LFOs Are “Debts” Within Article I, Section 17*

The question then becomes: What, if any, LFOs constitute “debts” within the meaning of the Constitution? The word “debt” is a broad term and should be determined in its “popular and general sense,” encompassing all “obligations due from one person to another of every character.”<sup>146</sup> Debt is a “specific sum of money due by agreement or otherwise.”<sup>147</sup> Thus, article I, section 17 prohibits imprisoning a debtor for failing to pay obligations due to another person or entity of “every character.” The provision does not apply to unpaid fines,<sup>148</sup> taxes, or license fees.<sup>149</sup>

A substantial amount of LFOs—what this Comment calls “non-fine LFOs”—do not constitute fines, taxes, or license fees, thus falling within the purview of article I, section 17. Such LFOs include court-appointed attorneys’ fees,<sup>150</sup> restitution,<sup>151</sup> costs of defense,<sup>152</sup> confinement costs,<sup>153</sup> the cost of guilty convictions or pleas,<sup>154</sup> deferred prosecution costs,<sup>155</sup> costs of a warrant for failing to appear,<sup>156</sup> pretrial supervision fees,<sup>157</sup>

145. *Bronson v. Syverson*, 88 Wash. 264, 275, 152 P. 1039, 1043 (1915) (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 451 (1891)).

146. *Id.* at 277, 152 P. at 1044.

147. BLACK’S LAW DICTIONARY 488 (10th ed. 2014).

148. BEVERLY PAULIK ROSENOW, THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889, at 507 (Quentin Shipley Smith ed., 1999).

149. *Austin v. City of Seattle*, 176 Wash. 654, 660–62, 30 P.2d 646, 648–49 (1934).

150. WASH. REV. CODE § 9.94A.030(30) (2014).

151. *Id.*

152. *Id.*

153. *Id.* § 9.94A.760(2) (imposing providing \$50 per day for incarceration in prison and up to \$100 per day for incarceration in county jail).

154. *Id.* § 36.18.020(2)(h) (imposing a cost of \$200).

155. *Id.* § 10.01.160(2) (imposing a cost up to \$250).

156. *Id.* (imposing a cost up to \$100).

157. *Id.* (imposing a cost up to \$150).

jury costs,<sup>158</sup> extradition costs,<sup>159</sup> electronic monitoring,<sup>160</sup> emergency response costs,<sup>161</sup> crime laboratory analysis fees,<sup>162</sup> biological sample collection fees,<sup>163</sup> costs of interlocal drug funds,<sup>164</sup> and “any other financial obligation that is assessed to the offender as a result of a felony conviction.”<sup>165</sup> These are all obligations due from one (the offender) to another (the government, or in the case of restitution, the victim), thus constituting “debts” within the provision.

In addition to excluding fines, taxes, and license fees, article I, section 17 prohibits imprisonment only for *civil* debts.<sup>166</sup> However, non-fine LFOs are civil debts. The Washington State Supreme Court characterizes Washington’s statute allowing imprisonment for LFO nonpayment as civil in nature.<sup>167</sup> Thus, non-fine LFOs are civil debts within article I, section 17 and the provision should prohibit imprisoning individuals for LFO default.

However, one Washington State Supreme Court case holds, at least in part, that LFOs do not fall within the protections embodied by article I, section 17. In upholding imprisonment for willful failure to pay court ordered public defenders’ fees, the Court in *State v. Barklind*<sup>168</sup> explained that probation orders did not constitute a “debt” under article I, section 17.<sup>169</sup> “A debt is created only in the sense that the order required defendant to repay society for a part of what it lost as a result of his commission of a crime.”<sup>170</sup> At first glance, this seems to settle the issue: LFOs (at least court-ordered public defender fees) fall outside of the constitutional prohibition on imprisonment for debt.

However, the *Barklind* Court cited only one case in support of its key proposition: *Decker v. Decker*,<sup>171</sup> which held as a matter of public policy

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158. *Id.* § 36.18.016(3)(b) (\$125 for six-person juries, \$250 for twelve-person juries).

159. *Id.* § 9.95.210(2).

160. *Id.*

161. *Id.*

162. *Id.* § 43.43.690(1) (imposing a mandatory fee of \$100 for each offense).

163. *Id.* § 43.43.7541 (imposing a mandatory fee of \$100 for each sentence imposed).

164. *Id.* § 9.94A.030(30).

165. *Id.*

166. ROSENOW, *supra* note 148, at 507 (noting the sponsor of article I, section 17’s explanation to the delegation that the provision would only apply to civil debts).

167. *Smith v. Whatcom Cnty. Dist. Ct.*, 147 Wash. 2d 98, 105, 52 P.3d 485, 489 (2002).

168. 87 Wash. 2d 814, 557 P.2d 314 (1976).

169. *Id.* at 819–20, 557 P.2d at 318–19.

170. *Id.* at 820, 557 P.2d at 319.

171. 52 Wash. 2d 456, 326 P.2d 332 (1958).

that familial support obligations are not “debts.”<sup>172</sup> The *Barklind* Court’s unwavering reliance on *Decker* is problematic for two reasons. First, imprisonment for failing to satisfy family support obligations is itself facing criticism.<sup>173</sup> Second, debts to society arising from the commission of a crime and debts arising from familial responsibilities are readily distinguishable. Society has long recognized a fundamental obligation to protect one’s family.<sup>174</sup> Courts need the power to imprison individuals for defaulting on family support obligations to ensure dependents are supported and to ensure family conflicts are expediently settled.<sup>175</sup> Failing to support one’s family “involves considerably more than the mere fact of noncompliance with a court order. It prompts considerations other than the matter of an affront to the dignity of the court.”<sup>176</sup>

Fueling the relatively new offender-funded model of criminal justice is not a fundamental obligation. Assessing LFOs, not to mention imprisoning LFO debtors for default, is a relatively recent phenomenon,<sup>177</sup> while the obligation to support one’s family is timeless.<sup>178</sup> Imprisonment for LFO nonpayment is not a “fundamental” obligation as was contemplated by *Decker*, calling *Barklind*’s holding into question.

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172. *Barklind*, 87 Wash. 2d at 820, 557 P.2d at 319 (citing *Decker*, 52 Wash. 2d at 458, 326 P.2d at 333).

173. See, e.g., Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN ST. L. REV. 349, 384–86 (2012). This argument is outside of the scope of this Comment.

174. For example, when drafting laws in the 1800s prohibiting imprisonment for debt, British Parliament maintained exceptions that allowed imprisonment for family support debts. Ware, *supra* note 35, at 362. This sentiment is reflected in early American cases. See, e.g., *Audubon v. Shufeldt*, 181 U.S. 575, 577 (1901) (finding the payment of alimony to be a fundamental duty of the husband to support his wife); *Andrew v. Andrew*, 20 A. 817, 819 (1890) (declaring familial support debts to arise out of a fundamental duty of a man to support his wife and children); *State v. King*, 22 So. 887, 889 (La. 1897) (calling familial support debts “of paramount importance to the welfare of society”). Each of these cases were cited favorably by the Washington Supreme Court in *In Re Cave*, 26 Wash. 213, 216, 66 P. 425, 427 (1901). The sentiment continues to be expressed in more modern Washington opinions. See, e.g., *Johnson v. Johnson*, 96 Wash. 2d 255, 262–63, 634 P.2d 877, 881 (1981) (discussing a child’s right to support as fundamental, longstanding, and “of greatest concern” to the state and court).

175. *Decker*, 52 Wash. 2d at 458, 326 P.2d at 333.

176. *Id.* at 458, 326 P.2d at 333.

177. See Shapiro, *supra* note 5. Governments began adopting “tough-on-crime” policies in 1970. *Id.* As a result, costs of criminal justice systems increased eleven-fold from 1970–2000. *Id.* Struggling with budget deficits and pressure to avoid increasing taxes, legislatures began charging defendants “user fees,” which also increased over time. *Id.*

178. For example, when limiting imprisonment for debt, Parliament consistently articulated family obligations as outside of any prohibitions, but did nothing to exempt debts owed to the state for costs related to prosecution or incarceration. See *supra* notes 53–54.

But, could it be that LFOs, like every debt owed to the government, are “fundamental” simply because they are owed to the public as a whole? No. Throughout most of Washington’s jurisprudence, the only financial obligations not protected from imprisonment were unpaid fines,<sup>179</sup> taxes, and license fees.<sup>180</sup> All other debts owed to the government, including costs and ordinary fees, were and are well within the purview of Washington’s and other states’ constitutional prohibitions on imprisonment for debt.<sup>181</sup> The word “debt” should be used in its “popular and general sense”—requiring recognition of its capaciousness.<sup>182</sup> “Obviously, it seems to us, [debt] was understood to signify obligations due from one person to another of every character.”<sup>183</sup> The current Court should respect the breadth of the term “debt” and not allow the faulty status obligation reasoning underlying *Barklind* to work around the fundamental protection from imprisonment for debt.<sup>184</sup>

Non-fine LFOs should be treated as “debts” under article I, section 17. The question then becomes whether imprisonment for LFO nonpayment constitutes “imprisonment for debt.” If not for the case law interpreting this provision divergently,<sup>185</sup> the answer would be a clear and simple “yes”: Non-fine LFOs are debts within article I, section 17 and imprisonment for debt is facially unconstitutional unless a debtor is absconding.<sup>186</sup> Although the constitution’s plain language makes no exception for LFO debts, non-absconding individuals are imprisoned for LFO default. Before discussing the case law abrogating this seemingly logical analysis, it is necessary to first understand the ideals embodied in

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179. ROSENOW, *supra* note 148, at 507.

