COMMENT

AN UNFORTUNATE CHANGE OF CIRCUMSTANCES: WISCONSIN PROHIBITS RETROACTIVE REVISION OF CHILD SUPPORT ORDERS

Before 1987, Wisconsin case law permitted retroactive modification of child support orders. This useful remedy allowed trial judges to reduce or cancel support arrearages in cases where the petitioner demonstrated substantially changed circumstances, such as unemployment or disability. In 1986, however, Congress enacted legislation which threatened Wisconsin with the loss of Aid to Families with Dependent Children (AFDC) funds unless the state prohibited retroactive modification of support orders. Wisconsin submitted to this threat by passing Wisconsin Statutes section 767.32(1m) in 1987.

Section 767.32(1m) prohibits judges from retroactively modifying support orders. The new law permits only prospective modification of support orders from the date a party files a petition to revise. Arrearages that accrue before the filing of a petition to revise cannot be expunged under the new law, even if the party's circumstances had changed well before the party filed the petition to revise support. Section 767.32(1m) thus requires obligors to promptly file petitions to revise. While this requirement may not be a problem for those who know about the law, those with inadequate access to legal help, such as the poor, may quickly accumulate large, unretireable support arrearages before they take action to modify support. These arrearages may not reflect any intentional noncompliance and may bear no relation to the obligor's ability to pay.

Other than the threatened loss of federal funds, Wisconsin had little reason to pass this law. Wisconsin already had an effective child support enforcement program, and section 767.32(1m) will actually do little to improve it. This Comment contends that section 767.32(1m) will unfairly harm those with inadequate access to legal help and suggests administrative, judicial, and legislative remedies to counteract the new law's harsh effects.

I. INTRODUCTION

Child support debts are a serious matter. Unlike most debts, they can form the basis for criminal or civil action resulting in imprisonment.[1] In addition, child support debts are not dischargeable in bankruptcy,[2] and cannot be expunged by serving a sentence for contempt of court[3] or criminal non-support.[4] Because child support debts carry

1. *See infra* notes 97-99 and accompanying text.

2. 11 U.S.C.A. § 323(a)(5) (Supp. 1988); 42 U.S.C.A. § 656(2)(B) (Supp. 1988). For a discussion of this general rule, as well as its exceptions, see Ravin & Rosen, *The Dischargeability in Bankruptcy of Alimony, Maintenance and Support Obligations*, 60 AM. BANKR. L.J. 1-6, 19-20 (1986).

3. *See infra* note 99.

4. WIS. STAT. § 940.27(7)(a)-(c) (1987-1988); WIS. STAT. § 940.27(7m)(a)-(c) (1987-1988).

such significant collateral disabilities, the amount of child support due from the parent who owes the support obligation (the obligor) must bear a reasonable relation to the obligor's ability to pay.[5]

Some obligors, however, are unable to comply with their support orders because of an adverse change in their economic circumstances.[6] Other obligors, who are financially able to comply with their court ordered support obligations, simply refuse to pay. Non-compliance for either reason shrinks the economic resources of custodial parents and their children. Hardship can result, and programs such as Aid to Families with Dependent Children (AFDC) may have to step in and make up for the money that the obligor cannot provide or refuses to pay.

Widespread non-compliance with support orders[7] has increased public funding of programs like AFDC,[8] stretching the resources of child support agencies and the taxpaying public. In response, Congress passed the Child Support Enforcement Amendments (CSEA) of 1984.[9] CSEA requires states to implement procedures to ensure that non-custodial parents who have been ordered to provide child support comply with support orders.[10] If a state does not obey the various CSEA directives, the federal government may cut off a portion of the funding that the state receives for its AFDC Child Support Enforcement (IV-D) pro-

5. *See* Edwards v. Edwards, 97 Wis. 2d 111, 116, 293 N.W.2d 160, 163 (1980) (the level of child support must be established according to the needs of the custodial parent and children and the ability of the non-custodial parent to pay); Campbell v. Campbell, 37 Wis. 206, 211 (1875). This need for fairness to the obligor can result in support orders set at low rates that properly reflect the obligor's ability to pay. Such support orders, however, do not ensure the financial well-being of the dependent children, and hardship can result. In such cases, public assistance such as Aid to Families with Dependent Children (AFDC) often supplies the custodial parent with the support needed to provide the children with a minimal standard of living. *See infra* note 37.

6. Significant loss of income and substantial change in the cost of living are typical changes of circumstances under WIS. STAT. § 767.32(1) (1987-1988). P. Shannon, Child Support Law in Wisconsin, Staff Brief 84-7, Wisconsin Legislative Council Staff, at 17 (1984). Although there are other kinds of changed circumstances (such as remarriage), this Comment will focus on changed circumstances that relate to an obligor's economic situation (common examples include the obligor's unemployment, imprisonment, or disability).

7. Weitzman, *The Economic Consequences of Divorce: An Empirical Study of Property, Alimony, and Child Support Awards*, 8 Fam. L. Rep. (BNA) 4037, 4053 (Aug. 3, 1982). The problem of child support enforcement largely stems from increases in the divorce rate, the desrtion rate, and the out-of-wedlock birthrate. For example, the number of never-married mothers increased 377% betwcen 1970 and 1983. *See* M. HENRY & V. SCHWARTZ, A GUIDE FOR JUDGES IN CHILD SUPPORT ENFORCEMENT 1-2 (2d ed.).

8. Federal AFDC payments amounted to approximately $13.8 billion in fiscal year 1983, compared to $1.0 billion in 1960 (figures are not adjusted for inflation). *See* M. HENRY & V. SCHWARTZ, *supra* note 7, at 4. *See also* Dodson & Horowitz, *Child Support Enforcement Amendments of 1984: New Tools for Enforcement*, 10 Fam. L. Rep. (BNA) 3051 (Oct. 23, 1984).

9. 42 U.S.C. § 666(a)-(b) (1985). For information on the federal bill, see Dodson & Horowitz, *supra* note 8, at 3051-64. *See also infra* notes 44-50.

10. *See infra* notes 44-49 and accompanying text.

gram.[11] This threat has been effective; most states, including Wisconsin, have substantially complied with the terms of the CSEA of 1984.[12]

Congress amended CSEA in 1986 by requiring states to prohibit the retroactive modification of child support orders. This requirement is codified in 42 U.S.C. § 666(a)(9)(C).[13] In 1987, the Wisconsin Legislature enacted legislation[14] to comply with the 1986 federal amendment, and thus avoided the loss of several million dollars in federal AFDC funds[15] under the IV-D program.[16]

Section 767.32(1m) of the Wisconsin Statutes provides that,

> [i]n an action under [section 767.32] sub. (1) to revise a judgment providing for child support, maintenance payments or family support payments, the court may not revise the amount of child support, maintenance payments, or family support payments due prior to the date that notice of the ac-

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11. Congress enacted the Child Support Enforcement (IV-D) program in 1975 to reduce the cost of the AFDC program. Under the IV-D program, the federal government pays state IV-D agencies 65% to 70% of the cost of collecting child support, locating delinquent obligors, and establishing paternity. The federal government also provides incentive payments to states to encourage efficient collection of support orders. A. NICHOLS-CASEBOLT, I. GARFINKEL & P. WONG, REFORMING WISCONSIN'S CHILD SUPPORT SYSTEM 4-5 (Institute for Research on Poverty Discussion Paper No. 793-85, 1985). The incentive payment scheme is codified in 42 U.S.C.A. § 658(a) (Supp. 1988).

12. Wisconsin has fully complied with CSEA. Telephone interview with Sherwood Zink, Counsel for the Wisconsin Office of Child Support Enforcement (Apr. 7, 1988). For a survey of state compliance with CSEA, see C. BRACKNEY, STATE CHILD SUPPORT LAWS: COMPLIANCE WITH THE 1984 FEDERAL AMENDMENTS (1987).

13. 42 U.S.C. § 666(a)(9)(C) was part of P.L. 99-509, the Budget Reconciliation Act of October 21, 1986. 42 U.S.C.A. § 666(a)(9) provides that each state have in effect:

> Procedures which require that any payment or installment of support under any child support order, whether ordered through the State judicial system or through the expedited processes required by paragraph (2), is (on and after the date it is due)—(A) a judgment by operation of law, with the full force, effect, and attributes of a judgment of the State, including the ability to be enforced, (B) entitled as a judgment to full faith and credit in such State and in any other State, and (C) not subject to retroactive modification by such State or by any other State; except that such procedures may permit modification with respect to any period during which there is pending a petition for modification, but only from the date that notice of such petition has been given, either directly or through the appropriate agent, to the obligee or (where the obligee is the petitioner) to the obligor.

14. Section 2135i of the 1987 Executive Budget Bill, 1987 Wis. Act 27 (codified at WIS. STAT. § 767.32 (1m) (1987-1988)). Section 767.32(1m) became effective August 1, 1987.

15. If the legislature had not passed section 767.32(1m), Wisconsin would have lost approximately $4 million in AFDC funds from the federal government in 1987, $8 million in 1988, and $9 million in 1989. Interview with Sherwood Zink, Counsel for the Wisconsin Office of Child Support Enforcement (Oct. 27, 1987). *See also infra* note 90.

16. *See supra* note 11 and *infra* notes 40-50 for an explanation of the IV-D program and CSEA.

> tion is given to the respondent, except to correct previous errors in calculations.[17]

Prior to enactment of this section, Wisconsin case law[18] had long permitted the obligor[19] to petition a Wisconsin court for a retroactive reduction[20] in the child support level. Such a petition, if granted, had the effect of reducing support arrearages. Relief, however, could be granted only if the party petitioning for retroactive reduction proved a significant change in circumstances[21] that rendered the support level unfair.[22] By placing the burden of proof on the petitioning party, Wisconsin courts struck a reasonable balance between fairness to the party alleging changed circumstances and the needs of the respondent.

The enactment of section 767.32(1m), however, overruled this longstanding Wisconsin case law; the statutes now permit only prospective revision of support.[23] With one minor exception,[24] section 767.32(1m) flatly prohibits the retroactive modification of support orders, regardless of changes in the petitioner's circumstances. Instead,

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17. WIS. STAT. § 767.32(1m) (1987-1988). While the law also applies to maintenance and family support payments, this Comment only discusses its impact on child support.

18. *See* Miner v. Miner, 10 Wis. 2d 438, 441, 103 N.W.2d 4, 6 (1960); Rust v. Rust, 47 Wis. 2d 565, 570, 177 N.W.2d 888, 891 (1970) and cases cited therein; Monson v. Monson, 85 Wis. 2d 794, 803, 271 N.W.2d 137, 141 (Ct. App. 1978); Ashby v. Ashby, 174 Wis. 549, 555-56, 183 N.W. 965, 967 (1921).

19. Theoretically, the obligee could also petition for retroactive reduction of support, but such an action would be uncommon; almost all petitions to reduce support would be filed by the obligor.

20. Wisconsin case law, while allowing prospective increase or retroactive reduction in support, has prohibited the retroactive increase in support payments. Foregger v. Foregger, 40 Wis. 2d 632, 645, 162 N.W.2d 553, 559 (1968), *reh'g denied*, 40 Wis. 2d 632, 164 N.W.2d 226 (1969) (increase in support order must be prospective); Whitwam v. Whitwam, 87 Wis. 2d 22, 30, 273 N.W.2d 366, 370 (Ct. App. 1978) (trial court has discretion to reduce or eliminate support arrearages with cause, but does not have authority to direct retroactive increase of support payments).

21. *See supra* note 6 for common changed circumstances. Although Wisconsin statutes have long allowed revision of support orders if there was a change of circumstances, before section 767.32(1m) was enacted, the statutes did not expressly allow or prohibit such revision to be retroactive. *See, e.g.*, WIS. STAT. Ch. 79, § 20 (1849); WIS. STAT. § 247.25 (1975). The Wisconsin Supreme Court interpreted the statutes to permit retroactive modification of support due if the obligor proved substantially changed circumstances. *See, e.g., Rust*, 47 Wis. 2d at 570, 177 N.W.2d at 891.

