

COMMENT

CAREGIVERS UNCARED FOR: HOW TO FIX WISCONSIN'S EX POST FACTO CAREGIVER LAW

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There are few responsibilities as great as caring for someone's child. In 2009, the Milwaukee Journal Sentinel began publishing a series of articles exposing a fraudulent scheme. Certain child-care providers were billing the state for children they were not actually caring for, resulting in millions of dollars in overpayments through the Wisconsin Shares program.

The Wisconsin State Legislature responded quickly by enacting 2009 Wisconsin Act 76, amending the existing law that regulates child-care licensing. Among the various amendments was a new provision permanently barring all individuals convicted of "fraudulent activity as a participant in the Wisconsin Works program" from obtaining or maintaining a child-care license or certification, or from even working as a caregiver. This provision applies retroactively without any exception for prior convictions.

Although well-intentioned, the permanent bar has had a punitive, over-inclusive effect on Wisconsin's caregivers and licensed child-care providers. This Comment posits that this retroactive and permanent effect renders the law violative of Wisconsin's Ex Post Facto Clause. Rather than overturn the law in its entirety, this Comment suggests three ways the legislature can resolve this defect by muting or eliminating its onerous impact. Finally, this Comment explains how petitioning the Wisconsin Department of Children and Families for a declaratory ruling can be beneficial to both the agency and the individual potentially affected by the law.

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*If, long after the commission of a crime, and long after the offender has suffered all the punishment prescribed at the time for its commission, a statute should, by its own force, and solely because of his conviction of that offence, take from him the right to further pursue his profession, would not such a statute inflict upon him a greater punishment than was annexed to the crime when committed, and alter the situation to his disadvantage, “in relation to the offence or its consequences”?*¹

1. *Hawker v. New York*, 170 U.S. 189, 202 (1898) (Harlan, J., dissenting) (emphasis omitted) (quoting *United States v. Hall*, 26 F. Cas. 84, 86 (C.C.D. Pa. 1809) (No. 15,285), *aff’d*, 10 U.S. 171 (1810)). In his *Hawker* dissent, Justice John Marshall Harlan argued that a statute permanently barring a doctor from continuing to practice medicine solely because he was convicted twenty years prior for performing an illegal abortion violated the Ex Post Facto Clause. *Id.* at 201 (Harlan, J., dissenting).

INTRODUCTION

Something about Latasha Jackson's income was not adding up. Ms. Jackson's only apparent source of revenue was her Milwaukee day-care center with the capacity to care for up to 110 children.² Yet she was driving a Jaguar convertible and living in a million-dollar mansion that included an indoor basketball court.³ The *Milwaukee Journal Sentinel* exposed the source of Ms. Jackson's good fortune in August 2009 when it began publication of the Pulitzer Prize-winning "Cashing in on Kids" series.⁴ Among other related issues, the series revealed how some day-care providers were billing Wisconsin for children they were not actually caring for.⁵

These child-care providers were abusing Wisconsin Shares.⁶ This child-care subsidy program is intended to help working parents keep their jobs by subsidizing child-care expenses with taxpayer funds.⁷ By enrolling more children than actually attended their facilities, some providers were swindling the state.⁸ Ms. Jackson, who pleaded guilty in May 2012 to wire fraud, conspiracy, and theft of public funds, was able to accumulate approximately three million dollars from Wisconsin Shares in a decade.⁹ The state investigation triggered by the *Milwaukee*

2. Raquel Rutledge, *Private Fortune, Public Cash*, MILWAUKEE J. SENTINEL, Aug. 30, 2009, at A1, available at <http://jsonline.com/watchdog/watchdogreports/56121342.html>. Although data on what day-care center owners earn is not available, a search for "childcare worker" in Wisconsin's WORKnet database reveals that the average annual salary for an experienced child-care worker in Milwaukee County in 2012 was \$21,880, slightly below the statewide average salary of \$22,680. *County Wage Comparison*, WISCONSIN'S WORKNET, <http://worknet.wisconsin.gov/worknet/wagecomparison.aspx> (search "childcare workers" and follow "Childcare Workers"; then select "Milwaukee"; then follow "Results" hyperlink). Experienced Milwaukee County Education Administrators working at preschools or child-care centers earned an average salary of \$63,720 in 2012 compared to the \$60,000 average statewide salary. *Id.* (search "childcare workers" and follow "Education Administrators, Preschool and Childcare Center/Program"; then select "Milwaukee"; then follow "Results" hyperlink).

3. Rutledge, *supra* note 2, at A1.

4. The entire "Cashing in on Kids" series and a list of accolades awarded is available online. *Cashing in on Kids*, JSONLINE, <http://jsonline.com/news/38617217.html> (last visited Apr. 10, 2013).

5. Rutledge, *supra* note 2, at A1.

6. Raquel Rutledge, *Child-Care Scams Rake in Thousands*, MILWAUKEE J. SENTINEL, Jan. 25, 2009, at A1, available at <http://jsonline.com/watchdog/watchdogreports/38283494.html>.

7. *Id.* See also *Wisconsin Shares – Child Care Subsidy Program*, WIS. DEP'T CHILD. & FAMS., <http://dcf.wi.gov/childcare/wishares/eligibility.htm> (last updated July 31, 2013).