180. *Austin v. City of Seattle*, 176 Wash. 654, 660–62, 30 P.2d 646, 648–49 (1934).

181. *State v. McFarland*, 60 Wash. 98, 110 P. 792 (1910) (holding that article I, section 17 protected the individual from being imprisoned for failing to pay an innkeeper fee); *see* 16A C.J.S. *Constitutional Law* § 710 (2005).

182. *Bronson v. Syverson*, 88 Wash. 264, 277, 152 P. 1039, 1044 (1915).

183. *Id.* at 277–78, 152 P. at 1044.

184. James, *supra* note 31, at 157 (“Courts and the federal government may attempt to put a new face on the old problem of debtors’ prisons by calling child support a ‘social obligation’ or by calling court orders ‘decrees’ rather than ‘debts,’ but if an individual is incarcerated for failure to pay money owed, then that individual is in a debtor’s prison.”).

185. *See infra* notes 245–95 and accompanying text.

186. *See Bronson*, 88 Wash. at 277, 152 P. at 1044 (“[Article I, section 17] is a simple declaration that there shall be no imprisonment for debt except in cases of absconding debtors. Nothing in the context or subject-matter indicates that it is otherwise limited, nor do we find elsewhere in the Constitution anything that indicates that it was intended to be otherwise limited.”); *Burrichter v. Cline*, 3 Wash. 135, 28 P. 367 (1891) (holding that arrest for failing to pay a private debt when the debtor was not absconding violated article I, section 17).

article I, section 17. These ideals reinforce the plain language interpretation discussed above while providing a foundation necessary to understand the provision's interpretive jurisprudence.

*B. Imprisonment for Failing to Pay LFOs Is Contrary to the Populist Ideals Embodied in the Washington State Constitution and Article I, Section 17*

The Washington Constitution's article I, section 17's plain language makes no exception for LFO default and the purpose and policy embodied in the provision, as well as the history underlying its enactment, runs contrary to finding an implied exception. Washington's article I, section 17 strongly protects individual liberties, exceeding the protection provided by many other state provisions.<sup>187</sup> As with much of the Washington Constitution's bill of rights, article I, section 17 is a provision espousing populist ideals<sup>188</sup> and must be interpreted with a mind for its unusual strength and an eye towards protecting individual liberties from State infringement.<sup>189</sup> Reading "debt" to exclude LFOs grants the government an implied right to meddle in personal affairs and fails to respect the populist ideals espoused in Washington's Constitution.

Washington's bill of rights is robust, encompassing the values of the populist movement prevalent during the time of the framing.<sup>190</sup> Occupying a large majority of Washington Territory politics, the populist movement emphasized individual liberties, focusing on limiting the state's ability to exercise its power on individual citizens.<sup>191</sup> Concerned about special interests controlling government, as well as power concentrations in the economically elite, the delegates crafted a constitution that strongly protected the working class' personal liberties.<sup>192</sup> Although some provisions have changed, the Washington Constitution still prioritizes individual liberties, respecting the populist

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187. Although most constitutional prohibitions on imprisonment for debt only apply to debts arising out of contract, 16A C.J.S. *Constitutional Law* § 711 (2005), Washington's provision also applies to debts arising from tort judgments. *Bronson*, 88 Wash. at 277–79, 152 P. at 244.

188. See Hugh Spitzer, *The Past and Present Populist State*, in *THE CONSTITUTIONALISM OF AMERICAN STATES* 771, 777 (George E. Connor & Christopher W. Hammons eds., 2008).

189. See *id.* at 771 (“[T]he sensibilities, concerns, and ideology entrenched in an original constitution continuously influence court interpretations of that document.”).

190. See *id.* (“Washington’s 1889 Constitution was, and remains, overwhelmingly ‘populist’ in its orientation, content, and practical effect.”).

191. *Id.* at 777.

192. *Id.* at 772.

sentiment so pervasive in 1889.<sup>193</sup> Interpreting article I, section 17 to respect its populist roots would limit the state's powers to infringe on individual liberties to only those expressly allowed by the provision.

Information regarding the 1889 convention suggests the delegates quickly passed article I, section 17 after only minor alteration.<sup>194</sup> This quick passage combined with a lack of recorded debate suggests there was little disagreement, further implying that the drafters intended the provision to be consistent with the underlying principles defining the populist movement and the political ideals of the delegates.<sup>195</sup>

State constitutions routinely borrow provisions from other states.<sup>196</sup> The Washington delegates' intentional deviations from other states' provisions, particularly those that come from "sister states," evince what each provision was intended to mean.<sup>197</sup> Because the transcript of the Washington constitutional convention has potentially been destroyed, it is unclear from where article I, section 17 was derived.<sup>198</sup> However, the provision is nearly identical to a draft authored by W. Lair Hill submitted to the 1889 convention: "There shall be no imprisonment for debt, except in cases of debt and absconding debtors."<sup>199</sup> Hill likely derived his provision from the Oregon Constitution, which provides: "There shall be no imprisonment for debt except in case of fraud or absconding debtors."<sup>200</sup>

Article I, section 17, while reflecting the flavor of these two provisions, mirrors neither of them identically.<sup>201</sup> The minor divergences

193. *Id.* ("The state's anti-special-interest constitution has not changed appreciably during the past century.").

194. ROSENOW, *supra* note 148, at 507.

195. *See* Spitzer, *supra* note 188, at 772–73 (discussing the populist movement pervasive at the time in the minds of the Washington delegates and citizens).

196. *See* G. Alan Tarr, *Understanding State Constitutions*, 65 TEMP. L. REV. 1169, 1190–91 (1992) (calling state constitutional drafters more likely "borrowers—at times, unabashed plagiarists—than creators").

197. *Id.*

198. ROSENOW, *supra* note 148, at vii.

199. W. LAIR HILL, A CONSTITUTION ADAPTED TO THE COMING STATE: SUGGESTIONS BY HON. W. LAIR HILL: MAIN FEATURES CONSIDERED IN LIGHT OF MODERN EXPERIENCE 21 (1889).

200. OR. CONST. art. I, § 19 (1859). Due to Washington's close ties with Oregon, and the fact that W. Lair Hill hailed from Oregon, much of Washington's Constitution was derived from Oregon's. ROSENOW, *supra* note 148, at 506 n.27. Oregon's constitutional prohibition on imprisonment for debt was likely derived from Indiana's but the delegation substantially altered the language of the Indiana provision, creating a much more succinct and robust prohibition. *See also* Claudia Burton & Andrew Grade, *A Legislative History of the Oregon Constitution of 1857—Part I*, 37 WILLAMETTE L. REV. 469, 484, 530–32 (2001); IND. CONST. art. I, § 22.

201. *Compare* WASH. CONST. art. I, § 17, with OR. CONST. art. I, § 19. *See also* HILL, *supra* note 199, at 21 (1889). Twenty years after the constitutional convention, the Washington State Supreme

serve only to make Washington's provision more robust. By removing the second "debt" in W. Lair Hill's draft, the delegates narrowed cases in which debtors could be imprisoned by articulating an unambiguous bar unless the debtor was absconding.<sup>202</sup> Similarly, if the delegates began with the Oregon version then removed "fraud," they eliminated a potentially broad exception, codifying their intent to allow imprisonment only when the debtor was absconding. The delegates intended this provision to be powerful: Although most provisions apply only to contractual debts,<sup>203</sup> for nearly one hundred years, article I, section 17 has applied more broadly, encompassing judgments in tort.<sup>204</sup>

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It is at worst unclear whether article I, section 17 protects from imprisonment for LFO default. "[I]mprisonment for debt is not favored, and in the enforcement of the constitutional guaranty, every doubt should be resolved in favor of the liberty of the citizen."<sup>205</sup> Accordingly, the Washington State Supreme Court should interpret the prohibition on imprisonment for debt broadly to protect citizens from imprisonment for LFO default—resolving every doubt in favor of Washingtonians' personal liberty. Furthermore, imprisonment for LFO default runs contrary to populist ideals. "It is elementary that personal liberty transcends the obligation to pay a monetary sum in most circumstances."<sup>206</sup> As one early Washington State Supreme Court explained:

Imprisonment for debt is abhorrent to the spirit of free government, and is not to be tolerated under the form of penal statutes. That no man shall oppress his debtor or restrain him of his liberty has come to be a fixed principle, cherished by the

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Court interpreted article I, section 17 to allow imprisonment for fraud. *In re Milecke*, 52 Wash. 312, 100 P. 743 (1909). This could imply that Washington's provision was intended to be functionally identical to Oregon's. However, the Court's holding did not rest on an argument that Washington delegates intended the provision to be read narrowly or to impliedly include an exception for fraud. Instead, the court explained that the case was essentially a criminal issue—the individual could be imprisoned because of his criminal action: partaking in the comforts of an inn with the intent to defraud. *Id.* at 317, 100 P. at 744–45; *see infra* Part V.C.1. That the provision was functionally revised by the Court twenty years after the constitution was ratified does not refute the argument that article I, section 17 was intended by the delegates to be a strong and broad prohibition.