22. *See Miner*, 10 Wis. 2d at 441-42, 103 N.W.2d at 6 (modification of alimony judgment requires a showing of circumstances that have changed so substantially that it would be unjust or inequitable to hold either party strictly to the judgment); *Rust*, 47 Wis. 2d at 570, 177 N.W.2d at 891 (a divorce court may, in its discretion, cancel an alimony or support arrearage, but only upon cause or justification).

23. Any party may still petition for prospective revision of a support order based on changed circumstances. Such a prospective revision can either increase or decrease the support level. In addition, the traditional change of circumstances test contained in WIS. STAT. § 767.32(1) was not altered by section 767.32(1m).

24. The new law permits retroactive revision of a support order to "correct previous errors in calculations." WIS. STAT. § 767.32(1m) (1987-1988). This narrow exception is discussed *infra* at notes 153 and 157 and accompanying text.

section 767.32(1m) permits a court to revise support orders only back to the date that notice of a petition to revise was given to the respondent.[25] Because the notice date is so crucial, Wisconsin obligors must promptly petition for revision of their support orders as soon as their circumstances change. Any delay will result in the accumulation of arrearages.

The federal government intended 42 U.S.C. § 666(a)(9) to improve child support enforcement by forcing Wisconsin, along with seventeen other states,[26] to enact laws like section 767.32(1m). Congress apparently believed that the eighteen states which allowed retroactive revision of support orders created a loophole which made support enforcement more difficult, especially in the area of interstate support orders.[27] Other observers suggested that prohibiting retroactive revision of support orders was desirable because it could eliminate a potential source of divisive litigation,[28] provide finality to support orders, and encourage obligors to file modification petitions promptly.[29] But while section 767.32(1m) might prevent certain abuses that may occur when child support orders are modified retroactively, this Comment contends that the harm to Wisconsin obligors resulting from section 767.32(1m) outweighs any possible benefit flowing from it.

In particular, section 767.32(1m) will unfairly harm obligors who have suffered a significant change of circumstances and have been unable to petition promptly for revision of their support orders. Though section 767.32(1m) may have the effect of encouraging timely petitions to revise,[30] it could lead to harsh results if the petitioner's circumstances have changed long before the date that notice is given. Obligors with inadequate access to attorneys and the legal system, such as institutionalized persons, the poor, and the unemployed, are likely to be

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25. In most cases, the respondent is the custodial parent. If the custodial parent receives AFDC or is a client of the IV-D agency, the IV-D agency will also be a respondent. *See infra* note 138 and accompanying text.

26. In July 1985, before the enactment of 42 U.S.C. § 666(a)(9) (1986), eleven states (Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, Pennsylvania, Rhode Island, South Dakota, Tennessee, and Wisconsin) permitted retroactive revision of support orders by case law or statute. Seven other states (Connecticut, Delaware, Hawaii, North Carolina, South Carolina, Vermont, and Wyoming) did not expressly prohibit retroactive revision of support orders. D. Dodson & S. Green de la Garza, *Retroactive Modification of Child Support Arrears*, A.B.A. NAT'L LEGAL RESOURCE CENTER FOR CHILD ADVOCACY & PROTECTION, June 1986, at 1, A-1, A-2, A-3. These eighteen states contain approximately 85,000,000 people, or 38% of the United States population (figures calculated by author using 1980 U.S. Census figures contained in U.S. DEPARTMENT OF COMMERCE AND BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1987 (107th ed.)).

27. This Comment, however, contends that Congress could have addressed the concern about interstate support enforcement without prohibiting retroactive modification of support orders. *See infra* notes 84-85 and accompanying text.

28. *See infra* note 76 and accompanying text.

29. D. Dodson & S. Green de la Garza, *supra* note 26, at 2, 4-5.

30. *Id.* at 9.

both unaware of section 767.32(1m), and unable to give prompt notice. Consequently, such obligors will accumulate support arrearages that are extremely difficult to expunge, and which may have resulted from their changed circumstances and their inadequate access to the courts, rather than from their willful refusal to pay support.

This Comment also contends that section 767.32(1m) is unnecessary to achieve better child support enforcement. Wisconsin, unlike many other states, already has in place a comparatively effective program for enforcing child support orders.[31] This tradition continues with two recent changes in Wisconsin family law: percentage guidelines and mandatory immediate income withholding. If properly implemented, these provisions not only prevent arrearages from accumulating, but also automatically adjust support orders to an obligor's changed economic circumstances.[32] More widespread use of these two innovations would improve child support enforcement, address many concerns that led to the enactment of 42 U.S.C. § 666(a)(9)(C) and Wisconsin Statutes section 767.32(1m), and would avoid the problems that result from those laws' flat prohibition on the retroactive modification of support orders.

Section II of this Comment briefly describes the history of child support enforcement throughout the United States and in Wisconsin, and discusses the rationale and legislative history behind both the federal and the Wisconsin laws prohibiting retroactive revision of child support orders. Section III focuses on the substantial adverse impact the law will have on delinquent obligors, and contrasts this to the negligible benefit the law will provide to the state of Wisconsin.

Finally, Section IV presents administrative, judicial, and legislative remedies which would ameliorate the harms resulting from section 767.32(1m). First, administrative agencies can encourage settlement agreements and modify their collection procedures. Second, courts can use their equitable powers to allow expungement of arrearages in certain cases. Third, the legislature could amend section 767.32(1m). By adopting these recommendations, Wisconsin can remain fair to obligors while maintaining its status as a leader in child support enforcement.

II. LEGISLATIVE BACKGROUND

The present federal and Wisconsin laws prohibiting retroactive modification of child support arrearages were enacted to prevent the serious harms caused by nonpayment of child support. On the whole,

31. *See infra* notes 51-52.

32. *See infra* notes 53-65 and accompanying text.

governmental agencies in the United States have been ineffective in enforcing child support orders. According to the U.S. Census Bureau, obligors comply with less than sixty percent of all child support orders.[33] Poor compliance with child support orders is a factor in what some observers call the feminization of poverty.[34] Because most custodial parents are women,[35] they bear the brunt of delinquent child support payments. Studies indicate that after a divorce a non-custodial father's standard of living rises an average of forty-two percent, while a custodial mother's standard of living drops seventy-three percent.[36] As a result, many female custodial parents and their children have been forced onto welfare rolls.

Skyrocketing welfare costs have drained federal and state relief funds.[37] Although enforcement of child support orders was traditionally left to the states,[38] Congress decided to attack the problem after ineffective state enforcement practices had resulted in a substantial drain on federal AFDC funds.[39]

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33. Weitzman, *supra* note 7 at 4053, 4054. Low support awards in many jurisdictions have exacerbated the problem of under-support. Child support guidelines, such as Wisconsin's, are an attempt to deal with this problem. Dodson & Horowitz, *supra* note 8, at 3059.

34. For example, three out of four single mothers under the age of twenty-five live below the poverty line. Savage & Roberts, *Unmarried Teens and Child Support Services,* 21 CLEARINGHOUSE REV. 443 (1987). Even with full compliance with child support orders, however, some custodial parents will still find themselves dependent on public aid. For instance, some non-custodial parents are underemployed or unemployed, and may never be able to support their family (or families) with their earnings. In addition, family income that once had been adequate may become inadequate after divorce or separation because the parents no longer pool their housing, food, and transportation costs. It is thus unclear what percentage of welfare costs are due to delinquent child support payments, for a large proportion of welfare payments may be unavoidable because of chronic unemployment, discrimination, and the structure of the economy.

35. The almost automatic tendency of courts to award custody of children to the woman, however, is changing as attitudes shift and joint custody becomes more common. For a discussion of this trend in custody determination, see Fineman & Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce,* 1987 WIS. L. REV. 107, 111-21.

36. Weitzman, *supra* note 7, at 4053. Absent and unknown fathers probably have a similar effect on women's financial status.

37. Only 42% of custodial parents potentially eligible for child support awards receive them. Taxpayers assume the burden of supporting many of the remaining (58%) custodial parents and children. For example, in Wisconsin, one-third of the custodial parents who are potentially eligible for support awards receive welfare. In 1979, Wisconsin AFDC payments alone totalled $213 million. In contrast, Wisconsin's private child support payments in 1980 amounted to $121 million. *See* Corbett, *Child Support Assurance: Wisconsin Demonstration,* FOCUS, Spring 1986, at 1-2. (FOCUS is published by the University of Wisconsin-Madison Institute for Research on Poverty.) *See also* Sampson, *Withholding From Earnings For Child Support: A Revolution In Enforcement (Pay Me Now Or Pay Me Now),* 49 TEX. BAR J. 544 (1986).

38. With the expansion of the AFDC program, the federal government now pays only lip service to the notion that states have exclusive jurisdiction over domestic relations matters. *See* Comment, *The Evolution of a Federal Family Law Policy Under Title IV-A of the Social Security Act—The Aid to Families with Dependant Children Program,* 36 CATH. U.L. REV. 197, 212 (1986).

39. Not all states have had dismal child support enforcement records. Wisconsin in particular has a good record. *See infra* notes 51-52 and accompanying text.

A. Nationwide Action to Improve the Enforcement of Child Support Orders

Congress first responded to the problem of child support enforcement by enacting Title IV-D of the Social Security Act in 1974. Title IV-D required states to set up child support enforcement offices (IV-D agencies) which were to use existing state law to carry out their enforcement duties.[40]

Many states had also passed the Revised Uniform Reciprocal Enforcement between States Act (RURESA). RURESA was designed to make it harder for child support delinquents to escape their support obligations by crossing state lines. RURESA set up a compact whereby a support obligee in one state can sue an absent obligor in another state to enforce the support obligation.[41]

Title IV-D and RURESA had only a limited impact on delinquency because they delegated enforcement to often reluctant local and state authorities. The compliance of some states was dismal.[42] In order to prevent skyrocketing AFDC expenditures, Congress enacted CSEA in 1984, thereby forcing states to adopt more effective enforcement procedures.[43] CSEA required states to adopt procedures and remedies, including: seizure of delinquent obligors' state income tax refunds;[44] implementation of wage withholding;[45] child support guidelines;[46] expedited procedures;[47] and improved parent locator services.[48] Con-

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40. Sampson, *supra* note 37, at 544.

41. Wisconsin has enacted RURESA in WIS. STAT. § 767.65 (1987-1988). The success of RURESA has been mixed. *See generally* Note, *Uniform Reciprocal Enforcement of Support Act*, 20 WASHBURN L.J. 409 (1981). *See also* Schultz, *Suspension of Child Support for Visitation Interference and the New Friend of the Court Act*, 3 COOLEY L.REV. 119, 122 (1985) (equitable defenses used to avoid payment under RURESA).

42. *See generally* Woods, *Child Support: A National Disgrace*, 17 CLEARINGHOUSE REV. 538, 539 (1983).

43. Dodson & Horowitz, *supra* note 8, at 3051.

44. This provision augments federal tax intercepts, which have existed since 1981. *See* Note, *Constitutional Implications of the Child Support Enforcement Amendments of 1984*, 24 J. FAM. L. 301, 310 (1986).

45. Some states, such as Wisconsin, require automatic wage withholding in all new or revised support orders. In other states, wage withholding begins only when the obligor falls more than one month behind in payments. Sampson, *supra* note 37, at 546. The federal government, however, will be requiring all states to implement limited immediate withholding by 1990. *See infra* note 52.

46. CSEA requires all states to establish percentage guidelines to assist courts and others in determining support levels. Such guidelines attempt to reduce the incidence of inadequate or excessive support levels, as well as eliminate statewide disparities between support awards. The task of fashioning fair guidelines is difficult. Dodson & Horowitz, *supra* note 8, at 3059. This requirement is codified at 42 U.S.C.A. 667 (Supp. 1988). *See also infra* note 62.

47. Expedited procedures are designed to eliminate the delay in enforcing child support orders. Dodson & Horowitz, *supra* note 8, at 3058-59.