8. See Rutledge, *supra* note 6, at A1.

9. Raquel Rutledge & John Diedrich, *Former Child Care Provider Gets 14 Months in Prison*, MILWAUKEE J. SENTINEL, Aug. 31, 2012, at A1, available at

Journal Sentinel exposé eventually resulted in the closing of over 170 day-care centers, the filing of dozens of criminal cases including Ms. Jackson's, and public embarrassment for state regulators.¹⁰

The Wisconsin State Legislature reacted swiftly, enacting 2009 Wisconsin Act 76 (Act 76) on November 13, 2009.¹¹ The Wisconsin Department of Children and Families (DCF) is the state agency charged with licensing and monitoring child-care providers that supervise at least four children for less than twenty-four hours a day.¹² Among its several provisions, Act 76 permanently bars all individuals convicted of “fraudulent activity as a participant in the Wisconsin Works program” from obtaining a child-care license or certification, or from simply working as a caregiver.¹³ Wisconsin broadly defines a caregiver as any “employee or contractor of an entity” such as a child-care center who has “regular, direct contact” with children receiving services.¹⁴ Thus the law can even apply to the unlicensed employees of agencies with whom a child-care provider may contract to provide services such as transportation.¹⁵

www.jsonline.com/news/crime/former-child-care-provider-sentenced-to-14-months-in-prison-ln6mpvm-168158826.html.

10. *Id.* See also Raquel Rutledge, *Government Blind to Child-Care Fraud*, MILWAUKEE J. SENTINEL, Aug. 31, 2009, at A1, available at <http://jsonline.com/watchdog/watchdogreports/56276582.html>. While the closings and arrests saved taxpayer funds, it also follows that innocent employees lost their jobs and the availability of subsidized child care was, at least in certain areas, temporarily affected.

11. S.B. 331, 2009–10 Leg., 99th Reg. Sess. (Wis. 2009). For the complete caregiver law, see WIS. ADMIN. CODE DHS ch. 12 (2012).

12. See WIS. STAT. § 48.65 (2009–10). See also § 48.02(4) (defining “department” as the Wisconsin Department of Children and Families (DCF) for purposes of Chapter 48).

13. § 48.685(5)(br)(5). No other state permanently bars those convicted of non-violent financial crimes from holding a child-care license. Brief of Appellant Alma Brown at 34 n.15, *Brown v. State Dep't of Children & Families*, No. 11-AP-1350 (Aug. 16, 2012).

14. § 48.685(1)(ag)(1)(a); see also § 48.685(1)(b). There are also caregivers for adults, but section 48.685(5)(br)(5) applies only to those individuals involved in child-care services. The Wisconsin Department of Health Services' Division of Quality Assurance regulates adult programs. *Caregiver Program Rules & Regulations*, WIS. DEP'T HEALTH SERVICES, <http://www.dhs.wisconsin.gov/caregiver/StatutesINDEX.HTM> (last updated Sept. 21, 2011).

15. *Frequently Asked Questions: Caregiver Background Check Requirements for Child Care Centers*, WIS. DEP'T CHILD. & FAMS., http://dcf.wisconsin.gov/childcare/licensed/cbc/cbc_faqs.htm (last updated May 28, 2010) [hereinafter *Frequently Asked Questions*]. Although DCF obviously cannot revoke the license of a caregiver who does not require one, a licensed individual or facility found by DCF to be employing such a caregiver who carries a qualifying conviction risks revocation. See *Brister v. Penfield Children's Ctr.*, No. 11-CV-16915, at 2 (Milwaukee Cnty. Cir. Ct. Jan. 23, 2013) (decision and order granting summary judgment in favor of defendants), for a situation in which DCF put an employer “on notice of a potential problem” with an employee's status and the employee was subsequently fired by the employer.

While the new caregiver law¹⁶ is well-intentioned, it is over-inclusive and has an arduous retroactive effect. Individuals with decades-old convictions for nonviolent “fraudulent activity”¹⁷ involving public assistance are finding that the caregiver licenses they held for years without incident or complaint are being revoked or that their child-care provider employers are preemptively firing them.¹⁸ This is the case whether the individual in question is the actual owner of the child-care facility or an employee without access to the employer’s finances.¹⁹ The law has been enforced regardless of whether the individual has ever harmed a child or been convicted of any other offense.²⁰ Others have been impacted by the law regardless of whether records of their conviction are extant.²¹

Given that the bar is permanent, affected individuals— notwithstanding their training and expertise—will never find employment as or for a licensed caregiver in Wisconsin unless the law is amended. The Wisconsin Supreme Court described this permanent licensure ban as a “harsh penalty.”²² Equally troubling for the court was the fact that an individual’s lifetime ban hinges *solely* on whether he or she carries a qualifying conviction.²³

16. Hereinafter I will refer to section 48.685(5)(br)(5) descriptively as “the new caregiver law.”

17. What “fraudulent activity” actually entails in the context of the new caregiver law remains an open question. The Wisconsin Supreme Court recently declined to craft a formal definition, concluding instead that “[t]he matter must be remanded to the Division of Hearings and Appeals to determine whether” a particular conviction involves “fraudulent activity.” *Jamerson v. Dep’t of Children & Families*, 2013 WI 7, ¶¶ 73, 77, 345 Wis. 2d 205, 824 N.W.2d 822. The court’s reluctance to define “fraudulent activity” may stem in part from the fact that each licensure revocation or denial decision made under the new caregiver law will be fact-driven.