202. *See* HILL, *supra* note 199.

203. 16A C.J.S. *Constitutional Law* § 711 (2005).

204. *Bronson v. Syverson*, 88 Wash. 264, 277–79, 152 P. 1039, 1044 (1915).

205. 16A C.J.S. *Constitutional Law* § 710 (2005).

206. *State v. Barklind*, 87 Wash. 2d 814, 819, 557 P.2d 314, 318 (1976) (citing *In re Milecke*, 52 Wash. 312, 100 P. 743 (1909)).

people, and so guarded by constitutional provisions that the Legislature cannot give ear to those who seek to use the power of the state to coerce the payment of their debts.<sup>207</sup>

Using contempt proceedings to avoid article I, section 17 nullifies the provision's plain language and the laudable populist goals it espouses<sup>208</sup> and puts a creative slant on an expressly unconstitutional practice. Yet litigants are not using article I, section 17 to combat the current system.<sup>209</sup> Why aren't advocates utilizing this provision to challenge potentially egregious violations of a constitutional liberty? The answer likely lies in the evolution of article I, section 17's jurisprudence.

*C. Case Law Has Abrogated the Constitutional Provision's Power to Protect Individuals From Imprisonment for Debt*

In construing article I, section 17 the Washington State Supreme Court has significantly diverged from the provision's text and sentiment. This Comment explains that divergence by separating the jurisprudence into three distinct eras. Although the Court began by robustly protecting the liberties expounded in article I, section 17 in the First Era, it gradually eroded individual rights, carving out an exception for family support obligations in the Second Era and qualifying the provision, predicating prohibition on the nature or intent of imprisonment. This corrosion has snowballed in the Third Era, rendering article I, section 17 into a mere shell of the protection embodied by the unambiguous text.

*1. In the First Era, the Court Robustly Protected the Prohibition on Imprisonment for Debt*

In Washington's infancy, the Court focused primarily on the distinction between punishing criminal intent and coercing payment. In each case implicating article I, section 17, the Court condemned imprisonment for defaulting on a civil debt.<sup>210</sup> Instead, the Court allowed

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207. *Milecke*, 52 Wash. at 315, 100 P. at 744.

208. *See supra* notes 140–204 and accompanying text.

209. *See, e.g.*, *Cavnar v. Bounceback, Inc.*, No. 2:14-cv-00235-RMP, 2015 WL 4429095 (E.D. Wash. July 18, 2014) (consumer protection laws); *Rucker v. Spokane Cty.*, No. CV-12-5157-LRS, slip op. at \*6 (E.D. Wash. Nov. 26, 2013) (due process); *State v. Blazina*, 182 Wash. 2d 82, 344 P.3d 680 (2015) (due process); *State v. Nason*, 168 Wash. 2d 936, 948, 233 P.3d 848, 853 (2010) (due process); *State v. Nash*, No. 38514-7-II, 2011 WL 198695, at \*1, \*3–4 (Wash. Ct. App. Jan. 6, 2011);. In fact, one scholar even suggests that it is unlikely the current practice of incarceration for failing to pay LFOs can be constrained by article I, section 17. *Giessen, supra* note 80, at 551 n.32.

210. *See, e.g.*, *Bronson v. Syverson*, 88 Wash. 264, 286, 152 P. 1039, 1046 (1915) (refusing to imprison an individual for defaulting on a civil judgment); *State v. McFarland*, 60 Wash. 98, 104–

imprisonment only when used to penalize criminal or fraudulent action.<sup>211</sup> These early Washington State Supreme Court opinions suggest the strong language and populist ideals espoused in the article I, section 17 indicate that the drafters intended a robust protection.

*Burrichter v. Cline*<sup>212</sup> is one of the earliest opinions construing article I, section 17. Written two years after the Washington constitutional convention and signed by leading delegates,<sup>213</sup> the opinion considered a debtor's arrest for failing to pay a private obligation.<sup>214</sup> Finding insufficient evidence that the individual had attempted to abscond, the Court found that jailing him was "illegal and improvident" under article I, section 17.<sup>215</sup> The Court took the constitutional provision at its word: Imprisonment for debt is per se unconstitutional unless the debtor is absconding.<sup>216</sup>

The Court first explained that the provision did not apply to punitive fines in *Colby v. Backus*.<sup>217</sup> In *Colby*, the Court examined a statute allowing judges to impose the costs of criminal prosecution upon an individual bringing a frivolous complaint and imprison the complainant until the fine was paid.<sup>218</sup> Characterizing the fine as a criminal penalty and thus not as civil debt, the Court found that imprisonment would not violate the Constitution.<sup>219</sup>

The Court first diverged from its respectful deference to the provision's unequivocal language in *In re Milecke*,<sup>220</sup> a case that dealt

05, 110 P. 792, 794 (1910) (refusing to imprison an individual for failing to pay inspection fees); *Burrichter v. Cline*, 3 Wash. 135, 136–37, 28 P. 367, 368 (1891) (refusing to imprison a non-absconding individual for failing to pay a private debt).

211. *In re Milecke*, 52 Wash. 312, 317, 100 P. 743, 743–44 (1909) (allowing imprisonment for using false pretenses to obtain food and lodging from an inn without payment); *Colby v. Backus*, 19 Wash. 347, 348–49, 53 P. 367, 367–68 (1898) (allowing imprisonment for failing to pay a criminal fine assessed for engaging in frivolous prosecution).

212. 3 Wash. 135, 28 P. 367 (1891).

213. The opinion was authored by Justice Theodore Stiles, a delegate. ROSENOW, *supra* note 147, at 485. The opinion was also signed by Justice Hoyt, the president of the constitutional convention. *Id.* at 465.

214. *Burrichter*, 3 Wash. at 136–37, 28 P. at 368.

215. *Id.* at 136, 28 P. at 368.

216. *Id.*

217. 19 Wash. 347, 53 P. 367 (1898).

218. *Id.*

219. *Id.* at 349, 53 P. at 367 ("These costs are cast upon him as a penalty. They do not constitute strictly and simply a debt—in the technical sense of the word—any more than the fine imposed upon a party convicted of assault and battery, is a debt." (quoting *In re Ebenhack*, 17 Kan. 618 (1877))).

220. 52 Wash. 312, 100 P. 743 (1909).

with a statute authorizing imprisonment of any individual who, using false pretenses, obtained food or lodging from a boarding house without payment.<sup>221</sup> Although the court admitted article I, section 17 only mentions absconding debtors and makes no express exemptions for fraud, the Court decided that imprisonment for fraudulent conduct resulting in debt did not offend the Washington Constitution.<sup>222</sup> The Court's decision turned on the character of the punishment: The defendant was being punished for intentionally pursuing a course of fraudulent conduct, not for accruing an unpaid debt.<sup>223</sup> As in *Colby*, the Court's concern seems to hinge on the distinction between punishing malicious intent and coercing payment. The Court also emphasized the importance of the protection embodied in article I, section 17.<sup>224</sup>

Soon after deciding *Milecke*, the Court took the opportunity to further emphasize article I, section 17's importance. *State v. McFarland*<sup>225</sup> held unconstitutional a portion of a statute punishing innkeepers for refusing to pay inspection fees.<sup>226</sup> The Court reasoned that a statute providing imprisonment for "a mere failure to pay" offended article I, section 17.<sup>227</sup> Although the opinion is quite short, this decision, too, seems to turn on the existence—or lack thereof—of malicious intent: "The only alleged criminal offense, with the commission of which the appellant has been charged, is that he did not pay the inspection fee. He cannot be fined or imprisoned for any such act, as it cannot be made a criminal offense."<sup>228</sup>

The Court once again respected the clear language in article I, section 17 in *Bronson v. Syverson*.<sup>229</sup> The defendant defaulted on a significant civil judgment entered against him, causing the plaintiff to obtain a writ of execution from the trial court mandating the defendant's

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221. *Id.* at 314, 100 P. at 744.

222. *Id.* at 315–16, 100 P. at 745.

223. *Id.* at 317, 100 P. at 745.

224. The Court stated:

Imprisonment for debt is abhorrent to the spirit of free government, and is not to be tolerated under the form of penal statutes. That no man shall oppress his debtor or restrain him of his liberty has come to be a fixed principle, cherished by the people, and so guarded by constitutional provisions that the Legislature cannot give ear to those who seek to use the power to the state to coerce the payment of their debts.

*Id.* at 315, 100 P. at 744.

225. 60 Wash. 98, 110 P. 792 (1910).

226. *Id.* at 99–101, 105, 110 P. at 792, 794.

227. *Id.* at 105, 110 P. at 794 (citing *Hubbell v. Higgins*, 126 N.W. 914, 918 (1910)).