48. The federal government paid up to 90% of the cost of new data processing equipment that locates missing parents through, for example, cross-governmental checks using a delin-

gress hoped that these provisions would decrease AFDC costs and deter desertion by fathers.[49] Hailed by politicians of both parties and endorsed by political groups of the right and the left, Congress passed CSEA unanimously.[50]

B. Wisconsin Action to Improve Enforcement of Child Support Orders

Wisconsin complied with the requirements of CSEA, but, unlike many other states, Wisconsin had previously established a comparatively good track record in enforcing child support orders.[51] Wisconsin has long been an innovator in this area.[52] Most recently, Wisconsin instituted two important innovations: percentage guidelines for child

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quent obligor's social security number. *Id.* at 3059. Wisconsin's law regarding parent locator services is contained in WIS. STAT. § 46.25 (1987-1988).

This list of procedures mandated by the CSEA is, of course, not complete; for a more complete summary, see Dodson & Horowitz, *supra* note 8, at 3058-59.

49. *See, e.g.*, 1984 U.S. CODE CONG. & ADMIN. NEWS at 2401-02. One of the stated purposes of CSEA (to "deter desertion") reflects an incomplete understanding of the child support enforcement problem. At one time, desertion may have been the most important cause of support problems. Today, however, most support difficulties arise because the father of the child is unknown or is divorced. Telephone interview with Margo Melli, Professor of Law, University of Wisconsin Law School (June 28, 1988). *See also* M. HENRY & V. SCHWARTZ, *supra* note 7, at 1-2.

50. *Child Support Enforcement Legislation Approved by House, Sent to President*, 10 Fam. L. Rep. (BNA) 1551 (Aug. 14, 1984). The final House vote was 413-0; the final Senate vote was 99-0.

51. The state's per capita child support collection is relatively high. For instance, in 1986 Wisconsin ranked seventh in total child support collections and fifth in federal incentive payments, yet is seventeenth in total population. Wisconsin collected more money from delinquent obligors than Illinois, Florida, and Texas, states with two to three times Wisconsin's population. U.S. DEP'T OF HEALTH AND HUM. SERVICES, OFFICE OF CHILD SUPPORT ENFORCEMENT, 2 ELEVENTH ANNUAL REPORT TO CONGRESS 12, 17 (1986).

52. Wisconsin originated many innovative practices in the area of child support enforcement, including: the Family Court Commissioner (known as the Friend of the Court in Michigan); the requirement that all child support payments be paid directly to the clerk of courts (allows monitoring of all payments and provides for judicial notice of whether payment was made); and income withholding (begun in 1978). Interview with Sherwood Zink, Counsel for the Wisconsin Office of Child Support Enforcement (Oct. 27, 1987).

In addition, the federal government recently has required other states to adopt percentage guideline systems similar to Wisconsin's. Under the Family Support Act of 1988, a state judge or family court commissioner must apply their state's percentage guidelines when setting support awards. As in Wisconsin, however, the pereentage guidelines may be disregarded if the judge or family court commissioner makes written findings that the percentage guidelines would be inappropriate or unjust. Rovner, *Congress Approves Overhaul of Welfare System*, CONG. Q., Oct. 8, 1988, at 2825. Also, *compare* WIS. STAT. §§ 767.25(1m) *and* 767.51(5) (1987-1988) with the Family Support Act of 1988, Pub. L. No. 100-485, § 103 (1988).

The Family Support Act also mandates nationwide immediate withholding. However, the Act does not take effect for several years, and it is not as sweeping as Wisconsin's immediate withholding law. For example, the Act does not require immediate withholding until 1990, and then only in cases being enforced by the state IV-D agency. By 1994, states will be required to implement wage withholding in all orders, regardless of whether a parent has sought assistance from the state IV-D agency. However, the wage-withholding requirement can be waived for "good cause" or if both parents sign an agreement providing for an alternate arrangement. Rovner,

support orders and mandatory wage withholding for all new child support orders.

1. PERCENTAGE GUIDELINES

Percentage guidelines apply to all Wisconsin child support orders entered or revised after June 30, 1987.[53] Under the statutes, the family court must determine child support payments by using the percentage standard established by the Department of Health and Social Services.[54] The court can depart from the percentage standard only if it finds that, by the greater weight of the credible evidence, the use of the percentage standard would be unfair to the child or any of the parties.[55]

The percentage guidelines are intended to make child support orders more fair and more uniform throughout the state. The guidelines can also automatically adjust for a change in the obligor's financial circumstances *if* the support order is expressed as a percentage of income.[56] To the extent that such automatic adjustment of support occurs, the guidelines eliminate the need for retroactive expungement of support arrearages.

2. IMMEDIATE INCOME WITHHOLDING

Like the percentage guidelines, immediate income withholding is required on all new or revised support orders.[57] Under this collection system, employers immediately withhold an obligor's child support

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supra, at 2825. Also, *compare* WIS. STAT. § 767.265 (1987-1988) *with* the Family Support Act of 1988, Pub. L. No. 100-484, § 101 (1988).

53. WIS. STAT. § 767.25 (1987-1988). Percentage guidelines and immediate income withholding began in 1984, but only as a pilot project in ten Wisconsin counties. *See* A. NICHOLS-CASEBOLT, I. GARFINKEL & P. WONG, *supra* note 11, at 21.

54. The standards are quite simple to apply; one simply multiplies the obligor's income by the appropriate percentage. For example, in most cases an obligor with a support obligation for one child will pay 17% of his or her base income for child support; for two children, the obligation would be 25% of base income; for three children, 29%; for four children, 31%; and, for five or more children, 35%. The guideline system does not apply in special circumstances such as serial families (children with a common father but different mothers), split-custody, and shared-time payers. Bailey, *A Practitioner's Approach to Child Support*, 60 WIS. BAR BULL. 19, 20 (June 1987). The percentage guidelines are contained in WIS. ADMIN. CODE § HSS 80 (Aug. 1987).

55. WIS. STAT. §§ 767.25(1m) and 767.51(5) (1987-1988).

56. Wisconsin law permits courts to enter the support amount as a percentage of income or as a fixed sum. WIS. STAT. § 767.25(1) (1987-1988).

57. Mandatory immediate wage withholding applies to all child support orders entered or revised after July 31, 1987. WIS. STAT. § 767.265 (1987-1988). For a discussion of previous wage withholding provisions in Wiseonsin, see the Legislative Council Note contained in WIS. STAT. ANN. §§ 765-778, at 362-63 (West 1981).

payment from the obligor's paycheck.[58] The employer then sends the payment directly to the clerk of courts, who registers the payment.[59]

This system eliminates the accumulation of arrearages (unless the obligor is concealing income),[60] particularly when used in orders expressed as a percentage of the obligor's income. Even if an obligor's order is expressed as a flat rate, immediate income withholding is still advantageous because it encourages obligors to seek revision of support orders promptly.[61]

Although there are drawbacks to Wisconsin's new child support enforcement system,[62] it does have several important advantages. First, a support order expressed as a percentage of the obligor's income will automatically provide for changes in the obligor's income.[63] Second, immediate wage withholding prevents arrearages from accumulating.[64] Finally, the new system works—it has increased child support collections by twenty-one percent in its first full year of operation.[65] In contrast, the old flat-rate, non-withholding system did not prevent arrearages from accumulating, did not adjust automatically for an obligor's changed financial circumstances, and was less effective in collecting support.

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58. In contrast, many states other than Wisconsin begin automatic wage withholding only after arrearages have begun accumulating. Corbett, *supra* note 37, at 17.

59. This arrangement serves two practical functions. First, support money gets to the custodial household or the IV-D agency promptly. Second, the system provides the clerk of courts with evidence of all support payments and thus eliminates disputes about whether the obligor has paid the ordered support money. Interview with Sherwood Zink, Counsel for the Wisconsin Office of Child Support Enforcement (Oct. 27, 1987).

60. Determining income is an inherent (and perhaps intractable) problem in setting child support levels. *See How Much is Reasonable?*, NAT'L L.J., May 23, 1988 at 13-14.

61. Suppose an obligor's income was $30,000 at the time the support order of $100 a week was entered. Further assume that the obligor's income then drops to $15,000, but the obligor's employer continues to withhold support payments of $100 a week. The obligor will quickly notice that support is taking a bigger percentage out of each paycheck and will have a strong incentive to petition for a revision of the support order. *See* D. Dodson & S. Green de la Garza, *supra* note 26, at 8.

62. While percentage guidelines have been controversial, an extensive discussion of their relative merit is beyond the seope of this Comment. For an extensive discussion of support guidelines, see articles compiled in 1 ABA CHILD SUPPORT PROJECT, IMPROVING CHILD SUPPORT PRACTICE I-1 to I-299 (1986).

63. Support orders expressed as a flat rate (for example, $125 a week) may have to be modified up or down whenever the obligor's income changes significantly from the rate in effect when the support order was entered.

In contrast, if an obligor's support order is expressed as a percentage of income (for example, 17% of gross income), the support level would automatically change as the obligor's income fluctuated. The amount of support due would automatically deerease when the obligor's wages decreascd, and would increase when the obligor's income increased.

64. Of course, immediate income withholding works only if income is reported; obligors who do not report the money they earn and otherwise conceal income will not have any of their unreported income withheld for child support.

65. This figure outpaccs increases in the number of child support cases and the rate of inflation. Milwaukee J., July 17, 1988, at 7B, col. 2.

3. THE OLD FLAT-RATE, NON-WITHHOLDING SYSTEM

Wisconsin support orders, with few exceptions,[66] will eventually be governed by the percentage guidelines and the immediate wage withholding system. The changeover to this new system, however, will be slow, because the vast majority of Wisconsin support orders still remain governed by the old flat-rate, non-withholding scheme. Under the old scheme, the obligor's support obligation is expressed as a flat rate (for example, $500 a month) rather than as a percentage of income. In addition, income withholding is required only after a default in payments has occurred.[67]

All support orders entered under the old system remain under the old system until modified. Because the percentage guidelines and immediate wage withholding provision did not become effective statewide until 1987, most current Wisconsin support orders were not promulgated under the new system.

In addition, most support orders entered under the percentage guideline system are not explicitly expressed as a percentage of income (for example, twenty-five percent of income). Instead, most child support orders, including those currently calculated under the percentage guidelines, are actually expressed as a flat rate (for example, $125 a week), calculated by multiplying the obligor's income at the time the support order was entered by the appropriate percentage. This defeats the drafters' intent that the percentage guidelines operate like an income tax, automatically adjusting for the obligor's income.

One reason for this is that county court clerks responsible for keeping track of support payments find fixed-rate orders easier to administer than support orders expressed as a percentage of income. As a result, perhaps only five percent of all support orders are expressed as a percentage of income rather than as a fixed amount. That number is changing, however, as an increasing number of obligors and attorneys discover the advantage to expressing support obligations as a percentage of income.[68]

Although coverage of the new system is far from complete, it already has had a dramatic impact,[69] and its existence is proof of Wisconsin's position as an innovator in the area of child support enforcement.[70] Congress recognized this Wisconsin tradition when it drafted

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66. *See, e.g., supra* note 54.

67. *See supra* note 57. The Family Support Act of 1988 does not appear to require immediate withholding of pre-existing child support orders. *See* Rovner, *supra* note 52, at 2825.

68. Interview with Sherwood Zink, Counsel for the Wisconsin Office of Child Support Enforcement (Oct. 27, 1987). *See also* Corbett, *supra* note 37, at 16.

69. *See supra* note 65 and accompanying text.

70. *See supra* note 52.

CSEA to include sections permitting Wisconsin to design and implement pilot projects to experiment with new methods to collect child support.[71] Wisconsin has complied with all the provisions of the CSEA of 1984.[72] But despite its unique position as an innovator, Wisconsin was required, along with other states, to further change its laws regarding child support enforcement.

C. 1986 Federal Prohibition of Retroactive Modification of Child Support Orders: 42 U.S.C. § 666(a)(9)(C)

The CSEA of 1984 did not alter a person's ability under state law to modify a child support order retroactively or to expunge arrearages. In 1986, however, Congress dealt with this issue and passed an amendment to CSEA that created 42 U.S.C. § 666(a)(9).[73]

Although there are several goals that may have prompted this Congressional action, speeches[74] and other legislative history[75] indicate that Congress was primarily concerned with interstate enforcement when it passed 42 U.S.C. § 666(a)(9). While it is possible that Congress banned retroactive revision of support orders for other reasons—perhaps to eliminate a source of potentially divisive litigation,[76] encourage

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71. Wisconsin was the only state permitted to do this. Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, § 22 (1984).