18. See Respondent’s Memorandum in Support of Its Motion for Summary Judgment at 1–2, *Brister v. Penfield Childrens’ Ctr.*, No. 11-CV-16915 (Milwaukee Cnty. Cir. Ct. Aug. 21, 2012) [hereinafter Brief for Respondent]; Paul Sloth, *Child Care Provider Sues County to Get Certification Back*, J. TIMES (Racine, Wis.), Mar. 22, 2010, at A1, available at http://journaltimes.com/news/local/childcare-provider-loses-certification-suing-county-to-get-it-back/article_784997e0-33b6-11df-997f-001cc4c002e0.html. Individuals aggrieved by a DCF action can request an administrative hearing within ten days of receiving notice of revocation. *E.g.*, *Brown v. State Dep’t of Children & Families*, 2012 WI App 61, ¶ 33, 341 Wis. 2d 449, 819 N.W.2d 827. In at least one instance, DCF dismissed an appeal without a hearing, but the Wisconsin Supreme Court later reversed, concluding that dismissal was inappropriate in Ms. Jamerson’s case because genuine issues of material fact existed. *Jamerson*, 2013 WI 7, ¶¶ 58, 67.

19. See Sloth, *supra* note 18, at A1; Brief for Respondent, *supra* note 18, at 3.

20. See Sloth, *supra* note 18, at A1.

21. *Brister v. Penfield Childrens’ Ctr.*, No. 11-CV-16915, at 2 (Milwaukee Cnty. Cir. Ct. Jan. 23, 2013) (decision and order granting summary judgment in favor of defendants).

22. *Jamerson*, 2013 WI 7, ¶ 2.

23. *Id.* ¶ 2 n.3.

Since the Act went into effect on February 1, 2010, it has been unsuccessfully challenged on constitutional grounds at the state level.²⁴ In 2012, Alma Brown appealed a Milwaukee County circuit court ruling affirming her child-care license revocation pursuant to the new caregiver law.²⁵ Ms. Brown challenged the law as unconstitutional on due process and equal protection grounds but failed to convince the Wisconsin Court of Appeals.²⁶ The court found the law constitutional because it passed the rational basis test and Brown could pursue “adequate post-deprivation remedies.”²⁷

A yet-unexplored ground for challenging the Act’s constitutionality is whether its retroactive effect is so punitive that it rises to the level of an ex post facto law. Both the United States and Wisconsin constitutions prohibit ex post facto laws.²⁸ Laws are considered ex post facto if they “retroactively alter the definition of crimes or increase the punishment for criminal acts.”²⁹ Although the Supreme Court declared in *Calder v. Bull*³⁰ that the clause applied only to criminal laws,³¹ the Court has since considered a series of ex post facto challenges to laws civil in nature but “so punitive either in purpose or effect as to negate that intention [to deem it civil].”³² Thus the question becomes whether a statute was enacted to punish for past activity or in furtherance of a legitimate governmental purpose.³³

Although some recent ex post facto challenges to nominally civil laws raised in lower federal and state courts have been unsuccessful,³⁴

24. There have been other legal challenges to the caregiver law but on procedural grounds. For example, Angelia Jamerson challenged DCF’s revocation of her group child-care license because she was not afforded a hearing. *Id.* ¶¶ 2, 19. *Jamerson* grants the license holder the right to a contested case hearing on appeal of the revocation of a child-care license under the new caregiver law. *Id.* ¶¶ 11–12. In order to establish that a conviction satisfies the requirements of the new caregiver law, evidence must clearly show that the conviction was for fraudulent activity. *Id.* ¶ 68.

25. *Brown v. State Dep’t of Children & Families*, 2012 WI App 61, ¶ 1, 341 Wis. 2d 449, 819 N.W.2d 827.

26. *Id.* ¶¶ 41–43. After *Brown* was decided, Jacqueline Brister also challenged the law on substantive and procedural due process grounds and on equal protection grounds but failed to convince the Milwaukee County Circuit Court. *Brister v. Penfield Childrens’ Ctr.*, No. 11-CV-16915, at 7–10 (Milwaukee Cnty. Cir. Ct. Jan. 23, 2013) (decision and order granting summary judgment in favor of defendants).

27. *Brown*, 2012 WI App 61, ¶¶ 33, 39–40.

28. U.S. CONST. art. I, §§ 9, 10; WIS. CONST. art. I, § 12.

29. *Collins v. Youngblood*, 497 U.S. 37, 43 (1990).

30. 3 U.S. (3 Dall.) 386 (1798). Note that *Calder* is a seriatim opinion.

31. *Id.* at 396 (opinion of Paterson, J.), 399 (opinion of Iredell, J.).

32. *United States v. Ward*, 448 U.S. 242, 249 (1980).

33. *De Veau v. Braisted*, 363 U.S. 144, 160 (1960).