228. *Id.*

229. 88 Wash. 264, 152 P. 1039 (1915).

imprisonment.<sup>230</sup> The defendant could be discharged only by satisfying the judgment.<sup>231</sup> Indicative of its respect for the clear wording of the provision, the Court took a textual approach to construing article I, section 17:

[I]t is a cardinal rule of construction that the language of a state Constitution, more than that of any other of the written laws, is to be taken in its general and ordinary sense . . . . “Every word employed in the Constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it.”<sup>232</sup>

Thus, the Court held, except in cases of absconding debtors, the Constitution, by its plain meaning, absolutely barred imprisonment for civil debts.<sup>233</sup> On that ground, the Court refused to uphold the defendant’s imprisonment, even though he had failed to comply with a court-ordered judgment.<sup>234</sup>

When one examines these cases together, a foundational interpretation of article I, section 17 begins to emerge. In *Milecke*, imprisonment for fraudulently failing to pay for food and lodging at an inn did not violate the prohibition on imprisonment for debt.<sup>235</sup> The debt was arguably incidental to the defendant’s wrongdoing—it was the fraudulent act that offended the Court. In contrast, *McFarland* held that imprisonment for failing to pay an innkeeper fee was unconstitutional.<sup>236</sup> The Court explained that, absent a finding of fraud in incurring the debt in the first place, imprisonment violated article I, section 17.<sup>237</sup> The Legislature could mandate payment, but it could not mandate imprisonment for failing to pay absent a finding of fraud.<sup>238</sup> In *Bronson*, the court held that an individual could not be imprisoned for failing to pay a court ordered judgment.<sup>239</sup> Because the debtor’s ability to obtain

230. *Id.* at 264–65, 152 P. at 1039.

231. *Id.* at 269, 152 P. at 1041.

232. *Id.* at 275, 152 P. at 1043 (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 451 (1891)).

233. *Id.* at 277, 152 P. at 1043 (“[Article I, section 17] is a simple declaration that there shall be no imprisonment for debt except in cases of absconding debtors. Nothing in the context or subject-matter indicates that it is otherwise limited, nor do we find elsewhere in the constitution anything that indicates that it was intended to be otherwise limited.”).

234. 88 Wash. at 284, 152 P. at 1046.

235. 52 Wash. 312, 316–17, 100 P. 743, 744–75 (1909).

236. *State v. McFarland*, 60 Wash. 98, 104, 110 P. 792, 794 (1910).

237. *Id.* at 104–05, 110 P. at 794.

238. *Id.*

239. *Bronson*, 88 Wash. at 283–84, 152 P. at 1046.

freedom was predicated on his payment of the debt, the Constitution had been violated.<sup>240</sup>

The crux of the reasoning underlying these cases is this: An individual could not avoid imprisonment for a criminal or fraudulent act just because it resulted in a debt.<sup>241</sup> In cases where the court allowed imprisonment, the fraud or criminal act *created* the debt.<sup>242</sup> The fraud or criminal act itself was not the mere *nonpayment* of a pre-existing debt.<sup>243</sup> Defendants could be penalized for the initial criminal or fraudulent act notwithstanding article I, section 17. But, if the fraudulent or criminal act was mere nonpayment of a pre-existing debt, the individual could not be imprisoned unless they were absconding.<sup>244</sup>

Nearly all of the Court's opinions during the First Era respected the strong language of article I, section 17. However, during this time the Court also provided the foundation for an implied exception—what this Comment will call the family support obligation exception. *In re Cave*<sup>245</sup> gave short shrift to an argument that jailing the defendant for unpaid alimony<sup>246</sup> was imprisonment for debt<sup>247</sup> by holding that alimony is not “debt” under article I, section 17.<sup>248</sup> The Court relied on “well-settled law” declaring alimony to be something other than a debt, citing only

240. *Id.* at 269–70, 152 P. at 1041.

241. *In re Milecke*, 52 Wash. at 317, 100 P. at 745 (“The offense consists, not in the creation of a debt, nor in its nonpayment, but rather in the fraud through which credit may be procured or payment evaded. The latter, and not the former, is the thing for which punishment is to be inflicted.” (quoting *State v. Yardley*, 32 S.W. 481, 484 (Tenn. 1895))).

242. *See, e.g., id.*

243. *See, e.g., id.*

244. *Burrichter et al. v. Cline*, 3 Wash. 135, 28 P. 367 (1891) (noting that an individual may not be imprisoned for failing to pay a debt unless they are found by the court to be absconding).

245. 26 Wash. 213, 66 P. 425 (1901).

246. BLACK'S LAW DICTIONARY 89 (10th ed. 2014) (defining “alimony” as court ordered support for one's separated spouse).

247. *In re Cave*, 26 Wash. at 216, 66 P. at 426 (dedicating only forty words of actual text to dismissing the argument).

248. *Id.* Although the holding of this case is clear and concise, predicated entirely on cases focusing on the fundamental nature of family support obligations, the Court later attempted to retroactively revise the holding:

[T]he real ground of the decision is that imprisonment can be used as a means of coercing the performance of the order of the court; to compel the defendant to do a thing which was in his power to do; not as a punishment for a failure to satisfy a judgment of alimony which he had no means of satisfying.

*Bronson v. Syverson*, 88 Wash. 264, 272, 152 P. 1039, 1042 (1915). The Court did not cite any portion of *Cave* to support this assertion. The Washington State Court of Appeals later used this characterization in *Britannia Holdings Ltd. v. Greer*, 127 Wash. App. 926, 931, 113 P.3d 1041, 1044 (2005), to find imprisonment for failing to pay a contractual debt would not offend article I, section 17 as long as the court found the default was willful. *Id.* at 934, 113 P.3d at 1045.

cases from the federal courts<sup>249</sup> and state courts in Illinois,<sup>250</sup> Vermont,<sup>251</sup> and Louisiana.<sup>252</sup> Each case cited by the Court predicated its holding on the fundamental duty of the husband to support his wife.<sup>253</sup> The Court did not significantly revisit its holding until nearly fifty years later.<sup>254</sup>

When examined in tandem, *Cave* and the other foundational holdings can be boiled down to a simple two-step test: (1) is this a debt within article I, section 17; and (2) if so, is this (a) imprisonment for failing to pay a previously incurred debt (impermissible); or is it (b) punishing fraudulent or criminal conduct that resulted in a debt (permissible)? This test is compelling in its simplicity. Although this test can be recognized driving the reasoning in many opinions, subsequent courts have unduly complicated its application.

## 2. *In the Second Era, the Court Began Carving out an Exception for Support Debts and Positing a Distinction Between Contempt and Civil Default*

During the Second Era, the Court began chipping away at the strong prohibition on imprisonment for debt it had emphasized in *Milecke* and its progeny, allowing imprisonment for failure to pay business and occupations taxes<sup>255</sup> and failure to pay debts imposed by divorce

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249. *Audubon v. Shufeldt*, 181 U.S. 575 (1901). This case examined whether alimony was dischargeable under the current bankruptcy act. *Id.* at 576. The Court explained that alimony “is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife.” *Id.* at 577. The Court held, “alimony cannot be regarded as a debt owing from the husband to the wife, and, not being so, cannot be discharged by an order in the bankruptcy court.” *Id.* at 580.

250. *Barclay v. Barclay*, 56 N.E. 636, 637 (Ill. 1900) (“The liability to pay alimony is not founded upon a contract, but is a penalty imposed for a failure to perform a duty . . . [A]limony cannot be regarded as a debt owing from the husband to the wife.”).

251. *Andrew v. Andrew*, 20 A. 817, 819 (Vt. 1890) (“[The right to collect familial support debts] grows out of the domestic relations of the parties. It is the duty of the husband to support the wife. That duty does not cease upon the dissolution of the marriage for his misconduct. It is the duty of the father to provide for his children. He is not relieved from that duty when their custody is given to the mother.”).

252. *State v. King*, 22 So. 887, 889 (La. 1897) (“[Alimony obligations are,] in no sense of the word, ‘debts’ due by the spouses; they are simply recognized legal duties, which it is of paramount importance to the welfare of society . . . . An order for alimony in a divorce suit is nothing more than the judicial sanction and enforcement . . . of the duty by the husband to support the wife.”).

253. See *supra* notes 249–52.

254. The Washington State Supreme Court continued to hold that alimony was not a “debt” under the Constitution, see, e.g., *Haakenson v. Coldiron*, 190 Wash. 627, 629, 70 P.2d 294, 295 (1937), but no robust opinion was provided until the late 1950s in *Decker v. Decker*, 52 Wash. 2d 456, 326 P.2d 332 (1958).