72. *See supra* note 12.

73. Senators Bill Bradley (D-NJ) and Russell Long (R-La) first introduced the amendment as the "Interstate Child Support Enforcement Act" (S. 2404, 99th Cong., 2d Sess. (1986)); Representative Barbara Kennelly (D-Ct) introduced a companion bill (H.R. 4769, 99th Cong., 2d Sess. (1986)) in the House a few days later. 12 Fam. L. Rep. (BNA) 1442 (1986); *see also* 132 CONG. REC. S5303 (daily ed. May 5, 1986); 132 CONG. REC. E1561 (daily ed. May 7, 1986). While the sponsors of these two bills never got them out of committee, they succeeded in getting them passed by burying them as an amendment to the Omnibus Budget Reconciliation Act of 1986, Pub. L. 99-509, § 9103, 100 Stat. 1973 (codified at 42 U.S.C. § 666).

74. 132 CONG. REC. S5303 (daily ed. May 5, 1986); 132 CONG. REC. E1561 (daily ed. May 7, 1986).

75. For example, the text of the legislative history reads in part:

> In most States, a child support order can be modified only prospectively . . . only future child support payments would be affected. However, a number of States permit the child support award to be retroactively modified. In sueh States, the court (or administrative entity) has the authority to reduce or nullify arrearages. Further, under . . . URESA, in interstate cases, the court in the noncustodial parent's State may modify the child support order of the custodial parent's State to the same extent the order could be modified in the State that issued the order.

Omnibus Budget Reconciliation Act of 1986, P.L. 99-509, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 3917. *See also HHS Rules Proposed on Proscription Against Retroactive Modification of Support Arrears* [hereinafter *HHS Rules*], 13 Fam. L. Rep. (BNA) 1600, 1601 (Oct. 13, 1987). *See also supra* note 74.

76. The Department of Health and Human Services has stated that allowing retroactive revision "permits arguments to be made about changed circumstances in prior periods at a time when evidence may not be abundant or clear." *HHS Rules*, 13 Fam. L. Rep. (BNA) 1601 (Oct. 13, 1987). While this might be true, Wisconsin case law places a heavy burden of proof on the party petitioning for revision, and thus discourages obligors from filing petitions for retroactive revision

obligors to file modification petitions promptly,[77] and punish delinquent obligors[78]—the legislative history reflects only congressional findings that relate to interstate child support enforcement.

In particular, Congress expressed concern that non-custodial parents were circumventing support orders by moving to states that allowed retroactive modification.[79] While Senator Bradley raised this point in a speech he gave upon introducing the Interstate Child Support Enforcement Act, he did not mention any factual basis for this concern.[80] It is likely that the sponsors of the House and Senate bills perceived, perhaps without factual basis, that interstate circumvention and abuses were not only frequent, but also inherent in actions to modify support orders retroactively.[81] By eliminating the possibility of retroactive modification, the sponsors of the legislation evidently believed they were closing a loophole they felt provided a "safe harbor" for delinquent obligors.

In addition, Congress concluded that states which permitted retroactive modification made interstate child support enforcement more cumbersome and thus less effective. Under RURESA and state law, an obligee can collect support arrearages only after those arrearages become a final judgment. Three states that *prohibited* retroactive modification of support orders, however, as well as the eighteen states that permitted retroactive revision, did not treat past due support payments as vested final judgments.[82] As a result, obligees in each of these states had to take the extra step of reducing child support arrearages to judgment before they could collect child support arrearages. This extra step made interstate support enforcement especially cumbersome. Along

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should they lack "abundant or clear" evidence of changed circumstances. *See supra* notes 21-22 and accompanying text.

77. D. Dodson and S. Green de la Garza, *supra* note 26, at 2, 4-5.

78. Congress' flat ban on the retroactive revision of child support orders (regardless of changed circumstances) resembles strict liability for support debts and takes on a punitive cast.

79. *See supra* note 26 for a list of these states.

80. 132 CONG. REC. S5303 (daily ed. May 5, 1986).

81. Traditionally, judges have been granted broad discretion to set and modify support orders. Naturally, abuses occur. There may not be, however, a great need to control judicial discretion over child support orders. A recent study of child support awards in Dane County, Wisconsin revealed that most (87%) awards were governed by stipulation between the parties, while most non-stipulated awards were determined by the income of one of the parents. The resulting system is thus fairly predictable. *See* M. MELLI, CHILD SUPPORT AWARDS: A STUDY OF THE EXERCISE OF JUDICIAL DISCRETION (Institute for Research on Poverty Discussion Paper No. 734-83, 1983). While this study only involved initial child support awards, its findings may also be applicable to revision of support orders. Most claims of changed circumstances (for example, illness, unemployment, higher cost-of-living, more children) are ultimately claims of changed disposable income. As a result, courts are likely to revise support orders in a manner similar to the initial award of child support: either approve the stipulation (if there is one), or look to the non-custodial parent's income to arrive at an appropriate support level.

82. D. Dodson & S. Green de la Garza, *supra* note 26, at 4-5. Note that this extra step was not unique to states that allowed retroactive revision of support orders.

with prohibiting retroactive revision of support orders, therefore, Congress also forced all states to treat each support arrearage as a vested final judgment entitled to the full faith and credit of other states.[83] This, in turn, eliminated the need to reduce arrearages to judgment, presumably improving the efficiency of the collection process.

Congress, however, did not have to prohibit all retroactive revision of support orders in order to improve interstate child support enforcement. Rather, it simply could have mandated that states treat each support payment as an enforceable judgment when each payment fell due, while continuing to permit retroactive revision in extraordinary cases.[84] Alternatively, Congress could have required that states prohibit retroactive modification in RURESA cases. Congress, however, instead chose a sweeping "solution" (prohibiting all retroactive revision) to a limited problem (retroactive revision in interstate cases), and may have made the situation worse.[85]

D. Wisconsin's Response: A Statutory Prohibition of Retroactive Modification of Child Support Orders

42 U.S.C. § 666(a)(9)(C) gave states until May 31, 1987, to enact legislation to prohibit retroactive revision of support orders, and, by extension, support arrearages.[86] As a result, Wisconsin governmental leaders began to weigh the benefits and disadvantages of complying with this federal mandate.

Shortly after his election in 1986, Wisconsin Governor Tommy Thompson formed the Welfare Reform Commission[87] to investigate ways to reduce Wisconsin's welfare caseload and its attendant costs. The Commission concluded that encouraging parents, rather than the state, to provide for their children would help achieve this goal.[88] Toward this end, the Commission recommended that Wisconsin com-

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83. 42 U.S.C. § 666(a)(9)(A)-(B) (Supp. IV 1986).

84. D. Dodson & S. Green de la Garza, *supra* note 26, at 4-5.

85. The new law mandates that support orders remain rigid, and huge support debts can result. IV-D agencies realize it is inefficient to spend money trying to collect uncollectable arrears, and rather than give the other state's judgment full faith and credit (as Congress intended), the IV-D agency may simply refuse to honor such judgments. Telephone interview with Sherwood Zink, Counsel for the Wisconsin Office of Child Support Enforcement (Mar. 31, 1988).

86. *See States Slow to Comply with IV-D Ban on Retroactive Modification of Arrears*, 13 Fam. L. Rep. (BNA) 1270 (Apr. 7, 1987) [hereinafter *States Slow to Comply*].

87. The Welfare Reform Commission members were Assembly Speaker Tom Loftus, Assembly Minority Leader Betty Jo Nelsen, Senate Majority Leader Joseph Strohl, Senate Minority Leader Susan Engeleiter, and Secretary of the Department of Health and Social Services Timothy Cullen. Letter from Timothy F. Cullen to Governor Tommy G. Thompson (May 22, 1987).

88. Welfare Reform Commission, Governor's Welfare Commission Report, Introduction (May 22, 1987).

ply with the federal mandate in 42 U.S.C. § 666(a)(9) and pass legislation to prohibit the retroactive modification of child support orders.[89] The rather scant legislative history suggests that the Commission and the Legislature (1) were concerned about the loss of federal AFDC funds;[90] (2) wanted to reduce the welfare budget by having non-custodial parents (instead of the state) support their children; and (3) wanted to protect custodial parents from having to return child support payments should the support order later be reduced.[91]

Despite the seeming plausibility of this rationale, attorneys, judges, family court commissioners, and IV-D agency staff objected to the mandate contained in 42 U.S.C. § 666(a)(9).[92] First, there was little demonstrated need for the law because Wisconsin has long had an effective program to enforce child support orders.[93] In addition, Wisconsin, like other states, has good policy reasons to allow the retroactive modification of child support orders. While some delinquent obligors have the ability to pay child support and simply choose not to do so, there are many delinquents who simply cannot pay arrearages. Wisconsin courts have recognized that retroactive modification is appropriate where the delinquent obligor has experienced a significant change in circumstances, and where the arrearage bears no relation to the obligor's ability to pay.[94]

The legislature, however, decided that the state could not afford to lose federal AFDC funds, and complied with the mandate contained in 42 U.S.C. § 666(a)(9)(C) by passing section 767.32(1m). This decision, while understandable, will have an adverse effect on Wisconsin obligors

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89. *Id.* at 13. Recommendation 25, which is entitled "Prohibit Retroactive Adjustments to Child Support and Maintenance Orders," states:

> Implement a new federal requirement that prohibits retroactive adjustments to child support orders. This will prohibit forgiving child support arrearages through a determination that the ordered amount was too high in the past. It will also eliminate the possibility of requiring the custodial parent to return payments that were received under an order later determined to be too high. Correcting errors in calculations will be excluded from the prohibition.
>
> No state cost—statutory change only.

90. The federal Office of Child Support (OCS) makes yearly audits to determine if a state is in substantial compliance with federal rules. Non-compliance can be punished by loss of 1-2% of the state's AFDC funds in the first year, 2-3% in the second year, and 3-5% in the third and succeeding years of noncompliance. Noncompliance is a flexible concept; if the state can demonstrate that its noncompliance has had no significant adverse impact on the effectiveness of the state's IV-D program, then it will not be penalized. *See* 42 U.S.C. § 603(h) (Supp. 1988).

91. This last goal (vesting support payments with the obligee) does not require a ban on retroactive revision of support orders. *See also supra* note 84 and accompanying text.

92. Interview with Sherwood Zink, Counsel for the Wisconsin Office of Child Support Enforcement (Oct. 27, 1987). Wisconsin was not the only state reluctant to adopt the mandates of 42 U.S.C. § 666 (a)(9)(C). *See States Slow to Comply, supra* note 86, at 1270.

93. *See supra* notes 51-52 and accompanying text.

94. *See supra* notes 18-22 and accompanying text.

without substantially improving Wisconsin's child support enforcement program.

III. The Effect of Wisconsin Statutes Section 767.32(1m)

Any Wisconsin child support obligor who has accumulated arrearages is subject to section 767.32(1m).[95] Because the statute prohibits court-ordered retroactive revision of support orders, it will be extremely difficult for obligors to expunge their arrearages. If an obligor has accumulated arrearages due to willful non-compliance with a support order, then prohibiting the expungement of the arrearage would be consistent with the objective of ensuring both fairness to the obligor and the financial well-being of the dependent children.

Other obligors, however, have accumulated arrearages because of their inability to pay. For instance, if an obligor suffers a drop in income, the obligor may be unable to keep up with support payments that assume a higher level of income.[96] Unless modified, the support obligation will remain, and arrearages will accumulate which bear no relation to the obligor's ability to pay. Those obligors unable to revise their support order promptly will be most affected, as their inability to expunge arrears will result in large, unretireable child support debts. Because child support debts have unusual and serious consequences, obligors who have large arrearages will be significantly affected by section 767.32(1m).

A. Child Support Debts are Serious Business

For several reasons, child support debts can result in significant collateral disabilities. First, the debt may form the basis of criminal[97] or

95. *But see infra* notes 149-54 and accompanying text.

96. This would not be true if the obligation were expressed as a percentage of income. *See supra* note 63 and accompanying text.