34. These challenges were raised against sex offender registration and notification laws. See, e.g., *United States v. Elkins*, 683 F.3d 1039 (9th Cir. 2012); *Anderson v. Holder*, 647 F.3d 1165 (D.C. Cir. 2011); *State v. Henry*, 228 P.3d 900 (Ariz.

there are signs of an emerging discomfort among some state courts with so-called civil restrictions that in practice impose arduous post-conviction burdens retroactively.³⁵ At least one state court has held that a law's effect can be so punitive that it is *ex post facto* even if the legislature's intent was nonpunitive and civil.³⁶

This Comment postulates that without a well-crafted exception for individuals with prior convictions, a reduction of the amount of time the licensure ban is in force, or a path to rehabilitation, retroactive application of Wisconsin Statute section 48.685(5)(br)(5) results in an over-inclusive, punitive effect oppressive enough to violate Wisconsin's Ex Post Facto Clause³⁷ regardless of legislative intent. Part I describes the existing Wisconsin framework for analyzing *ex post facto* laws that impose civil consequences on convicted individuals by providing an overview of relevant Wisconsin and Federal jurisprudence. Part II analyzes the effect of the new caregiver law in light of this existing framework and suggests an exception for prior convictions, a reduction of the ban from permanent to five years, and the option of rehabilitation as possible remedies for the statute's defect.³⁸

I. THE WISCONSIN FRAMEWORK FOR ANALYZING EX POST FACTO LAWS

To understand how the new caregiver law rises to the level of *ex post facto* legislation, a brief overview of Wisconsin and relevant federal

Ct. App. 2010); *State v. Gragg*, 137 P.3d 461 (Idaho Ct. App. 2005). See *State v. Raines*, 857 A.2d 19 (Md. 2004) for an unsuccessful challenge to a state's DNA collection law.

35. See, e.g., *Doe v. State*, 189 P.3d 999, 1019 (Alaska 2008) (holding that Alaska's sex offender registration law violates the state's *ex post facto* clause because its effects are punitive); *State v. Letalien*, 2009 ME 130, ¶ 63, 985 A.2d 4 (holding that Maine's sex offender registration and notification law imposes *ex post facto* punishment on offenders sentenced before its effective date).

36. *Riley v. New Jersey State Parole Bd.*, 32 A.3d 190, 197, 203 (N.J. Super. Ct. App. Div. 2011) (holding that the legislature's intention was civil and nonpunitive but that a GPS monitoring program imposed restraints that could only be regarded as punishment).

37. WIS. CONST. art. I § 12.

38. While the caregiver law remains in effect and unaltered, potentially affected individuals can first seek clarification of whether and how the law's child-care licensure and caregiver employment bans would apply to their circumstances in the form of a declaratory ruling from DCF under WIS. STAT. § 227.4(1) (2011–12). The State of Wisconsin suggested this remedy for Ms. Brister in its motion for summary judgment. Brief for Respondent, *supra* note 18, at 3. A declaratory ruling can be beneficial for both the potentially-affected individual as well as DCF. It may result in relief for an individual without the time and expense of formal court proceedings. Despite the potential burden of its statutory obligation to respond to petitions, it is in DCF's interest to clarify the caregiver law's scope absent legislative or judicial guidance and thus tailor its enforcement to serve the state's interest in protecting children and taxpayer funds. By granting a hearing and issuing a declaratory ruling, DCF can announce and control if and how the caregiver law will apply in specific sets of circumstances.

ex post facto jurisprudence relating to the post-conviction and post-sentencing imposition of civil consequences is necessary.³⁹ First, the Ex Post Facto clauses in the Wisconsin and federal constitutions are nearly identical.⁴⁰ Yet while both constitutions prohibit ex post facto laws, neither explains what they are, leaving judicial interpretation to determine meaning. In addition, though state supreme courts are the final authority in interpreting their own state constitutions,⁴¹ the Wisconsin Supreme Court has long looked to federal ex post facto jurisprudence as a guide for its own.⁴²

A. The Long-Held Presumption against Ex Post Facto Laws

There is little doubt that the architects of the United States Constitution desired to guard against the “sudden and strong passions” that can incite the passage of ex post facto laws.⁴³ For James Madison, ex post facto laws were “contrary . . . to every principle of sound legislation.”⁴⁴ Alexander Hamilton agreed, characterizing the prohibition of ex post facto laws as one of the “greate[st] securities to liberty and republicanism” in the Constitution.⁴⁵ The Constitution explicitly declares the prohibition of such laws twice in Article I.⁴⁶ The ban in Clause 3,

39. A complete history of ex post facto jurisprudence is well beyond the scope of this Comment. See, Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261, 1275–80 (1998), for a more robust review of the history and the United States Supreme Court’s interpretation of the clause. See also, MARGARET COLGATE LOVE ET AL., *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE* § 3.7 (2013), for an overview of state and federal ex post facto case law to which this Comment is indebted. Due to space constraints and the thrust of my claims, I focus primarily on those federal and state cases that analyze laws that retroactively impose civil consequences on criminally convicted individuals.

40. Compare U.S. CONST. art. I, §§ 9, 10, with WIS. CONST. art. I § 12.

41. *Minnesota v. Nat’l Tea Co.*, 309 U.S. 551, 557 (1940) (“It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions.”).

42. See, e.g., *State v. Thiel*, 188 Wis. 2d 695, 699, 524 N.W.2d 641 (1994).

43. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137–38 (1810). A bias against retroactive statutes is evident in both Confederation-era state constitutions and during the federal constitutional debate in 1787. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 375–76, 435, 439–60, 640 (Max Ferrand ed., 1937); Robert G. Natelson, *Statutory Retroactivity: The Founders’ View*, 39 IDAHO L. REV. 489, 504 (2003) (noting prohibitions in Confederation-era state constitutions). See Elmer E. Smead, *The Rule against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775, 775–77 (1936), for a discussion of the roots of this bias in Greco-Roman law as well as English common law.