255. *Austin v. City of Seattle*, 176 Wash. 654, 30 P.2d 646 (1934).

courts.<sup>256</sup> These holdings provide the foundation upon which modern courts rely when imprisoning individuals for LFO nonpayment. In *Austin v. City of Seattle*,<sup>257</sup> the Court considered a statute imprisoning individuals for failing to pay the city's business and occupations tax.<sup>258</sup> Recognizing the factual similarities to *McFarland*, the Court attempted to distinguish the two cases, arguing that in *McFarland* the statute

[D]id not make it unlawful to operate a hotel without paying the inspection fee. Under the ordinance here involved, it is unlawful to engage in the proscribed business without paying the tax and obtaining a license. That is the very essence of the offense which is made the subject of punishment.<sup>259</sup>

Imprisonment was not being used to coerce payment, it was instead being used to punish noncompliance with the ordinance.<sup>260</sup> At first, this seems right in line with *Milecke*, which allowed punishment of fraudulent conduct.<sup>261</sup> However, *Austin* takes the *Milecke* reasoning a step farther. In *Milecke*, an individual did not violate the statute unless she used "false pretenses"—i.e. acted fraudulently.<sup>262</sup> This emphasis on fraud is supported by *McFarland*, which held unconstitutional a statute that did not contain language limiting violations to fraudulent acts, instead allowing imprisonment for "mere failure to pay."<sup>263</sup> The ordinances involved in *McFarland* and *Austin* are functionally indistinguishable: they both allow for imprisonment for failing to pay a tax or fee, and both defendants were punished for violating the word of law. Nonetheless, *McFarland* and *Austin* reached entirely different results.

However, the *Austin* Court's primary holding was that taxes and license fees were not protected by article I, section 17.<sup>264</sup> This Court's reasoning, which slightly tweaks the foundational two-step described above, may be where the current jurisprudence allowing imprisonment under the guise of contempt was born.

In the cases following *Austin*, the Court further compromised article I,

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256. *Decker*, 52 Wash. 2d at 457, 326 P.2d at 332; *Brantley v. Brantley*, 54 Wash. 2d 717, 344 P.2d 731 (1959).

257. 176 Wash. 654, 30 P.2d 646 (1934).

258. *Id.* at 655–56, 30 P.2d at 647.

259. *Id.* at 661, 30 P.2d at 649.

260. *Id.*

261. *See supra* notes 220–24 and accompanying text.

262. *In re Milecke*, 52 Wash. 312, 317, 100 P. 743, 745 (1909).

263. *State v. McFarland*, 60 Wash. 98, 105, 110 P. 792, 794 (1910).

264. *Austin*, 176 Wash. at 660, 30 P.2d at 648.

section 17. In *Decker* the defendant was imprisoned for failing to pay community debts imposed on him by a court-ordered divorce decree.<sup>265</sup> The Court first explained that because public policy supports expedient settlement of divorce disputes, article I, section 17 did not apply to family obligations.<sup>266</sup> The Court briefly discussed contempt powers, but it predicated its holding on an overarching concern regarding the fundamental nature of family support obligations.<sup>267</sup> Of course, this decision was not without dissent, as three justices challenged the notion that an individual could have the power to imprison their former spouse for failing to pay a debt to a third party.<sup>268</sup>

Similarly, in *Brantley v. Brantley*,<sup>269</sup> a divorce court ordered the defendant to pay his marital community's debts owed to third party creditors.<sup>270</sup> When he defaulted, he was imprisoned for contempt.<sup>271</sup> The court reached the same result obtained in *Decker*, again basing its opinion entirely on the unique nature of family support debts.<sup>272</sup>

[T]he significant question to be determined is whether the provision that the court seeks to enforce by contempt proceedings, regardless of the name given it, bears a reasonable relationship to the husband's duty to support his wife and

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265. 52 Wash. 2d 456, 457, 326 P.2d 332 (1958).

266. *Id.* at 458, 326 P.2d at 333.

267. *Id.* (stating that failing to comply with a court order "involves considerably more than the mere fact of noncompliance with a court order. It prompts considerations *other than the matter of an affront to the dignity of the court*—which in itself is serious enough" (emphasis added)).

268. *Id.* at 467–70, 326 P.2d at 338–39 (1958) (Mallery, J., dissenting).

269. 54 Wash. 2d 717, 344 P.2d 731 (1959).

270. *Id.* at 718, 344 P.2d at 732.

271. *Id.*

272. Unlike in *Decker*, the *Brantley* Court did not tie this analysis to the word "debt," instead arguing that the prohibition did not pertain to the equitable powers of divorce court. *Brantley*, 54 Wash. 2d at 719–20, 344 P.3d at 732–33. Thus, the Court was convinced that "Art. I, § 17, of our constitution, simply was not designed to thwart or prevent a proper exercise of the *equity power and discretion of our divorce courts*." *Id.* at 719, 344 P.2d at 732–33 (emphasis added). At least one court has embraced the unique reasoning in *Brantley*, attempting to extend it to include contempt in all proceedings. *State ex rel. Daly v. Snyder*, 117 Wash. App. 602, 609–10, 72 P.3d 780, 783 (2003). However, the *Snyder* court was examining imprisonment for failing to pay child support under article I, section 17. *Id.* at 604–05, 72 P.3d at 780–81. Family obligation debts are not within the purview of the provision due to their unique fundamental nature and the court's attempt to extend the equitable decree argument should be limited to its facts. Subsequent courts have generally not relied upon the "equitable decree" argument proffered by the *Brantley* court. Instead, their holdings are predicated on either determining the obligation is not a debt, *see, e.g., State v. Barklind*, 87 Wash. 2d 814, 820, 557 P.2d 314, 319 (1976), or articulating a distinction between imprisoning an individual, not for owing a debt, but for failing to comply with a court order to pay a pre-existing debt, *see, e.g., id.* at 819, 557 P.2d at 318; *Britannia Holdings Ltd. v. Greer*, 127 Wash. App. 926, 932–33, 113 P.3d 1041, 1044 (2005).

children. If it does, it does not fall within the constitutional prohibition against imprisonment for debt.<sup>273</sup>

Even this holding—which was more clearly based on the unique nature of family support debts than was *Decker*—was not without dissent:

It is not the prerogative of the court to change the universally accepted meaning of the English language. We are here concerned with an order for the payment of *debts* and an order of imprisonment for contempt of court. . . .

. . . .

I prefer the theory that the constitutional prohibition against imprisonment for debt deprives the court of the power to make any order respecting a debt if the contemplated method of enforcement is by imprisonment.<sup>274</sup>

During the Second Era, the Court chipped away at the strong protection provided by article I, section 17. However, it did not do so in a coherent way. The clearest contribution made by these cases is that “debt” under the Constitution does not include family support debts or debts owed to third parties in connection with family support obligations.<sup>275</sup> Although the Court also attempted to distinguish between punitive imprisonment for violating a statute or court order and coercive imprisonment for failing to pay a debt,<sup>276</sup> this distinction was contested by justices both in dissent and majority.<sup>277</sup> However, the arguably extraneous<sup>278</sup> contempt-versus-civil-debt analyses erected a platform off

273. *Brantley*, 54 Wash. 2d at 721, 344 P.2d at 734.

274. *Id.* at 54 Wash. 2d at 723, 344 P.2d at 734–35 (1959) (Mallery, J., dissenting) (emphasis in original).

275. *Brantley*, 54 Wash. 2d at 721, 344 P.2d at 734 (“[T]he significant question to be determined is whether the provision that the court seeks to enforce by contempt proceedings, regardless of the name given it, bears a reasonable relationship to the husband’s duty to support his wife and children. If the [sic] does, it does not fall within the constitutional prohibition against imprisonment for debt.”); *Decker v. Decker*, 52 Wash. 2d 456, 458, 326 P.2d 332, 333 (1958) (“It has been clear in this state for over fifty years that arrearages in alimony and support payments do not constitute a debt within the meaning of the constitutional prohibition.”); *In re Cave*, 26 Wash. 213, 216, 66 P. 425, 426 (1901) (“It is the well-settled law of this country that a decree or order for alimony in a divorce proceeding is not a debt, within the meaning of that term as used in section 17 of article 1 of our constitution.”).

276. *See, e.g.*, *Austin v. City of Seattle*, 176 Wash. 654, 661–62, 30 P.2d 646, 649 (1934).

277. *Brantley*, 54 Wash. 2d at 721, 344 P.2d at 734 (1959) (seemingly rejecting the contempt-versus-civil-debt distinction raised briefly in *Decker* by predicating its holding solely on the equitable nature of family support debts).

278. In both *Austin*, 176 Wash. 654, 30 P.2d 646, and *Decker*, 52 Wash. 2d 456, 326 P.2d 332, the contempt/ordinance violation versus civil debt distinction was a secondary discussion or alternative holding. *Austin*, 176 Wash. at 660–62, 30 P.3d at 649 (holding that taxes and license fees are not debts within the constitution, but then stating “the misdemeanor consists in a refusal to obey

which future courts dove, rendering the provision a mere shell of the protection set forth in the First Era.

3. *In the Third Era, the Court Expanded the Family Support Debt and Fraud Exceptions Significantly, Further Debilitating Article I, Section 17*

In the 1970s, the United States began experiencing an unprecedented crime wave and most states, including Washington, adopted a “tough on crime” attitude and the “offender funded” model of criminal justice.<sup>279</sup> Similarly, the Court took a tougher stance on offenders, failing to treat the contempt-versus-civil-debt distinction as contested. In this third and final era, the Court relied heavily on contempt proceedings to effectively hamstring article I, section 17.