97. Wis. Stat. §§ 940.27(2) and (2m) (1987-1988) [Class E felony, failure to support; Wis. Stat. § 939.50(3)(e) (1987-1988) sets maximum penalties at two years in prison and/or $10,000 fine]; Wis. Stat. §§ 940.27(3) and (3m) (1987-1988) [Class A misdemeanor, failure to support; Wis. Stat. § 939.51(3)(a) (1987-1988) sets maximum penalties at nine months in jail and/or $10,000 fine]; Wis. Stat. § 940.28 (1987-1988) [Class D felony, abandonment; Wis. Stat. § 939.50(3)(d) (1987-1988) sets maximum penalties at five years in prison and/or $10,000 fine]; Wis. Stat. § 785.03(1)(b) (1987-1988) [criminal contempt; penalties depend on whether contempt proceeding is summary or non-summary: Wis. Stat. § 785.04(2)(a) (1987-1988) (in non-summary proceedings, maximum penalties are one year in prison and/or $5,000 fine); Wis. Stat. § 785.04(2)(b) (1987-1988) (in summary proceedings, maximum penalties are thirty days in prison and/or $500 fine)]; Wis. Stat. § 818.02(1)(e) (1987-1988) (authorizing arrest of obligor in a proceeding to enforce the duty of child support or maintenance). In Dane County's first criminal trial involving failure to make support payments, a jury took only 90 minutes to convict an obligor who already was serving a six month jail sentence for contempt of court in connection with the same back payments. Capital Times (Madison, Wis.), May 5, 1988, at 32, col. 2.

civil[98] action resulting in imprisonment. Second, child support debts are unusually long-lived; unlike non-payment of fines, such debts cannot be expunged by serving a sentence for contempt of court[99] or criminal non-support,[100] nor can they be discharged in bankruptcy.[101] Third, a delinquent obligor might find it difficult to obtain credit; CSEA now allows a IV-D agency to report arrearages of more than $1,000 to credit agencies.[102] And fourth, if an obligor with arrearages obtained money or property, the money could be garnished and a lien placed on the property.[103] Thus, child support arrearages can result in long-lived, serious consequences for delinquent obligors.

B. Persons Affected by Wisconsin Statutes Section 767.32(1m)

Section 767.32(1m) affects obligors who want to decrease a child support order retroactively. Before August 1, 1987, obligors[104] could retroactively reduce[105] a child support order if they proved a change of circumstances.[106] When section 767.32(1m) became effective on August 1, 1987, it restricted the scope of Wisconsin Statutes section 767.32(1) to allow only prospective modification of child support orders.[107]

While obligees with support orders entered after August 1, 1987 will enjoy the advantages of immediate withholding and percentage guidelines,[108] many obligors remain governed by support orders that reflect the old flat-rate, non-withholding system.[109] Still other obligors/

98. WIS. STAT. § 785.01(1)(b) (1987-1988) (civil contempt; remedial sanctions contained in WIS. STAT. § 785.04(1)(b) (1987-1988) can include up to six months in jail).

99. Contempt is classified as either criminal or civil. Under the criminal contempt statute, WIS. STAT. § 785.04(2) (1987-1988), a court imposes sanctions such as imprisonment in order to uphold the authority of the court. WIS. STAT. § 785.01(2) (1987-1988). Imprisonment for civil contempt is intended to be remedial, and can only continue for six months, or as long as the person commits the contempt of court (here, non-payment of support), whichever is shorter. WIS. STAT. § 785.04(1)(b) (1987-1988). For a discussion of criminal and civil contempt in the context of child support, see Hicks *ex. rel.* Feiock v. Feiock, 108 S. Ct. 1423 (1988).

100. WIS. STAT. §§ 940.27(7)(a)-(c) and (7m)(a)-(c) (1987-1988).

101. *See supra* note 2.

102. Dodson & Horowitz, *supra* note 8, at 3057. Wisconsin implemented an even stronger law than required by CSEA: any arrearage can be reported to a credit agency. WIS. STAT. § 46.25(11) (1987-1988).

103. Dodson & Horowitz, *supra* note 8, at 3055-56. For example, WIS. STAT. § 767.42 (1987-1988) authorizes seizure of an obligor's property in abandonment actions.

104. While section 767.32(1m) theoretically affects obligees who want to decrease their child support retroactively, in practice few obligees would file such a petition.

105. Wisconsin case law prohibits the retroactive increase of support orders. *See supra* note 20.

106. *See supra* notes 18-22 and accompanying text.

107. *See supra* notes 23-24 and accompanying text.

108. *See supra* notes 57-66 and accompanying text. There are, of course, problems with the new law. *See supra* note 62.

109. *See supra* notes 66-67 and accompanying text.

obligees under the new immediate withholding/percentage guideline system continue to have the percentage amount expressed as a flat rate.[110]

Those obligors who (1) have their support orders expressed as a flat rate, and (2) have experienced changed circumstances after their support order was entered will be most affected by section 767.32(1m). Such obligors can easily fall behind in child support payments if their income drops dramatically; the loss of income prevents the obligor from making the ordered support payments and from hiring counsel to petition for revision of the order.[111] If the obligor cannot modify the now unreasonable flat-rate support order, arrearages will mount rapidly and, ironically, in direct proportion to the obligor's financial setback.[112]

Certain populations will be especially harmed by the law. Section 767.32(1m) provides that accumulation of arrearages under the old order will cease on the date that notice of the action to modify was given to the respondent, assuming that petitioner's motion to modify the support order is successful.[113] Bringing such a petition requires some kind of legal assistance, however, and certain segments of society—prisoners, teenagers, and the poor—rarely enjoy easy access to an attorney.[114] Hence, these groups are at particular risk of accumulating substantial debts. For example, inmates in Wisconsin prisons may have to wait up to six months before they can even speak to an attorney or law student from the University of Wisconsin's Legal Assistance to Institutionalized Persons program (LAIP).[115] Even then, prompt action is not always achieved. Such delays can prove costly to the obligor, especially where the support level is high and the change in the obligor's income or situation is significant.[116]

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110. *See supra* note 68 and accompanying text.

111. For example, an Illinois man, Charles Jobe, became disabled in 1984 and informed the circuit court clerk and the Illinois Department of Public Aid of his disability and inability to pay his ordered child support. Jobe, however, did not file a formal petition for modification until January of 1986. The trial court modified Jobe's support order retroactive to 1984. The appellate court "recogniz[ed] [Jobe's] hardship" but reversed the trial court because the Illinois statute, like § 767.32(1m), prohibits modification of a support order prior to the date of a petition to revise. *In re* Jobe, 151 Ill. App. 3d 998, 503 N.E.2d 1146 (1987).

112. In contrast, obligors whose support obligation is expressed as a percentage of income will not accumulate arrears because the percentage automatically takes the financial setback into consideration.

113. WIS. STAT. § 767.32(1m) (1987-1988). *See also supra* notes 23-25 and accompanying text.

114. For example, studies in Texas, Colorado, and Massachusetts document that the poor's legal needs are not being met. *See Pro Bono Publico*, A.B.A. J., Dec. 1, 1987, at 54.

115. Interview with Kenneth Lund, Clinical Associate Professor and Director, LAIP (Apr. 6, 1988).

116. One case from the files of LAIP is illustrative. Prisoner K has been incarcerated since late 1984. His support level (based on his 1983 income of $23,000) is $440 per month. In prison, his

Like prisoners, indigent or near-indigent obligors also have inadequate access to legal services. For instance, Legal Services Corporation (LSC) offices in Wisconsin do not handle support revisions, due to their extremely limited resources. Instead, their priorites are focused on domestic abuse cases.[117] The situation is similar for the low-income clients of Legal Action of Wisconsin (LAW)[118] and other such agencies. Until meaningful legal access is provided to groups traditionally denied such access, these groups will be especially harmed by section 767.32 (1m).[119]

C. The Net Effect of Wisconsin Statutes Section 767.32(1m) on Wisconsin Citizens

Wisconsin Statutes section 767.32(1m) arguably has one positive effect: under it, obligors who are financially able, but unwilling, to comply with support orders cannot expunge the arrearages they should have and were able to pay. However, such obligors could not have expunged their arrearages before the passage of section 767.32(1m) because they would not have been able to justify such an action under Wisconsin case law.[120] Hence, it is unclear whether there is any real benefit to section 767.32(1m) from that standpoint.[121]

In contrast, section 767.32(1m) will profoundly affect those obligors whose income has tumbled and whose access to legal assistance is limited. These obligors will accumulate substantial arrearages that bear little relation to their ability to pay. Because child support debts can trigger significant collateral consequences, such debts will hang over the obligor until paid off, if ever. Only grudging compliance, at best, can be expected in such a situation, for huge debts can dissolve any resolve to pay back old arrearages.[122]

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income has been only about $32 per month. As a result, even if K paid 100% of his monthly prison wages for child support, his debt to the IV-D agency would still increase over $400 for each month of delay before petitioning to revise his support order under § 767.32(1).

117. Interview with David Cook, Clinical Assistant Professor, University of Wisconsin Law School (Feb. 10, 1988).

118. Interview with Amy Shapiro, Staff Attorney, Legal Action of Wisconsin, Milwaukee office (Apr. 6, 1988). In addition, the State Public Defenders Offiee does not handle civil cases involving support modification unless an obligor's failure to pay results in criminal charges. *See* WIS. STAT. § 977.05(4)(i) (1987-1988).

119. Ways to improve access include making the modification procedure easier, providing pro se forms to obligors, and improving public education about the new law. *See infra* notes 174-75 and accompanying text.

120. *See supra* notes 21-22.

121. The most obvious benefit of section 767.32(1m), rather, is that it prevented the federal government from cutting off a portion of Wisconsin's AFDC funds. *See supra* note 15.

122. This is particularly true where the child support debt has been incurred while the obligor has been in prison or otherwise institutionalized. Such debts are unjust for several reasons. First, they impose additional punishment that is not related to the crime. *See* Pierce v. Pierce, 162

The government has a strong interest in encouraging prompt support payments and in collecting support arrearages. To achieve these goals, Congress has insisted, through 42 U.S.C. § 666(a)(9)(C), that states pass laws like section 767.32(1m). Wisconsin, however, could better accomplish these goals simply by expanding the use of its current enforcement system. Support orders entered as a percentage of income automatically adjust for an obligor's changed economic circumstances, and immediate income withholding ensures timely payments while preventing arrearages from accumulating. For those obligors not covered by these two provisions, however, section 767.32(1m) will have a harsh effect, and other remedies will be necessary.

IV. Recommendations to Reduce the Harshness of Wisconsin Statutes Section 767.32(1m)

When child support arrearages accumulate for reasons beyond the obligor's control, retroactive modification of the support order may be appropriate. In such cases, administrative, judicial, and legislative measures other than outright repeal of section 767.32(1m) could ease the potentially harsh effect of that law.[123]

A. Administrative Remedies

The IV-D agencies have at least three ways to soften the potentially harsh effect of section 767.32(1m). First, the IV-D agency can simply decide not to collect the child support debt. Second, IV-D agencies could implement reasonable withholding limits once they have decided to garnish an obligor's wages for non-payment of support arrearages. And finally, IV-D agencies (as well as other obligees) can enter into settlement agreements with obligors to satisfy support debts.

Mich. App. 367, 370-71, 412 N.W.2d 291, 293 (1987) (quoting Ohler v. Ohler, 220 Neb. 272, 277-78, 369 N.W.2d 615, 618-19 (1985) (Krivosha, C.J., dissenting)). Second, support debts that bear no relation to the obligor's ability to pay are contrary to principles of fairness. *See, e.g.*, Edwards v. Edwards, 97 Wis. 2d 111, 116, 293 N.W.2d 160, 163 (1980). In addition, large support debts incurred during imprisonment discourage the inmate from advancing himself or herself when released. If the inmate will be liable for these debts once he or she begins earning money, then the obvious way to accumulate money and avoid support debts is in the underground economy. Interview with Professor Walter Dickey, former head of the Division of Corrections, Wisconsin Department of Health and Social Services (Nov. 5, 1987). *See also infra* notes 164-65 and accompanying text.