44. THE FEDERALIST NO. 44, at 282 (James Madison) (Clinton Rossiter ed., 1961).

45. THE FEDERALIST NO. 84, at 511 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

46. U.S. CONST. art. I, §§ 9, 10.

Section 9 binds the Federal government while Clause 1, Section 10's proscription is one of the very few limitations initially placed on the power of state governments.⁴⁷

A concern for fairness and a fear of vindictive lawmaking affecting aspersed individuals "of the moment"⁴⁸ lie at the heart of hostility toward ex post facto laws.⁴⁹ Such laws effectively deprive individuals of notice that their behavior is legally prohibited rather than "giv[ing] fair warning of their effect and permit[ting] individuals to rely on their meaning until explicitly changed."⁵⁰ Ex post facto laws thus result in unjust deprivations, deprivations that are often greatest in the context of criminal law.⁵¹ The United States Supreme Court has acknowledged that America's "presumption against retroactive legislation" runs deep, and that "individuals should have an opportunity to know what the law is and to conform their conduct accordingly."⁵²

B. Establishing Wisconsin's Ex Post Facto Analytical Framework

Establishing Wisconsin's approach to ex post facto laws requires a discussion of relevant federal and state jurisprudence. Article 1, section 12 of the Wisconsin State Constitution prohibits ex post facto laws using language nearly identical to that of the Federal Constitution.⁵³ As a result, Wisconsin courts have long relied on federal ex post facto jurisprudence as a guide to interpreting Wisconsin's Ex Post Facto Clause.⁵⁴

1. CALDER: THE THRESHOLD DETERMINATION

In 1798, the United States Supreme Court had its first opportunity to interpret the Constitutional restriction in its now-seminal *Calder* decision. While the *Calder* facts are not germane to this Comment,⁵⁵ the

47. *Id.*

48. *Fletcher*, 10 U.S. (6 Cranch) at 138.

49. *Weaver v. Graham*, 450 U.S. 24, 28–29 (1981). Justice Samuel Chase articulated his similar suspicion of retroactive legislation in *Calder v. Bull*, noting that "the advocates of such laws were stimulated by ambition, or personal resentment, and vindictive malice." 3 U.S. (3 Dall.) 386, 389 (1798) (opinion of Chase, J.).

50. *Weaver*, 450 U.S. at 28–29.

51. Logan, *supra* note 39, at 1276.

52. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994).

53. "No bill of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed, and no conviction shall work corruption of blood or forfeiture of estate." WIS. CONST. art. I § 12.

54. *State v. Thiel*, 188 Wis. 2d 695, 699, 524 N.W.2d 641 (1994).

55. *Calder* filed an unsuccessful ex post facto challenge to a law changing the window for filing appeals. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 386–87 (1798) (opinion of Chase, J.). Justices William Paterson and James Iredell wrote separately, noting that the

categories of ex post facto laws it established are. Justice Samuel Chase observed that while “[e]very *ex post facto* law must necessarily be retrospective,” not all retrospective laws are inevitably ex post facto.⁵⁶ To give meaning to this characterization, Justice Chase enumerated four categories of laws that fall under the prohibition: laws that retroactively criminalize innocent behavior, aggravate crimes, increase punishment, and alter the rules of evidence.⁵⁷ Of relevance to this Comment is the third *Calder* category: laws that inflict greater punishment than what was prescribed when the crime was committed.⁵⁸

Calder also gave rise to a threshold determination still crucial in ex post facto analysis: whether a legislature intended to establish civil or criminal proceedings when it passed the law in question.⁵⁹ Although the *Calder* holding limiting the Ex Post Facto Clause to criminal laws appeared to establish a bright-line rule excluding civil laws,⁶⁰ subsequent jurisprudence blurred this distinction by revealing a willingness to consider ex post facto challenges to civil laws or laws with civil consequences.⁶¹

Ex Post Facto Clause applied only to criminal statutes. *Id.* at 396 (opinion of Paterson, J.), 399 (opinion of Iredell, J.).

56. *Id.* at 391 (opinion of Chase, J.).

57. *Id.* at 390.

58. *Id.*

59. *E.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 360–61 (1997) (holding that Kansas had not established criminal proceedings when it passed a civil commitment statute for sexually violent individuals).

60. *Calder*, 3 U.S. (3 Dall.) at 396 (opinion of Paterson, J.), 399 (opinion of Iredell, J.).

61. *E.g.*, *Hawker v. New York*, 170 U.S. 189, 190, 196 (1898) (upholding a law that denied convicted felons the right to practice medicine); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 125–26, 138, 142–43 (1810) (invalidating a Georgia civil statute in part because it “would have the effect of an *ex post facto* law”). Justice Clarence Thomas, for one, has questioned the soundness of applying the Ex Post Facto Clause solely in the criminal context. *Eastern Enters. v. Apfel*, 524 U.S. 498, 538–39 (1998) (Thomas, J., concurring). The distinction between the criminal and civil has arguably always been obscure in the United States. For example, the fact that debtors’ prisons existed in the early Republic evidences the use of a criminal punishment (incarceration) for a civil offense. For a general overview of this history, see BRUCE H. MANN, *REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE* 78–108 (2002). More than a third of states still allow incarceration for failure to repay debts. *See* Alain Sherter, *Jailed for \$280: The Return of Debtors’ Prisons*, CBS MONEYWATCH (Apr. 20, 2012, 12:16 PM), [http://www.cbsnews.com/8301-505144_162-57417654/jailed-for-\\$280-the-return-of-debtors-prisons/](http://www.cbsnews.com/8301-505144_162-57417654/jailed-for-$280-the-return-of-debtors-prisons/).