In *Barklind*, the Court held that, although it is “elementary that personal liberty transcends the obligation to pay a monetary sum in most circumstances,” a defendant could be jailed for willfully failing to pay court ordered public defenders fees.<sup>280</sup> The Court reasoned the defendant was not jailed for owing the county, but was jailed for failing to comply with a court order demanding payment.<sup>281</sup>

Lower courts did not necessarily endorse this hard-line approach to imprisonment for debt. In *State v. Enloe*,<sup>282</sup> the Washington State Court of Appeals invalidated a statute allowing imprisonment for intentionally failing to pay for agricultural products.<sup>283</sup> Emphasizing that “[c]riminal statutes involving a deprivation of liberty must be strictly construed against the State,” the court endorsed the approach expounded by *Milecke* and its progeny, explaining that fraud resulting in debt was an imprisonable offense, while mere willful failure to pay was not.<sup>284</sup>

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the provisions of the ordinance, and the fine authorized to be imposed upon conviction is not intended as a payment of the license tax, but as a punishment for defying the commands of the ordinance”); *Decker*, 52 Wash. 2d at 458–65, 326 P.2d at 333–37 (holding that alimony is not a “debt” within article I, section 17, but then engaging in additional analysis discussing cases in non-familial-debt contexts). In each case, the Court could have settled the issue with only its first holding: The obligations at issue (penalties and fines in *Austin*, familial debts in *Decker*) were not “debts” within article I, section 17. *Id.* Given the doctrine of constitutional avoidance, there is an argument that the *Austin* and *Decker* Courts should not have delved into any additional secondary or alternative analyses.

279. See *supra* notes 68–71 and accompanying text.

280. 87 Wash. 2d 814, 819–20, 557 P.2d 314, 318–19 (1976).

281. *Id.*

282. 47 Wash. App. 165, 734 P.2d 520 (1987).

283. *Id.* at 166, 734 P.2d at 521.

284. *Id.* at 170–72, 734 P.2d at 523–24.

Mirroring *Enloe*'s approach, the Washington State Supreme Court also refused to imprison a defendant for taking his own vehicle from a mechanic's shop without paying for services.<sup>285</sup> Absent proof of a mechanic's lien, taking the car was no more than defaulting on a contractual debt and did not rise to the level of theft.<sup>286</sup> Imprisonment would thus violate article I, section 17.<sup>287</sup> Finding that the statute did not require fraud and thus offended the Constitution, the Court explained, "[w]e are loath to turn the criminal justice system into a mechanism for the collection of private debts . . . . Although it is acceptable to imprison for fraud, one cannot be imprisoned merely for failure to pay a debt."<sup>288</sup> It is telling that that the Court took a lenient approach in this case, when the offender-funded model of criminal justice was not implicated. The stark contrast between *Pike* and *Barklind* demonstrates the influence that Washington's "tough on crime" attitude had on the Court and its article I, section 17 jurisprudence.

The varied Washington State Supreme Court decisions interpreting article I, section 17 have led the Washington State Courts of Appeals to author at least two opinions pushing the boundaries of the contempt-versus-civil-debt distinction. In *State ex rel. Daly v. Snyder*,<sup>289</sup> the court of appeals upheld imprisonment for failing to pay child support, even after the child had reached adulthood.<sup>290</sup> Relying on the contempt-versus-civil-debt-distinction, the court emphasized that civil contempt was not being used to punish, which would be improper, but was instead being used to induce remedial behavior, which is permitted.<sup>291</sup> This seems to be an inverse approach to the contempt-versus-civil-debt distinction examined by *Barklind*, which predicated valid imprisonment on punishing bad behavior rather than compelling payment. Nonetheless, because the litigants successfully framed the imprisonment as contempt, jailing the defendant for failing to pay was constitutionally permissible.

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285. *State v. Pike*, 118 Wash. 2d 585, 587–88, 826 P.2d 152, 153 (1992).

286. *Id.* at 595, 826 P.2d at 157.

287. *Id.*

288. *Id.*

289. 117 Wash. App. 602, 72 P.3d 780 (2003).

290. *State ex rel. Daly v. Snyder*, 117 Wash. App. 602, 604–05, 610, 72 P.3d 780, 780–81, 783 (2003).

291. *Id.* at 606, 82 P.3d at 781 (citing *In re Interests of M.B.*, 101 Wash. App. 425, 439, 3 P.3d 780 (2000) ("A coercive sanction is justified only on the theory that it will induce a specific act that the court has the right to coerce . . . should it become clear that the civil sanction will not produce the desired result, the justification for the civil sanction disappears. Further incarceration can be justified as a punishment for disobeying the court's orders, but only after a criminal proceeding.")).

In *Britannia Holdings Ltd. v. Greer*,<sup>292</sup> the Washington State Court of Appeals examined a court order requiring the defendants pay their private debt within four months or be jailed.<sup>293</sup> Just as in *Snyder*, the court rested its decision on the coercive nature of its use of contempt: “It has long been settled . . . that coercive imprisonment for contumacious refusal to obey a lawful order to pay money is not imprisonment for debt.”<sup>294</sup> “Where a court orders a party to deliver money or property in supplemental proceedings and the party is able but refuses to comply, a remedial contempt order imposing imprisonment does not violate the constitutional prohibition against imprisonment for debt.”<sup>295</sup> Mirroring the federal due process analysis expounded in *Bearden v. Georgia*,<sup>296</sup> the Court held that, as long as an individual is able to pay, imprisonment for failing to respect a court order mandating payment does not violate the constitution.<sup>297</sup>

#### D. *Opinions Handed down in the Third Era Do Not Stand on Strong Foundation*

So, what does article I, section 17 stand for? If one accepts Third Era opinions at face value, one must accept that the judiciary has rewritten article I, section 17, departing both from its original text and purpose and from the Court’s early interpretation. In essence, opinions handed down in the Second and Third Eras have changed the provision from stating “[t]here shall be no imprisonment for debt, except in cases of absconding debtors”;<sup>298</sup> to now read:

**There shall be no imprisonment for debt, [unless the debt is a familial support debt]<sup>299</sup> [or a debt owed to third parties in**

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292. 127 Wash. App. 926, 113 P.3d 1041 (2005).

293. *Id.* at 928, 113 P.3d at 1042.

294. *Id.* at 931, 113 P.3d at 1043 (citing *In re Cave*, 26 Wash. 213, 216, 66 P. 425, 426 (1901)); see also *Brantley v. Brantley*, 54 Wash. 2d 717, 344 P.3d 731 (1959), *Bronson v. Syverson*, 88 Wash. 264, 272, 152 P. 1039, 1042 (1915).

295. *Britannia Holdings Ltd.*, 127 Wash. App. at 933, 113 P.3d at 1044.

296. 461 U.S. 660 (1983) (holding that the federal Due Process Clause was violated when an indigent individual was imprisoned for failing to pay without a finding that he was able to pay); see also *State v. Nason*, 168 Wash. 2d 936, 948, 233 P.3d 848, 853 (2010) (holding that Spokane County’s “auto-jail policy,” wherein offenders were automatically imprisoned for failing to pay LFOs, violated federal due process because it did not require the court find that the defendant was able to pay).

297. *Britannia Holdings Ltd.*, 127 Wash. App. at 932, 113 P.3d at 1044.

298. WASH. CONST. art. I, § 17.

299. *In re Cave*, 26 Wash. 213, 216, 66 P. 425, 426 (1901) (emphasis added).

connection with familial support,]<sup>300</sup> **except in cases of absconding debtors** [or in cases of debtors who are not determined to be absconding but fail to comply with an order of the court demanding payment of debt, as long as that court order is punitive rather than coercive,]<sup>301</sup> [or coercive rather than punitive].<sup>302</sup>

Setting aside the blaring inconsistencies, the very fact that judicial interpretation has substantially rewritten the provision is cause for concern. The constitutional drafting process is unlike any other rule promulgation in modern government.<sup>303</sup> Constitutions serve as overarching documents defining the validity of all governmental actions. Failing to respect constitutional language and intent compromises the judicial process, both by compromising respect for judges and by undermining the certainty of individual liberty protections fundamental to Washington constitutional jurisprudence. Absent constitutional amendment, the Washington judiciary should respect the plain language and original intent of article I, section 17.

So far, the judiciary has allowed article I, section 17 to be rendered null regarding an entire class of civil debts—incapacitating it to such an extent that most litigants challenging imprisonment for LFO nonpayment do not even cite the provision. However, the Court can remedy this injustice by embracing the sentiment and interpretation set forth during the constitutional convention and in the First Era of article I, section 17 jurisprudence.

### *1. Washington's Modern Jurisprudence Has Nearly Nullified the Provision*

The current jurisprudence has rendered article I, section 17 a shell of

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300. *Brantley v. Brantley*, 54 Wash. 2d 717, 721, 113 P.3d 731, 734 (1959); *Decker v. Decker*, 52 Wash. 2d 456, 458, 326 P.2d 332, 333 (1958).