123. The law's harshness will also become tempered over time. Eventually, almost all Wisconsin support orders will be governed by the percentage guidelines and immediate income withholding. Since these provisions prevent most arrears from accumulating, retroactive expungement of arrears will be largely unnecessary. *See supra* notes 52-65 and aecompanying text.

1. DISCRETION IN COLLECTION

Administrative discretion in collection is one way to soften the effect of section 767.32(1m). Like other debts, child support arrearages can become stale and uncollectable if they get too large and too old. District attorneys and IV-D agencies, with only limited resources, may decide that attempting collection would be economically inefficient[124] or inequitable. Of course, discretion is a two-edged sword. An informal decision not to collect is not the same as expungement of a debt; if the obligor later comes into money or property, authorities can decide whether to institute an action to recover the arrearage.[125] Thus, unexpunged debts hang over an obligor's head even if the IV-D agency does not intend to collect. Finally, administrative discretion can be arbitrary, selective, and unreviewable. Still, by formulating a collection policy that limits collection efforts to those cases that involve unjustified obligor non-compliance, the IV-D agencies can exercise discretion that is in some ways similar to that exercised by judges[126] before the enactment of section 767.32(1m).

2. LIMITATIONS TO GARNISHMENT WHEN COLLECTING SUPPORT ARREARAGES

A IV-D agency that decides to recover an arrearage from a delinquent obligor is prevented by the federal Consumer Credit Protection Act from garnishing more than sixty-five percent of the obligor's disposable income.[127] This Act is not much protection for obligors, however, because they may have great difficulty supporting themselves after such a large percentage is taken from their paycheck.

Federal law does not, however, bar states and agencies from establishing their own, lower limits on garnishment.[128] Therefore, Wisconsin's IV-D agencies could institute their own maximum withholding limits where income is being garnished to pay a support arrearage. One way to do this would be to bring garnishment actions for support arrearages (but not for current support) under the Wisconsin garnish-

124. Savage & Roberts, *supra* note 34, at 443.

125. This becomes a fairness problem if the arrears accumulated for reasons beyond the obligor's control, rather than due to the obligor's unwillingness to pay support. *See, e.g., supra* note 122. A IV-D agency has tremendous leverage against an obligor should it decide to pursue past arrearages. The CSEA of 1984 gives IV-D agencies a wide array of collection techniques such as liens, tax refund intercepts, and mandatory wage withholding. *See generally* Dodson & Horowitz, *supra* note 8.

126. *See supra* notes 18-22.

127. This assumes the obligor has only one family to support. An obligor who is supporting more than one family cannot be garnished more than 55%. Consumer Credit Protection Act, § 303(b), 15 U.S.C.A. § 1673(b) (1982).

128. 42 U.S.C. § 666(b)(6)(B) (1985).

ment statute contained in Chapter 812. Regular Wisconsin garnishment law does not apply to garnishments made pursuant to collection of support money,[129] but if it did, obligors would be afforded better protection because the Wisconsin withholding limits are lower than the present federal maximum. For example, while the federal maximum provides only illusory protection to obligors subject to garnishment for arrearages, Wisconsin law (if it applied to child support garnishments) would exempt from garnishment a portion of the garnishee's wages sufficient to ensure a minimum standard of living.[130]

3. SETTLEMENT AGREEMENTS

Finally, settlement agreements may soften the effect of section 767.32(1m) for those obligors with good cause to retroactively modify a child support order. In a settlement agreement the obligee(s)[131] must be willing to stipulate that payment of a certain sum will satisfy the debt represented by the arrearage.[132] If the judge approves the settlement agreement,[133] the obligor's debt is satisfied upon payment of the agreed amount of money to the obligee.[134]

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129. WIS. STAT. § 812.18(2)(d)(1) (1987-1988).

130. WIS. STAT. § 812.18(2)(a) (1987-1988).

131. If the obligee is not a IV-D agency client, the IV-D agency would not be involved in the settlement agreement. In such cases, the obligor and obligee are the only parties who would have to sign the stipulation.

Where a IV-D agency is a party, however, other interested persons might also need to agree to the stipulation. Some judges require that the custodial parent, as well as the IV-D agency, sign the stipulation. This is true even where the custodial parent is receiving AFDC, has already assigned the IV-D agency the right to collect child support, and has no direct financial interest in the settlement agreement. Interview with Richard Graeber, Investigator for Winnebago County Child Support Agency (Nov. 19, 1987). *See also infra* note 138.

132. The procedure here is similar to that in other civil proceedings involving settlement of a debt (for example, bankruptcy proceedings). *See infra* note 135.

133. Parties cannot validly modify support orders without judicial approval. *Cf.* Paterson v. Paterson, 73 Wis. 2d 150, 242 N.W.2d 907 (1976) (obligor who has experienced changed circumstanees must petition court to change support order—not even a private agreement between the custodial parent and the obligor can accomplish modification or termination of court-ordered support payments). *But cf. In re* Watkins, 42 Wash. App. 371, 374, 710 P.2d 819, 822 (1985), *petition for review denied*, 105 Wash. 2d 1010 (1986) (while agreements between parents regarding modification of prospective child support are invalid as against public policy, laches may mitigate harshness of claim for arrears brought by obligee over five years after payments ceased). *See generally* Annotation, *Validity of Release from Child Support*, 100 A.L.R.3d 1129, 1149-53 (1980).

134. A settlement agreement can have res judicata effect. *See, e.g.*, Penney v. White, 594 S.W.2d 632, 635 (Mo. Ct. App. 1980) (as with any other debt, a past-due child support judgment may be settled or compromised by the parties upon adequate consideration). Note that Missouri permits such settlement agreements even though it prohibits retroactive revision of support orders. MO. ANN. STAT. § 452.370(1) (Vernon Supp. 1987); Jenkins v. Jenkins, 453 S.W.2d 619, 621 (Mo. Ct. App. 1970).

Section 767.32(1m) does not explicitly forbid courts from approving such settlement agreements between obligees and obligors.[135] Hence, a plausible interpretation of section 767.32(1m) is that the statute is merely a limitation on a court's ability to order retroactive modification; under section 767.32(1m), courts remain free to approve settlement agreements between parties.

Although allowing parties to enter into settlement agreements permits discretionary action that the legislature had attempted to eliminate, the state interest in enforcing support orders is not undermined by allowing settlement agreements.[136] All interested parties must approve a settlement agreement before a court will ratify it.[137] The state will be a party to many settlement agreements—mainly those that involve IV-D clients.[138] Other settlement agreements will be between individuals, and will not involve the state as a party.[139] But in either case, if all parties approve a settlement agreement, that agreement is one which likely fulfills all parties' needs. Moreover, courts may reject any stipula-

135. The statute provides that ". . . the court may not revise the amount of child support . . . due prior to the date that notice of the action is given to the respondent. . . ." WIS. STAT. § 767.32(1m). In approving a settlement agreement, however, a court does not actually revise the original support order. The situation is similar to what happens in other civil actions: there may be a court judgment of $10,000 for plaintiff, but the defendant and plaintiff can agree at any time to satisfy the judgment upon payment of a lesser amount. The judgment is not altered by such action, but the debt is satisfied by a payment specified by the parties, such as ten cents on the dollar.

The federal legislation, moreover, simply required states to pass laws prohibiting courts from modifying support orders retroactively; it did not place any restriction on state IV-D agencies entering into settlement agreements. The Wisconsin Office of Child Support Enforcement (OCSE) currently opines that WIS. STAT. § 767.32(1m) does not bar a IV-D agency from entering into such a stipulation. Letter from Connie Chesnik, Assistant Legal Counsel for the Wisconsin Office of Child Support Enforcement, to Aaron Bransky (Nov. 5, 1987) (discussing settlement agreements). *See also* M. HENRY & V. SCHWARTZ, *supra* note 7, at 179-80.

136. A IV-D agency may wish to have the latitude to enter into stipulations with obligors who want to modify their support orders retroactively. For example, cancelling an arrearage removes uncollectable debts from the books, and can increase the likelihood that an obligor will keep up with current support obligations. Interview with Sherwood Zink, Counsel for the Wisconsin Office of Child Support Enforcement (Oct. 27, 1987).

137. *See supra* notes 131-35 and accompanying text.

138. Many IV-D clients are AFDC reeipients; as a condition of receiving aid, AFDC recipients must assign the IV-D agency the right to collect child support. Obligees need not be AFDC recipients to be clients of the IV-D agency, however. The CSEA of 1984 allows non-AFDC recipients to be clients of the IV-D agency for purposes of enforcing ehild support orders. The obligee merely has to pay a $25 fee to the agency and assign to them the right to collect support. By giving state IV-D agencies incentive payments for all of their clients, not only AFDC recipients, Congress believed it could improve child support enforcement for all obligees. Dodson & Horowitz, *supra* note 8, at 3051. *See also* State v. Wagner, 136 Wis. 2d 1, 400 N.W.2d 519 (Ct. App. 1986) (custodial parent need not prove financial inability to retain private counsel in order to receive representation from district attorney in support action).

139. *See supra* note 131 and accompanying text.

tion that reflects unequal bargaining power, undue influence, or is otherwise against public policy.[140]

Settlement agreements, however, cannot be implemented in many cases because they require cooperation between potentially adverse parties.[141] Cooperation will be unlikely where the IV-D agency or other obligee is hostile to the obligor. For example, an obligee who has fought a bitter divorce battle against the obligor may be reluctant to forgive any arrearages and thus unlikely to sign any settlement agreement. In addition, some IV-D agencies may refuse to bargain away arrearages for fear of appearing soft on child support delinquents.[142] Finally, judges are free to reject settlement agreements.[143] Thus, settlement agreements are a limited tool that will not work where there is bitterness and mistrust between the parties.

In summary, IV-D agencies have substantial discretion to collect support debts and to enter into settlement agreements. This discretion, if properly exercised, can temper the apparent inflexibility of section 767.32(1m). In particular, settlement agreements are a promising method of retiring uncollectable and/or unreasonable support arrearages. These methods, however, are entirely dependent on the cooperation of either the custodial parent, the IV-D agency, or both. When such cooperation is lacking, obligors who have unreasonable support arrearages will require other remedies that could be provided by the courts.

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140. *See, e.g.*, Wurtz v. Fleischman, 97 Wis. 2d 100, 293 N.W.2d 155 (1980) (duress); Lundin v. Shimanski, 124 Wis. 2d 175, 368 N.W.2d 676 (1985) (fraudulent misrepresentation); La Rosa v. Hess, 258 Wis. 557, 46 N.W.2d 737 (1951) (unconscionability).

141. The Legal Assistance to Institutionalized Persons program has successfully entered into settlement agreements with several Wisconsin IV-D agencies and obligors since the passage of section 767.32(1m), but the program has encountered resistance to such agreements from IV-D agencies, court commissioners, and custodial parents. Interview with Kenneth Lund, Clinical Associate Professor and Director, LAIP (Apr. 6, 1988).

142. Even before section 767.32(1m) became effective, some Wisconsin IV-D agencies consistently refused to join in stipulations that would expunge arrearages that had aecrued while a person was incarcerated. Interview with Kenneth Lund, Clinical Associate Professor and Director, LAIP (Apr. 6, 1988). Child support agencies are under pressure from obligees to recover arrearages from delinquent obligors, and from the obligee's point of view, forgiveness of arrearages can appear inexcusable. Consider the following common scenario: the obligor (Smith) ignores a support order and disappears. The custodial parent (Jones) suffers financial hardship, is forced onto relief rolls, and becomes a client of the IV-D agency. Arrears accumulate, so the IV-D agency searches for and finds Smith. Smith, however, has no assets. The IV-D agency wants to ensure that Smith pays current support, and believes the best way to achieve this is to (1) have the support level modified to reflect Smith's current income, and (2) forgive the uncollectable arrearages.

Jones, who has had to go on welfare because of Smith's non-compliance, wants to see Smith punished. It may appear to Jones, however, that Smith's actions were rewarded; the arrearages are forgiven and the support order modified to a lower level.

So, while there may be good reason for the IV-D agency to forgive ehild support arrearages, such forgiveness can appear to be unfair to obligees. Interview with Sherwood Zink, Counsel for the Wisconsin Offiee of Child Support Enforcement (Oct. 27, 1987).