2. THE CONTEMPORARY FEDERAL APPROACH

Although centuries later the *Calder* categories continue to apply virtually unchanged,⁶² the Court clarified its contemporary approach to ex post facto analysis in *Kansas v. Hendricks*⁶³ and *Smith v. Doe*.⁶⁴ While the question of civil or criminal remains a threshold determination for ex post facto analysis,⁶⁵ a finding of legislative intent to establish civil proceedings does not end the inquiry.⁶⁶ If a court finds that the legislative intent is to create criminal proceedings that impose sanctions retroactively, an ex post facto challenge is satisfied without need to examine the statute's effects.⁶⁷ In contrast, a "civil label is not always dispositive,"⁶⁸ but if deemed civil, the challenger must offer "the clearest proof" that the statute's purpose or effect is so punitive that the state's intention to shield it as a civil remedy and not a criminal penalty is negated.⁶⁹ The legislature's intent as stated is thus granted significant but not fatal deference.⁷⁰

When determining whether the challenger has met the heavy burden of providing "the clearest proof" of a law's alleged punitive effect, federal courts employ the multi-factor test elaborated in *Kennedy v. Mendoza-Martinez*.⁷¹ The *Mendoza-Martinez* inquiry requires a court to consider seven factors:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is

62. See, e.g., *Carmell v. Texas*, 529 U.S. 513, 538–39 (2000); *Collins v. Youngblood*, 497 U.S. 37, 46 (1990).

63. 521 U.S. 346, 350 (1997) (challenging laws allowing civil detention of convicted individuals likely to commit sexually violent acts).

64. 538 U.S. 84, 89 (2003) (questioning the constitutionality of the Alaska Sex Offender Registration Act's retroactive requirements).

65. E.g., *id.* at 92.

66. See, e.g., *Hendricks*, 521 U.S. at 361 (1997).

67. *Smith*, 538 U.S. at 92–93.

68. *Hendricks*, 521 U.S. at 361 (quoting *Allen v. Illinois*, 478 U.S. 364, 369 (1986)).

69. *United States v. Ward*, 448 U.S. 242, 249 (1980) (quoting *Fleming v. Nestor*, 363 U.S. 603, 617 (1960)).

70. *Smith*, 538 U.S. at 92–93.

71. 372 U.S. 144, 168–69 (1963).

assignable for it, and whether it appears excessive in relation to the alternative purpose assigned⁷²

These factors are not exhaustive or dispositive given that they apply in myriad constitutional contexts and are not original to ex post facto case law.⁷³

3. INTENT-EFFECTS: THE CURRENT WISCONSIN APPROACH

In Wisconsin courts, potential ex post facto laws are subject to an intent-effects test analogous to the federal approach.⁷⁴ In *State v. Thiel*,⁷⁵ the Wisconsin Supreme Court adopted the United States Supreme Court's definition of an ex post facto law elaborated in *Collins v. Youngblood*⁷⁶ as any law that either (1) punishes conduct that was innocent at the time it was committed, (2) retroactively increases the quantum of punishment for a crime, or (3) removes a defense available when the act was committed.⁷⁷ This definition has been affirmed and applied in subsequent Wisconsin ex post facto case law.⁷⁸

As in federal courts, the threshold question for ex post facto analysis in Wisconsin is whether the law in question "is a nonpunitive civil statute or a punitive criminal statute."⁷⁹ A court must begin by deciding "whether the legislature either expressly or impliedly indicated a preference that the statute in question be considered civil or criminal."⁸⁰ Determining intent "is primarily a matter of statutory construction."⁸¹ While the legislative purpose behind a law's "unpleasant consequences" suffered as a result of prior behavior is often influential in Wisconsin ex post facto cases,⁸² it does not end the analysis.

72. *Id.*

73. *Smith*, 538 U.S. at 97. The factors "have their earlier origins in cases under the Sixth and Eighth Amendments, as well as the Bill of Attainder and the *Ex Post Facto* Clauses." *Id.*

74. *State v. Rachel (In re Commitment of Rachel)*, 2002 WI 81, ¶¶ 38–39, 254 Wis. 2d 215, 647 N.W.2d 762. The intent-effects test adopted in *Rachel* is taken from the United States Supreme Court decision in *Hudson v. United States*, 522 U.S. 93, 99–100 (1997).

75. 188 Wis. 2d 695, 524 N.W.2d 641 (1994).

76. 497 U.S. 37, 43 (1990).

77. *Thiel*, 188 Wis. 2d at 699.

78. *E.g.*, *State v. Carpenter*, 197 Wis. 2d 252, 272–73, 541 N.W.2d 105 (1995); *State v. Simpson*, 2012 WI App 1U, ¶ 9, 338 Wis. 2d 212, 808 N.W.2d 175 (quoting *State v. Haines*, 2002 WI App 139, ¶ 6, 256 Wis. 2d 226, 647 N.W.2d 311).