301. *Austin v. City of Seattle*, 176 Wash. 654, 661–62, 30 P.2d 646, 649 (1934) (holding that a statute providing imprisonment did not violate article I, section 17 because it was *punishing* the defendant for violating the statute rather than *coercing* the defendant to pay the license fee); *Colby v. Backus*, 19 Wash. 347, 349, 53 P. 367, 367 (1898) (explaining that imprisonment for failing to pay costs cast upon a defendant *as a penalty* did not offend the constitution);

302. *Britannia Holdings Ltd.*, 127 Wash. App. at 931, 113 P.3d at 1043 (“It has long been settled . . . that *coercive* imprisonment for contumacious refusal to obey a lawful order to pay money is not imprisonment for debt.” (emphasis added)); *State ex rel. Daly v. Snyder*, 117 Wash. App. 602, 606, 72 P.3d 780, 781 (2003) (“A coercive sanction is justified only on the theory that it will induce a specific act that the court has the right to coerce . . . should it become clear that the civil sanction will not produce the desired result, the justification for the civil sanction disappears.”).

303. *See Bronson v. Syverson*, 88 Wash. 264, 275, 152 P. 1039, 1043 (1915).

its former self. Although the provision facially allows imprisonment for debt only in cases of absconding debtors, courts have imprisoned many for failing to pay various debts, even without finding the individual was absconding—and even without finding the debtor fraudulently incurred the debt by never intending to pay it. In the most extreme example, article I, section 17 no longer protects non-absconding individuals from imprisonment for failing to pay civil debts.<sup>304</sup> So long as a debt is court-ordered and the defendant, in the judge’s opinion, willfully fails to pay, she can be imprisoned even if she is not absconding.<sup>305</sup>

If willful non-payment is truly the touchstone for article I, section 17, then the provision provides no further protection than is required by the state Due Process Clause. The Due Process Clause protects individuals from imprisonment via contempt for failing to pay unless the court has first determined that the default was willful.<sup>306</sup> *Britannia Holdings* imposes no further protections. The delegates cannot have intended article I, section 17 to essentially mirror the state’s Due Process Clause. “[A] constitutional protection cannot be bypassed by allowing it to exist in form but letting it have no effect in function.”<sup>307</sup> In order for the provision to exist in both form and function, it must have been intended to provide additional protections for individuals imprisoned for unpaid civil debts. Thus, the current interpretation of article I, section 17 is impermissible. The most recent decisions are based on a misunderstanding of precedent and the provision itself. The Court must understand where its predecessors improperly diverged in order to remedy the current jurisprudence. Article I, section 17 cannot continue to exist in form but not substance. “The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name . . . . If the inhibition can be evaded by the form of the enactment,

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304. *Britannia Holdings Ltd.*, 127 Wash. App. at 933, 113 P.3d at 1044 (holding that imprisoning defendants for failing to satisfy a court ordered judgment mandating payment to a private party did not constitute imprisonment for debt).

305. *Id.* at 933, 113 P.3d at 1044 (requiring only that the court find the debtor is able but refuses to pay in order to imprison that debtor for contempt). Although this case is the most extreme example, it seems to be generally accepted as good law. Prominent Washington constitutional law scholars have cited the case as an uncontroverted interpretation of the provision. *See, e.g.*, ROBERT F. UTTER & HUGH D. SPITZER, *THE WASHINGTON STATE CONSTITUTION* 44 (2d ed. 2013).

306. The United States Supreme Court issued this seminal holding in *Bearden v. Georgia*, 461 U.S. 660 (1983). The Washington State Due Process Clause does not afford protections exceeding the federal Due Process Clause. *In re Dyer*, 143 Wash. 2d 384, 394, 20 P.3d 907, 912 (2001) (en banc) (“Washington’s Due Process Clause does not afford a broader due process protection than the Fourteenth Amendment.”).

307. *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 660, 771 P.2d 711, 724 (1989).

its insertion in the fundamental law was a vain and futile proceeding.”<sup>308</sup>

2. *The Modern Cases Are Inconsistent with the Foundational Interpretation of Article I, Section 17*

The modern cases, employing the contempt-versus-civil-debt distinction, fail to respect the analytical framework derived from the foundational decisions in the First Era: (1) if the principal is a debt within article I, section 17, then (2) imprisonment for failing to pay a previously incurred debt is impermissible, but punishing fraudulent or criminal conduct that resulted in a debt is allowed.<sup>309</sup>

Interestingly, the cases providing foundation for the contempt-versus-civil-debt distinction did so through extraneous or alternative holdings. In *Austin*, the Court held that imprisonment for failing to pay the business and occupations tax did not violate the Constitution because taxes were not “debts” within the provision. The Court then set forth a second holding: Because the imprisonment was intended to punish the defendant for failing to comply with the ordinance rather than compel payment of the license tax, it did not constitute imprisonment for debt.<sup>310</sup> The Court could have limited its discussion to only one holding: Taxes are not “debts” within the provision. However, by endorsing a separate holding that alternatively characterizes the obligation as a debt and allows imprisonment without finding fraud, the Court adopted reasoning contrary to *Milecke*. Similarly, although the primary holding in *Decker* was that alimony is not a “debt” within article I, section 17—and the Court retroactively attempted to cabin the case to just this holding<sup>311</sup>—*Decker* has been cited for the proposition that imprisonment for contemptuous default, even absent a finding of fraud, does not offend the constitution.<sup>312</sup>

One can dismiss the jurisprudential discrepancies if one accepts the holdings predicated on defining “debt” as the only holding in each of these cases, dismissing the extraneous contempt-versus-civil-debt

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308. *Id.* at 655, 771 P.2d at 721 (alteration in original) (quoting *State v. Strasburg*, 60 Wash. 106, 116, 110 P. 1020, 1023 (1910)).

309. *See supra* notes 235–54 and accompanying text.

310. *Austin v. City of Seattle*, 176 Wash. 654, 655, 661–62, 30 P.2d 646, 649 (1934).

311. *Brantley v. Brantley*, 54 Wash. 2d 717, 721, 344 P.3d 731, 734 (1959) (“It should be clear from our holding in the *Decker* case that . . . the significant question to be determined is whether the provision that the court seeks to enforce by contempt proceedings, regardless of the name given it, bears a reasonable relationship to the husband’s duty to support his wife and children. If it does, it does not fall within the constitutional prohibition against imprisonment for debt.”).

312. *State v. Barklind*, 87 Wash. 2d 814, 820, 557 P.2d 314, 319 (1976).

discussions. However, subsequent courts have embraced the extraneous discussions expounded in these cases, holding contempt, even absent a finding of fraud, to be outside of the constitutional prohibition on imprisonment for debt.<sup>313</sup> Apart from the determination of “willfulness” required by the Due Process Clause, courts no longer determine if a fraudulent or criminal act occurred.<sup>314</sup> This doctrine, predicated on the contempt-versus-civil-debt distinction, has been recently heralded as well-established law.<sup>315</sup>

Every so often, a court recognizes the inconsistencies and attempts to bring the doctrine back down to its basics. In *Enloe*, the court invalidated a statute providing imprisonment for failing to pay, explaining that the statute failed to imprison individuals for only fraudulent acts as required by *Milecke* and its progeny.<sup>316</sup> The Court explained that the mere finding of intentionality is insufficient to satisfy the fraud requirement espoused by the early foundational cases.<sup>317</sup> Similarly, the Washington State Supreme Court refused to imprison a man for taking his own car from a mechanic without paying.<sup>318</sup> The Court explained: “Although it is acceptable to imprison for fraud, one cannot be imprisoned merely for failure to pay a debt.”<sup>319</sup> Courts can recognize the fundamental wrongness embodied by the current jurisprudence, but it is up to litigants to give courts the tools to unify the doctrine by returning to the foundational interpretation of article I, section 17.

### 3. *Imprisonment for Failing to Pay Non-Fine LFOs Is Contrary to the Court’s Early Jurisprudence*

The foundational cases interpreting article I, section 17 provide a

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313. *State ex rel. Daly v. Snyder*, 117 Wash. App. 602, 610, 72 P.3d 780, 783 (2003). The Court did not address fraud. *Id.* Instead, the Court predicated the validity of imprisoning the defendant for failing to pay child support on a nuanced distinction:

“[E]nforcement of equitable orders through the use of contempt is permitted because a contempt order is an attempt by the court to compel the defendant to comply with the court’s prior, lawful, equitable order. It is not imprisonment for a debt, but rather imprisonment for refusing to comply with the court’s equitable order to do or not to do something.”

*Id.*; see also *Britannia Holdings Ltd. v. Greer*, 127 Wash. App. 926, 933, 113 P.3d 1041, 1044 (2005) (requiring only that the debtor be able to satisfy the debt to be imprisoned for default).

314. See, e.g., *Britannia Holdings Ltd.*, 127 Wash. App. at 933, 113 P.3d at 1044.

315. *Id.* at 931, 113 P.3d at 1043 (“It has long been settled . . . that coercive imprisonment for contumacious refusal to obey a lawful order to pay money is not imprisonment for debt.”).

316. 47 Wash. App. 165, 170–72, 734 P.2d 520, 523–24 (1987).

317. *Id.*

318. *State v. Pike*, 118 Wash. 2d 585, 826 P.2d 152 (1992).