143. *See supra* notes 133 and 140.

B. Judicial Remedies

The constitutionality of section 767.32(1m) is currently being litigated in the Wisconsin Court of Appeals.[144] While the statute does raise some equal protection[145] and due process[146] problems, given the general presumption of a statute's constitutionality,[147] the court of appeals might decline to declare the law facially unconstitutional. Rather, the court may choose to decide the validity and effect of the statute on related, but narrower grounds that involve the statute's effective date.

Wisconsin Statutes section 991.11 provides that [legislation] "which does not expressly prescribe the time when it takes effect shall take effect on the day after its day of publication. . . ."[148] Although

144. A notice of intent to pursue postconviction relief was filed on August 24, 1988 by John Hinde of the State Public Defenders Rice Lake Office. The two cases being appealed from are *In re* The Marriage of Linda Coleman, No. 86-FA-362 (Barron County Circuit Court) and *In re* The Marriage of Lynette Breed and Robert Breed, No. 83-CV-626 (Barron County Circuit Court). Both cases involve convictions for contempt of court arising from failure to pay child support.

145. For example, if a custodial parent wishes to set, increase, and collect child support, the state provides counsel essentially free of charge. *See supra* note 138. In contrast, even indigent obligors are generally denied free counsel if they wish to modify a support order, unless and until they are faced with the prospect of incarceration for non-support or contempt. *See, e.g., supra* notes 117-18. The effect of this disparity is that obligors can be subject to imprisonment for arrearages even if they lack any real notice (other than their "presumed" knowledge of the law) of the need to file a motion to modify support. *Cf.* Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 13-15 (1978) (municipal utility customer's due process rights violated when utility shut off service for nonpayment without advising customers of available administrative procedure).

Although it is likely that WIS. STAT. § 767.32(1m) will be harsher on those who have inadequate access to legal help (that is, the poor and prisoners), wealth has not been viewed as a suspect classification for equal protection purposes. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 323 (1980) (although principal impact of challenged law fell on the indigent, that fact alone did not invalidate the law under the equal protection clause, because poverty is not a suspect classification). A court, however, may sometimes scrutinize a law more carefully if its impact falls disproportionately on the poor. *Cf.* Plyler v. Doe, 457 U.S. 202 (1982).

146. While legislation readjusting rights and burdens is not unlawful solely because it upsets expectations, it does not follow that what the legislature can legislate prospectively, it can legislate retrospectively; the retrospective aspects of legislation must comply with due process. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16-17 (1975). Under section 767.32(1m), child support orders cannot be lowered nor arrearages reduced prior to the filing of a motion to modify support. The statute freezes all support levels as they existed on August 1, 1987. In a sense, the statute creates an irrebuttable presumption that all prior child support orders are correct and based on the earning capacity and total economic circumstances of each parent. This irrebuttable presumption may violate due process because it denies obligors the opportunity to introduce evidence to rebut the presumption.

147. *See, e.g.*, State v. Hart, 89 Wis. 2d 58, 64-65, 277 N.W.2d 843, 846 (1979) (a heavy burden is placed on party challenging a statute's constitutionality); Omernik v. State, 64 Wis. 2d 6, 19-20, 218 N.W.2d 734, 741-42 (1974) (legislative classifications are presumed valid; the basic test is not whether inequality results from the classification, but whether reasonable basis exists to justify the classification). There is an arguable rational basis behind section 767.32(1m). For example, the Welfare Commission Report supplies several reasonable grounds for the law. *See supra* notes 89-91 and accompanying text. Moreover, similar laws have existed for many years in a majority of states. *See infra* note 155 and accompanying text.

148. WIS. STAT. § 991.11 (1987-1988).

section 767.32(1m) clearly "took effect" on August 1, 1987, the meaning of that term is ambiguous. On one hand, the law could be construed to prohibit the retroactive modification of only those support obligations existing after August 1, 1987. Such an interpretation would permit obligors to retroactively modify support orders and cancel or reduce only those arrearages that accumulated prior to August 1, 1987. This construction is reasonable under Wisconsin case law,[149] and at least one trial court has construed the statute to have such a prospective effect.[150]

On the other hand, section 767.32(1m) could be construed to affect all support orders and arrearages, no matter when entered or accumulated. Such a construction also is reasonable[151] and has been upheld in at least one trial court.[152] Until the matter is settled in the appellate

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149. While the legislature has the power to pass laws which have a retroactive effect, statutes are generally presumed to apply prospectively. Accordingly, Wisconsin courts have interpreted WIS. STAT. § 991.11 to mean that statutes act prospectively unless otherwise stated or implied. State *ex rel.* Briggs & Stratton Corp. v. Noll, 100 Wis. 2d 650, 655, 302 N.W.2d 487, 490 (1981). *Cf.* Dep't. of Revenue v. Dziubek, 45 Wis. 2d 499, 505-06, 173 N.W.2d 642, 644-45 (1970) (even where no question of vested rights is involved, it is presumed that a statute does not invalidate the accrued results of its operative tenure, and the statute will not be retroactively construed as undoing an accrued result if not clearly required by the language of the repealing act). While a 1981 case did uphold the retroactive effect of a statute that concerned support obligations, that case involved a statute that was clearer about its retroactive effect. *See* Behnke v. Behnke, 103 Wis. 2d 449, 309 N.W.2d 21 (Ct. App. 1981). In contrast, section 767.32(1m) lacks an explicit statement of retroactive effect.

A prospective construction of the statute could also be upheld on equitable grounds; Wisconsin obligors have long had the ability to modify a support order retroactively and may very well have relied on such an avenue of relief. *See supra* note 18. For example, the author has encountered Wisconsin prison inmates who were unaware of the change caused by section 767.32(1m), and had been instructed by child support agencies to deal with arrearages after their release. In addition, the "notice" period provided by passage of section 767.32(1m) was quite brief: the governor signed the law on July 31, 1987, and it became effective the next day! Laws of Wisconsin 69 (1987).

150. In a case involving an obligor who had been imprisoned from May 1985 to January 1987, Judge James R. Erickson held that "[t]his Court will not determine the constitutionality of sec. 767.32(1m), Stats.; determining rather that it applies prospectively only since the jail term of Kim H. Belanger occurred prior to August 1, 1987, the effective date of sec. 767.32(1m), Stats. He is entitled to a credit of $1,500.00 against support arrears for that period of time." Belanger v. Belanger, No. 79-CV-103, slip. op. at 2 (Barron County Circuit Court, July 22, 1988).

151. Section 767.32(1m) can be construed to prohibit, after August 1, 1987, any "pre-notice of motion" retroactive revision of support orders. This construction of the statute, like that discussed *supra* notes 149-50 and accompanying text, can be characterized as providing prospective effect: the legislature simply made the statute effective prospectively from August 1, 1987, after having provided the public with proper notice via passage and publication of the law.

152. *See* Coleman v. Coleman, No. 86-FA-362, slip. op. at 2 (Barron County Circuit Court, Aug. 5, 1988). Unlike the *Belanger* case, *see supra* note 150, Mr. Coleman was not imprisoned while his support arrears accumulated. He was, however, unemployed and without counsel when his support order was set at $314 a month. In fact, Mr. Coleman did not receive counsel until he faced contempt charges arising out of non-payments of support. Brief for respondent at 1-2, Coleman v. Coleman, No. 86-FA-362 (Barron County Circuit Court, Aug. 5, 1988).

courts, obligors who have accrued arrearages prior to August 1, 1987 should raise the issue of the law's effective date.

Creative interpretation of section 767.32(1m) provides another promising way to alleviate its harshness. Section 767.32 (1m) does allow support orders to be retroactively modified "to correct previous errors in calculation." While this language clearly includes arithmetic errors, a court sympathetic to the equities of an obligor's situation could interpret this language to include "equitable errors."[153] An "equitable error" in calculation might result from a flat-rate support order if the order resulted in arrearages exceeding those which would have accrued under either a percentage guideline calculation or a calculation under Wisconsin Statutes section 767.25(1m). The court could then "correct" the error by ordering the obligor to pay only those arrearages that would have accrued had the support order been expressed as a percentage of income.[154]

Experience in other states suggests that some Wisconsin judges might indeed be willing to invoke their traditional equitable powers to allow expungement of support arrearages in certain cases. Before 42 U.S.C. § 666(a)(9)(C) forced the issue, thirty-two states had already prohibited retroactive modification of child support orders either through statute or case law.[155] Courts in at least seven of these states, however, had created equitable exceptions to such statutes.[156] Likewise, Wisconsin judges may be willing to use the leeway provided by the "errors in calculation" phrase in section 767.32(1m),[157] or to simply

153. *See, e.g.*, Johnson v. Johnson, No. 79-FA-66, slip op. at 3 (LaCrosse County Circuit Court, Jan. 31, 1989). *But see* D. Dodson & S. Green de la Garza, *supra* note 26, at 6 (in an analogous situation, the income withholding provisions of CSEA allow the defense of mistake of fact. These mistakes of fact, however, include things like arithmetic errors, but do not include the defense of changed financial circumstances.). *See also infra* note 157.

154. *See Johnson*, No. 79-FA-66, slip op. at 3 (To calculate a prisoner's child support obligation on the basis of pre-incarceration earnings is an "error in calculation" within the meaning of WIS. STAT. § 767.32(1m), because it results in an obligation exceeding that which would have been imposed under either the percentage guidelines or WIS. STAT. § 767.25(1m).). The suggestion in the text is a judicial enactment of the legislative proposal described in notes 169-73 and accompanying text.

155. Puerto Rico and the District of Columbia also prohibit retroactive modification of support orders. *See* D. Dodson & S. Green de la Garza, *supra* note 26, at B4, B7.

156. The seven states are Arizona, Colorado, Illinois, Kentucky, Missouri, Montana, and Washington. Some of these equitable exceptions are narrow; for example, Washington merely allows obligor overpayments to be set off against arrearages. Colorado courts, on the other hand, may use their equitable powers more broadly ("as circumstances require"). *See* Note, *Retroactive Modification of Accrued Child Support Payments*, 48 MONT. L. REV. 151, 151-52 (1987).

157. *See Johnson*, No. 79-FA-66. The ambiguity in WIS. STAT. § 767.32(1m) (1987-88) is discussed *supra* at notes 153-54 and accompanying text. While there is some leeway in the "errors in calculation" phrase, many courts will be unwilling to view the term as meaning anything but mechanical errors. *See, e.g.*, Strawser v. Strawser, 126 Wis. 2d 485, 377 N.W.2d 196 (Ct. App. 1985) (a court's *nunc pro tunc* authority is limited to rectifying "mechanical errors," such as a mistaken entry by the court reporter or clerk of court).

use their equitable powers to come up with equitable solutions in a limited number of cases. Although widespread equitable relief can open the door to inconsistent application of the law,[158] such relief may be appropriate in certain cases.

For instance, equitable relief would usually be proper for obligors who accumulated arrearages while they were incarcerated, hospitalized, or otherwise confined. Unlike some claims of change of circumstances, incarceration or confinement cannot be characterized as a voluntary attempt to escape support obligations; rather, it is involuntary and compelled by state action.[159] Moreover, incarceration or confinement is a significant change of circumstances which presents few, if any, problems of proof.[160] Finally, institutionalized persons' inadequate access to the legal system makes it unlikely that they will be able to timely petition the court for revision of their support orders.[161]

Of course, prisoners present an extreme case of the need for equitable exceptions to allow retroactive revision of support orders; less extreme cases, involving poor people with poor access to the courts, may also warrant such exceptions. Many judges, however, will be unwilling to fashion equitable remedies in the face of the language contained in section 767.32(1m). In any event, judicial exceptions and administrative remedies would be unnecessary if the legislature decided to amend section 767.32(1m).

C. Legislative Remedies

The simplest way to soften the harsh effect of Wisconsin Statutes section § 767.32(1m) would be to repeal it. Nevertheless, this is not likely to happen. Delinquent obligors do not have a strong lobby and are not treated with sympathy in today's political climate. The legislature would be unwilling to risk losing federal AFDC money to please such a small, unpopular, and unorganized constituency.[162] Moreover,

158. *See supra* note 81 and accompanying text.