79. *In re Commitment of Rachel*, 2002 WI 81, ¶ 22.

80. *Id.* ¶ 32 (citing *Hudson v. United States*, 522 U.S. 93, 99 (1997)).

81. *Id.* ¶ 40.

82. *Carpenter*, 197 Wis. 2d at 273 (citing *State v. Thiel*, 188 Wis. 2d. 695, 704, 524 N.W.2d 641 (1994)).

Once a Wisconsin court has determined legislative intent, the analytic focus shifts to the statute's "purpose or effect" if the law is deemed civil in nature.⁸³ To survive an ex post facto challenge, a Wisconsin law that restricts individuals based on their past conduct must "serve[] a legitimate regulatory public purpose apart from punishment for the predicate act."⁸⁴ If the statute is found to serve a "regulatory public purpose," the court will find a violation of the state's Ex Post Facto Clause only if its "purpose or effect" is so punitive that "what was clearly intended as a civil remedy" effectively becomes "a criminal penalty."⁸⁵ As in federal courts, the *Mendoza-Martinez* factors guide the Wisconsin court's determination of "whether the legislative intent is overcome by the form and effect of the statute" in question.⁸⁶

A strong presumption of constitutionality must be overcome in Wisconsin to prevail on an ex post facto claim.⁸⁷ Although some more recent ex post facto challenges to state laws designated by the legislature as civil have failed,⁸⁸ the Wisconsin Supreme Court has shown discomfort with the new caregiver law's civil consequences.⁸⁹ Given the

83. *In re Commitment of Rachel*, 2002 WI 81, ¶ 33 (quoting *Hudson*, 522 U.S. at 99 (1997)).

84. *Carpenter*, 197 Wis. 2d at 273.

85. *In re Commitment of Rachel*, 2002 WI 81, ¶ 33 (quoting *Hudson*, 522 U.S. at 99 (1997)).

86. *Id.* ¶ 43. State court results can diverge from typical federal holdings because they may give different weight to various *Mendoza-Martinez* factors and apply more robust state constitutional ex post facto prohibitions. See Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1130–32 (2012) (discussing three court decisions concluding that the statutes in question were unconstitutionally punitive despite their designation as civil).

87. *State v. Thiel*, 188 Wis. 2d 695, 705, 524 N.W.2d 641 (1994). Although a party mounting an ex post facto challenge in Wisconsin courts bears a heavy burden of proof, the Wisconsin Supreme Court has nonetheless been sympathetic to some ex post facto claims in the criminal context. E.g., *State v. White*, 97 Wis. 2d 517, 519–20, 294 N.W.2d 36 (Ct. App. 1979) (prohibiting the application of a probation statute because it imposed a punishment "more onerous" than was possible under the prior version of the law).

88. E.g., *In re Commitment of Rachel*, 2002 WI 81, ¶ 69 (holding that Wisconsin's civil commitment law is not ex post facto because it is not a criminal, punitive statute).

89. On January 10, 2013, the Wisconsin Supreme Court issued its decision in *Jamerson*, a case challenging DCF's revocation of Ms. Jamerson's child-care license under the new caregiver law. *Jamerson v. Dep't of Children & Families*, 2013 WI 7, ¶ 1, 345 Wis. 2d 205, 824 N.W.2d 822. The court twice described the new caregiver law's licensure ban as a "harsh penalty," a phrase it borrowed from the Court of Appeals decision under review. *Id.* ¶¶ 2, 2 n.3, 72. These are choice words from two courts for a law arguably meant to serve as a mere civil regulatory scheme. In addition, the court noted that license revocation inhibits an individual's opportunity "to make a living" and is therefore "a serious action." *Id.* ¶ 2 n.3. In light of this penalty, the court noted that it

Court's expressed unease with the new caregiver law's effects, the law's chance of survival under the intent-effects test is arguably questionable. When the test is applied, it becomes clear that the law must be amended if it is to avoid running afoul of Wisconsin's Ex Post Facto Clause.

II. REMEDYING WHAT IS EX POST FACTO ABOUT THE CAREGIVER LAW

Since its enactment in 2010, DCF has applied the caregiver law retroactively.⁹⁰ The results, although unintentional, are over-inclusive and punitive. Enforcement efforts have focused primarily on Milwaukee County, where the Milwaukee Child Care Anti-Fraud Task Force has aggressively investigated fraud in the Wisconsin Shares program.⁹¹ Since January 2010, DCF has initiated 66 revocation and denial actions against providers under its regulations governing caregiver background checks.⁹² Another 247 revocation and denial actions were initiated for "other" reasons.⁹³ Affected individuals range from day-care center owners to bus

found the procedures in the *Jamerson* case "troubling" because the revocation decision was based entirely on prior convictions. *Id.*

90. There is no indication in the statute itself that DCF should have done otherwise. See WIS STAT. § 48.685(5)(br) (2009–10). DCF can only enforce the law as written.

91. *E.g.*, Press Release, Dep't of Children & Families, Anti-Fraud Efforts Result in Child Care Provider Sentenced for Fraud (Apr. 26, 2012), available at http://dcf.wi.gov/press/2012/042612_shares_fraud.htm. For a list of currently suspended providers, the majority of which are in the city of Milwaukee, see DCF's suspended providers listing. *Suspended Providers*, WIS. DEP'T CHILD. & FAMS., http://dcf.wi.gov/program_integrity/suspended_providers/default.htm (last visited Aug. 14, 2013).