319. *Id.* at 595, 826 P.2d at 157.

simple test: (1) if the principal is a debt within the provision, then (2) imprisonment for failing to pay a previously incurred debt is impermissible, while punishing fraudulent or criminal conduct that resulted in a debt is permissible.<sup>320</sup> Defendants cannot use article I, section 17 to avoid discipline for fraudulent and criminal acts merely because they resulted in debt.<sup>321</sup> However, the plaintiffs cannot obliterate the constitutional protection by imprisoning individuals for failing to pay previous debts, or even for accruing those debts absent a finding of fraud.<sup>322</sup>

Non-fine LFOs are “debts” within article I, section 17.<sup>323</sup> Furthermore, imprisonment for LFO default occurs well after the individual incurs the debt, constituting imprisonment for failing to pay a previously incurred debt. LFOs do not arise as a result of fraudulent or criminal act creating a debt in the way contemplated by *Milecke*. No finding of fraud is required when a defendant is imprisoned for default.<sup>324</sup> LFOs do not operate as penalties, the nonpayment of which constitutes fraud—convicted felons pay their “penalties” in the form of fines and jail time. Non-fine LFOs are designed to reimburse the State and victims for monetary losses incurred due to the debtor’s bad actions and conviction. Were this practice in existence one hundred years ago, the Court would have surely declared it unconstitutional.<sup>325</sup> Imprisoning individuals for failing to pay LFOs is contrary to the foundational doctrine interpreting article I, section 17 and should no longer be endorsed by Washington courts.

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320. See *supra* notes 235–54 and accompanying text.

321. See *supra* notes 235–54 and accompanying text.

322. See *supra* notes 235–54 and accompanying text.

323. See *supra* notes 146–86 and accompanying text.

324. See, e.g., *Britannia Holdings Ltd. v. Greer*, 127 Wash. App. 926, 933, 113 P.3d 1041, 1044 (2005) (requiring only that the debtor be able to satisfy the debt to be imprisoned for default).

325. In *Milecke*, the court emphasized the difference between “unfortunate debtors” (protected from imprisonment) and “wrongdoers”—such as a man who “beats his neighbor, kills his ox, or girdles his fruit trees”—who could be imprisoned for his fraudulent actions. 52 Wash. 312, 316, 100 P. 743, 745 (1909). Individuals who beat their neighbor, kill their ox, or girdle fruit trees serve their moral debt to society by paying fines and serving jail sentences. See *id.* LFOs are something else altogether. They are designed to fund the criminal justice system and recoup losses caused to victims; LFOs are not intended to punish: They primarily serve as a funding mechanism, levying a debt against those who participate in the criminal justice system. See *supra* notes 68–74 and accompanying text.

V. THE STATUTORY SCHEME ENABLING IMPRISONMENT FOR FAILING TO PAY LFO'S IS EXPRESSLY CONTRARY TO WASHINGTON'S CONSTITUTIONAL JURISPRUDENCE

Not only does imprisonment for LFO nonpayment violate article I, section 17, but the character of the statutes endorsing the practice compromises its legality. Statutory requirements allowing the practice defy the reasoning apparent in the foundational article I, section 17 jurisprudence. Furthermore, the practical effects of LFO imprisonment fail to satisfy the statutory mandates.

A. *The Statute's Requirement That Contempt Must Be Remedial Contradicts the Fundamental Jurisprudence Endorsing Only Punishment for Criminal Intent*

Foundational jurisprudence distinguishes between punishing individuals for fraudulent conduct that resulted in debt and punishing individuals for failing to pay previously incurred debts.<sup>326</sup> Early courts were hesitant to allow criminal or fraudulent conduct to go unpunished merely because it resulted in debt.<sup>327</sup> Punishing fraudulent or criminal conduct resulting in debt was permitted, while coercing payment of previously incurred debts violated the Constitution. The Court endorsed only punitive imprisonment, rather than coercive imprisonment intended to remedy nonpayment. Even the more modern contempt-versus-civil-debt distinction is predicated on a punitive theory distinguished from judicial coercion.<sup>328</sup> It is constitutional to imprison LFO defaulters, not to coerce payment of the debt, but to punish disrespect for the court.<sup>329</sup>

However, the statute allowing imprisonment for LFO nonpayment sets forth civil, remedial contempt.<sup>330</sup> Remedial contempt requires imprisonment be aimed at remedying nonpayment—it must be coercive.<sup>331</sup> Inversely, remedial contempt cannot be punitive.<sup>332</sup>

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326. See *supra* notes 235–54 and accompanying text.

327. *In re Milecke*, 52 Wash. at 316, 100 P. at 744–45 (1909).

328. See *supra* notes 289–97 and accompanying text.

329. See *Austin v. City of Seattle*, 176 Wash. 654, 661–62, 30 P.2d 646, 649 (1934) (finding an ordinance allowing imprisonment for failing to pay a fine fell outside of the purview of article I, section 7 because “[t]he misdemeanor consists in [sic] a refusal to obey the provisions of the ordinance, and the fine authorized to be imposed upon conviction is not intended as a payment of the license tax, but as a punishment for defying the commands of the ordinance”).

330. *Smith v. Whatcom Cnty. Dist. Ct.*, 147 Wash. 2d 98, 110, 52 P.3d 485, 492 (2002) (referencing WASH. REV. CODE § 7.21.030 (2002)).

331. *State v. Nason*, 146 Wash. App. 744, 757, 192 P.3d 386, 393 (2008), *rev'd in part on other grounds*, 168 Wash. 2d 936, 233 P.3d 848 (2010) (“The primary purpose of the civil contempt

Imprisoning an individual to coerce payment is contrary to the constitutional doctrine regarding imprisonment for debt predicated on a theory of punishment, rejecting imprisonment characterized as judicial coercion.<sup>333</sup> Imprisoning individuals for failing to pay LFOs either violates the remedial contempt statutes (it is not remedial as required by the statute because it is a penalty for violating a court order, as mandated by constitutional jurisprudence) or violates the constitutional jurisprudence (it is not a penalty as required by the Constitution because it is intended to coerce payment, as mandated by the remedial statutes). The Legislature cannot have it both ways.

*B. The Current Practice of Imprisoning Individuals for LFO Nonpayment Is Not Remedial as Is Required by the Statute*

Along similar lines, imprisoning individuals for LFOs may not satisfy the remedial requirements of the statute at all. Civil contempt may only be used to the extent it is coercive or remedial in nature.<sup>334</sup> However, there is little evidence the practice is actually remedying LFO nonpayment.<sup>335</sup> In fact, numerous case studies suggest that imprisonment for LFO default exacerbates LFO non-payment problems.<sup>336</sup> In some cases, the seemingly unsurmountable barrier posed by LFOs actually causes individuals to cease payments entirely.<sup>337</sup> Furthermore,

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power is to coerce a party to comply with an order or judgment.”). The *Daly* court provided further support for this notion when it stated:

A coercive sanction is justified only on the theory that it will induce a specific act that the court has the right to coerce . . . . And should it become clear that the civil sanction will not produce the desired result, the justification for the civil sanction disappears. Further incarceration can be justified as a punishment for disobeying the court’s orders, but only after a criminal proceeding.

State *ex rel.* Daly v. Snyder, 117 Wash. App. 602, 606, 72 P.3d 780, 781 (2003).

332. Washington has separate statutes allowing for punitive contempt. These do not apply to LFO nonpayment because LFO nonpayment implicates remedial contempt. *Smith*, 147 Wash. 2d at 110, 52 P.3d at 492 (referencing WASH. REV. CODE § 7.21.030).

333. This is probably where the incongruity between opinions such as *Britannia Holdings* and *Austin* arise. The contempt-versus-civil-debt distinction was promulgated before the court had to ensure compliance with remedial contempt statutes. Where the *Austin* Court explained that individuals can be imprisoned to punish but not to compel debt satisfaction, *Austin*, 176 Wash. 654, 30 P.2d 646, the *Britannia Holdings* Court held that individuals can be imprisoned only to compel payment, while punishing failing to pay would be improper, *Britannia Holdings Ltd. v. Greer*, 127 Wash. App. 926, 113 P.3d 1041 (2005).

334. WASH. REV. CODE § 7.21.030(2)(a) (2014) (“The imprisonment [for contempt of court] may extend only so long as it serves a coercive purpose.”).

335. *See supra* notes 117–39 and accompanying text.

336. *Id.*

337. *Id.*

individuals who are imprisoned cannot make payments while incarcerated.<sup>338</sup> Since imprisonment for failing to pay LFOs is probably not effectively coercing individuals to satisfy their debts, the practice does not satisfy the remedial requirements of civil contempt.

## CONCLUSION

Imprisonment for failing to pay LFOs in Washington is a practice inviting institutional challenge. However, modern litigants are not attacking the system itself. The Washington judiciary has, over time, substantially abrogated article I, section 17. But the current Court need not continue down this troublesome path. With a thorough understanding of Washington's constitutional jurisprudence, a thoughtful litigant can explain where past interpretations of article I, section 17 have impermissibly diverged and present the Court with the tools it needs to breathe new life into a forgotten protection. A thorough understanding of article I, section 17's interpretational evolution reveals that the foundational jurisprudence contradicts the current statutory scheme allowing imprisonment for debt. Washington's Constitution prohibits imprisonment for failing to pay LFOs and the practice must be challenged systemically.

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338. *Id.*