159. *See* Pierce v. Pierce, 162 Mich. App. 367, 412 N.W.2d 291 (1987); *In re* Marriage of Edmonds and Edmonds, 53 Or. App. 539, 633 P.2d 4 (1981). *But see* Ohler v. Ohler, 220 Neb. 272, 369 N.W.2d 615 (1985). The distinction between voluntary and involuntary action is important because a voluntary change of circumstances normally will not satisfy the requirement for modification. *See, e.g.*, Ohland v. Ohland, 141 Vt. 34, 41, 442 A.2d 1306, 1310 (1982). *See also supra* note 122.

160. Indeed, the Michigan Court of Appeals recently ruled that "where a noncustodial parent is imprisoned for a crime other than nonsupport that parent is not liable for child support while incarcerated unless it is affirmatively shown that he or she has income or assets to make such payments." *Pierce*, 162 Mich. App. at 370, 412 N.W.2d at 292 (1987). *See also* Clemans v. Collins, 679 P.2d 1041 (Alaska 1984).

161. *See supra* notes 114-16 and accompanying text.

162. Repeal of section 767.32(1m) might result in the loss of $4 to $9 million annually. *See supra* note 15.

section 767.32(1m) has some modest advantages that would be lost if it were repealed outright.[163]

One alternate course would be to amend the notice requirement in section 767.32(1m) to reduce the law's harsh impact on institutionalized persons. As noted above, institutionalized persons such as jail and prison inmates experience changed circumstances that are significant and easy to document. Their inadequate access to the courts, however, renders them unable to promptly file for revision of their support orders. Therefore, the legislature could add language to section 767.32(1m) that treats incarceration as constructive notice of a petition to revise a support order.[164] This provision would not automatically result in revision of prisoners' support orders, but would simply give prisoners the opportunity to appear in court after their release from incarceration. At such appearances, institutionalized persons could request the court to revise their support orders back to the date they gave constructive notice of a petition to revise, namely, the date of confinement.[165]

This proposal is desirable because, for little or no cost, it prevents unfairness to institutionalized obligors who have experienced a clear change in circumstances. Such a proposal, however, assists only imprisoned or institutionalized obligors, a narrow segment of the obligor population adversely affected by section 767.32(1m). What is needed, therefore, is a procedure that will (1) avoid unfairness to the broadest

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163. For example, the law does encourage timely revision of support orders. *See* D. Dodson & S. Green de la Garza, *supra* note 26, at 8.

164. Section 767.32(1m) provides that:

> In an action under [767.32] sub. (1) to revise a judgment providing for child support, maintenance payments or family support payments, the court may not revise the amount of child support, maintenance payments or family support payments due prior to the date that notice of the action is given to the respondent, except to correct previous errors in calculations. *When a person is incarcerated or confined in a jail, prison, mental health institution, or treatment facility, the initial date of such confinement is constructive notice that a petition to revise support obligations accruing during the period of incarceration or confinement is pending.*

(The suggested modification is italicized.)

This proposal would probably require a waiver from the federal government. *See infra* note 173.

165. Providing such relief to prisoners would not be politically popular. Some will see the proposal in note 164, *supra*, as providing prisoners with an unwarranted benefit. This, however, is not true: the proposal would not expunge those support arrears which obligors accumulated before confinement. Moreover, under the proposal, imprisoned and institutionalized obligors would still owe past support after their release. Nonetheless, the author has heard a law school professor and members of the public express the sentiment that if the proposal in note 164 were adopted, non-custodial parents would desire incarceration to avoid child support payments. I believe such a viewpoint is based on the erroneous assumption that most individuals who commit crimes do so because they find prison life desirable and consciously choose to go there. *See also supra* notes 122 and 159.

possible group of Wisconsin obligors, and (2) protect the state's interest in effective child support enforcement.

This Comment suggests that the legislature could achieve these two goals by adopting an approach discussed by the Wisconsin Court of Appeals in *O'Brien v. Freiley*.[166] In that case, obligor O'Brien claimed changed circumstances and petitioned for retroactive reduction of his support arrearages. The trial court partially reduced O'Brien's support arrearages by applying the percentage guidelines retroactively to O'Brien's income, and by crediting O'Brien with the difference between his flat-rate obligation and that calculated under the percentage guidelines.[167] The Court of Appeals held that a "trial court may apply the percentage guidelines [retroactively] in determining [the obligor's] ability to pay vis-a-vis what he was supposed to pay," emphasizing that only after considering all past years, "fat" and "lean," may the trial court make a determination of credit to arrears.[168]

The legislature should codify the sensible approach taken in *O'Brien*. This would permit judges to apply the percentage guidelines retroactively in instances where an obligor is under a flat-rate order and proves a change in circumstances. To effect this change, the legislature could simply broaden the definition of "error in calculation" to include support orders expressed as a flat rate. Courts could then adjust support orders back to the date of the "error" (the date the order was entered), and "correct" the "error" by expressing the support order as a percentage of the obligor's income, subject to immediate withholding.[169] Alternatively, the legislature could explicitly authorize Wisconsin courts, upon petition from a party, to revise a support order so that it would be expressed as a percentage of the obligor's income. Again, such a revision would subject the obligor to immediate withholding of child support payments.[170] Under either scheme, the result would be the same: the obligor would be responsible for only those arrearages

166. 130 Wis. 2d 174, 387 N.W.2d 85 (Ct. App. 1986).

167. For example, suppose an obligor's support order for two children was a flat $500 per month, or $6,000 for the year. Assume also that the obligor earned only $16,000 for that year. Under the percentage guidelines for two children, the obligor's support responsibility would be $4,000 (25% of the $16,000 yearly income) rather than the $6,000 under the flat rate, and the obligor would be entitled to a $2,000 credit (the difference between the flat rate and the percentage rate).

168. *O'Brien*, 130 Wis. 2d at 180, 387 N.W.2d at 88. The court of appeals held that the trial court erred by reviewing each year separately and adjusting the arrears only for those years in which application of the percentage guidelines resulted in a reduced support obligation. The court of appeals recognized that support could not be retroactively increased, but noted that it would be inequitable to look at each year separately, decreasing support for lean years and leaving alone the fat years.

169. Immediate income withholding is required on all new or revised support orders. WIS. STAT. § 767.265 (1987-1988).

170. *Id.*

that accrued under the revised percentage-of-income order.[171] An obligor with a flat-rate support order would still have to prove changed financial circumstances, of course, because any reduction in the obligor's arrearages would occur only to the extent that the obligor's income actually dropped from the time the original flat-rate order was entered.

This proposal is advantageous for several reasons. First, it would satisfy the state's interest in timely collection of debts by broadening the coverage of immediate income withholding. Second, it would promote uniformity in support orders because more orders would be under the percentage guidelines. Third, fewer arrearages would accumulate, to the advantage of both obligor and obligee; an obligor's support level would be expressed as a percentage of income and would self-adjust as the obligor's income changed. This self-adjusting feature would conserve judicial resources by eliminating the need for courts to revise support orders due to changes in the obligor's income. In addition, the proposal would eliminate the disparity between those under flat-rate child support orders and those under true percentage guidelines.[172] A waiver from the federal government would be necessary for this suggestion to be implemented.[173]

Finally, one other legislative action could help educate the public about the new law and improve obligor access to the courts. Presently, clerks of courts must give out free information about the percentage guidelines and child support levels to each person who is subject to a paternity action.[174] The legislature could expand the scope of this statute and require the clerks of courts to provide each party in a support proceeding with free informational sheets concerning child support modification. This information would alert obligors and obligees of the need for prompt action should their circumstances change. In addition, the clerks of courts (or family court commissioners or child support

171. *See* note 167 for an example of this calculation. A court would determine the appropriate percentage by applying the percentage guidelines contained in WIS. ADMIN. CODE § HSS 80 (Aug. 1987). *See supra* note 54 and accompanying text.

172. *See supra* notes 66-67 and accompanying text.

173. A state can obtain a waiver from instituting procedures mandated by CSEA if it can prove that its modifications would not harm children relying on support and would not cost the federal government more AFDC funds. Dodson & Horowitz, *supra* note 8, at 3062-63. The author believes this proposal would meet such a test. Waivers, however, are difficult to get. Telephone interview with Sherwood Zink, Counsel for the Wisconsin Office of Child Support Enforcement (Apr. 7, 1988).

174. WIS. STAT. §§ 767.45(7) and 767.455(6) (1987-1988); the sections are nearly identical. WIS. STAT. § 767.45(7) (1987-1988) provides that:

> The clerk of court shall provide without charge, to each person bringing an action under this section, except to the state under sub. (1)(g), a document setting forth the percentage standard established by the department of health and social services under s. 46.25 (9)(a) and listing the factors which a court may consider under s. 767.51 (5).

agencies) could provide obligors with simple pro se support modification forms at the time a support order is entered. These forms would help improve obligor's access to the courts should they wish to modify their support orders due to a change of circumstances. After all, if it is appropriate for the state to supply AFDC clients with free legal counsel, it is only fair to provide some minimal assistance to obligors. In addition to such a statutory requirement, child support agencies and legal services organizations could independently provide simple forms to educate obligors about the need to revise a support order promptly.[175]

In summary, a combination of administrative, judicial, and legislative remedies could, in appropriate cases, soften the harsh impact of section 767.32(1m). Some promising remedies, such as modifying section 767.32(1m), would be difficult to implement.[176] Other remedies, such as settlement agreements, are available now but do not assist all obligors.[177] To ensure both fairness to obligors and strong child support enforcement, however, all appropriate remedies should be implemented and applied fairly and consistently throughout Wisconsin.

V. CONCLUSION

For the past fifteen years, Congress has tried to improve the states' child support enforcement programs. In 1986, Congress passed 42 U.S.C. § 666(a)(9)(C), which requires all states to enact legislation prohibiting their courts from retroactively modifying child support orders. Wisconsin complied with this mandate by enacting section 767.32(1m). While the federal law was enacted to improve the interstate enforcement of support orders, Wisconsin enacted section 767.32(1m) simply to avoid losing a portion of its federal AFDC money.

Wisconsin actually had little need or desire to enact section 767.32(1m): the state's child support enforcement program is comparatively good. The negligible positive aspects of section 767.32(1m) will be far outweighed by harms to obligors who have genuinely experienced a change of circumstances and who have inadequate access to the courts. Such obligors will accumulate serious and substantial child support debts which bear little or no relation to their ability to pay.

Because child support debts can result in substantial collateral disabilities, Wisconsin Statutes section 767.32(1m) should be made more

175. D. Dodson & S. Green de la Garza, *supra* note 26, at 8. The Legal Aid Society of Milwaukee presently provides such pro se support modification materials. Letter from James M. Brennan, Chief Staff Attorney, Civil Division Legal Aid Society of Milwaukee, to Aaron Bransky (Apr. 13, 1988) (discussing pro se materials).

176. *See supra* notes 162, 165, & 173 and accompanying text.

177. *See supra* notes 141-43 and accompanying text.

flexible through administrative, judicial, and/or statutory action. Administrative remedies such as settlement agreements would be helpful when both the obligor and obligee believe that arrearages should be reduced. When such agreements are warranted but not possible (for example, because of bitterness between the obligor and obligee), judicially created equitable doctrines would be appropriate. Wisconsin judges, like judges in other states, might be willing to fashion equitable solutions when an obligor has a strong case for changed circumstances. Although widespread equitable relief could open the door to inconsistent application of the law, such relief will be appropriate in certain cases.

Finally, the legislature could amend section 767.32(1m) to provide a remedy that resembles retroactive modification of support orders. Under this proposal, Wisconsin courts would be authorized to revise flat-rate support orders retroactively, but only by expressing them as a percentage of the obligor's income. The obligor would then be responsible for only those arrearages that accrued under the revised order; the obligor's new arrearages would be equal to the obligor's income (during the period of changed circumstances) multiplied by the appropriate percentage. This statutory remedy would not only erase unwarranted arrearages, but would also protect the state's interest in the effectiveness of its new program of child support enforcement.

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