92. DCF declined to provide this author with data specific to revocations under the new caregiver law, pointing instead to its publically available information instead. E-mail from Mark Mueller, Comm'n Specialist, Dep't of Children & Families, to author (Aug. 16, 2013, 10:15 CST) (on file with author). DCF's annual reports detail how many revocation actions are taken annually under Wisconsin Administrative Code DHS chapter 12 (2012), the agency's regulations governing caregiver background checks. The number given here combines the number of denials and revocations under chapter 12. See JILL D. CHASE, ANNUAL REPORT: CHILD CARE LICENSING & CERTIFICATION ACTIVITY – JANUARY THROUGH DECEMBER 2012, at 6 (2013); JILL D. CHASE, ANNUAL REPORT: CHILD CARE LICENSING & CERTIFICATION ACTIVITY – JANUARY THROUGH DECEMBER 2011, at 6–7 (2012); JILL D. CHASE, LICENSING ACTIVITY SUMMARY REPORTS FOR LICENSED CHILD CARE – JANUARY THROUGH DECEMBER 2010 Attachment F (2011). In addition, some caregivers may be voluntarily surrendering their licenses upon receipt of a warning letter from DCF. Between 2010 and 2012, DCF sent 2,215 warning letters. JILL D. CHASE, ANNUAL REPORT: CHILD CARE LICENSING & CERTIFICATION ACTIVITY – JANUARY THROUGH DECEMBER 2011, at 6–7 (2012); JILL D. CHASE, LICENSING ACTIVITY SUMMARY REPORTS FOR LICENSED CHILD CARE – JANUARY THROUGH DECEMBER 2010 Attachment F (2011).

93. JILL D. CHASE, ANNUAL REPORT: CHILD CARE LICENSING & CERTIFICATION ACTIVITY – JANUARY THROUGH DECEMBER 2011, at 6–7 (2012); JILL D. CHASE, LICENSING

drivers, and from those with felonies to those with a lone misdemeanor decades in the past.⁹⁴ Without an exception for prior convictions, a decrease in the length of the ban, or a path to rehabilitation, the law increases the quantum of punishment for certain crimes, overriding any legislative intent to create a civil remedy.

A. Looking for Legislative Intent: Strong Passions Imply a Punitive Purpose

The threshold question for a Wisconsin court to consider when determining a retroactive law's constitutionality is whether it is "a nonpunitive civil statute or a punitive criminal statute."⁹⁵ This is initially "a matter of statutory construction" for a court that "must first decide whether the legislature either expressly or impliedly indicated a preference that the statute in question be considered civil or criminal."⁹⁶ In other words, does the "penalizing mechanism" of the new caregiver law indicate a legislative "preference for one label or the other"?⁹⁷

I. EXPRESS INTENT TO CREATE A CIVIL REMEDY

There is a strong argument that the Wisconsin State Legislature expressly intended to create a civil remedy when it enacted the new caregiver law. The "penalizing mechanism" is controlled by DCF, not the Department of Corrections.⁹⁸ In addition, the law does not impose a criminal sentence but rather a licensure and certification ban for providers as well as an employment ban for individuals who qualify as caregivers.⁹⁹ The law's defenders might argue that such a sanction arguably functions as a civil remedy—that of preventing individuals with a demonstrated penchant for taxpayer fraud from being in a position to repeat their past behaviors. Thus, individuals with past convictions for "fraudulent activity" are excluded from the child-care profession not as an additional punishment for their past behavior, but because their convictions indicate their unfitness as a class.¹⁰⁰ However, the new

ACTIVITY SUMMARY REPORTS FOR LICENSED CHILD CARE – JANUARY THROUGH DECEMBER 2010 Attachment F (2011).

94. See *infra*, Part II.B.

95. *State v. Rachel (In re Commitment of Rachel)*, 2002 WI 81, ¶ 22, 254 Wis. 2d 215, 647 N.W.2d 762.

96. *Id.* ¶ 32 (citing *Hudson v. United States*, 522 U.S. 93, 99 (1997)).

97. *Id.* ¶ 40 (quoting *United States v. Ward*, 448 U.S. 242, 248 (1980)).

98. See WIS. STAT. § 48.02(4) (2009–10).

99. § 48.685(5)(br)(5).

100. As discussed in Part II.B *infra*, there is no correlation between a past conviction for "fraudulent activity" and an individual's future behavior as a child-care provider or caregiver.

caregiver law applies only to criminal behavior, a factor that weighs in favor of a finding of punitive intent.

2. EVIDENCE OF AN IMPLIED PUNITIVE INTENT

While the express legislative intent of the new caregiver law may be characterized as civil, it is possible to find an implied punitive intent as well. The circumstances surrounding the passage of the caregiver law suggest a quick reaction to the *Milwaukee Journal Sentinel* investigation and imply strong passions.¹⁰¹ The bill that would eventually become the law was introduced in the Senate on October 2, 2009,¹⁰² where it passed unanimously on November 5.¹⁰³ That same day the bill was sent to and passed unanimously by the Assembly.¹⁰⁴ The legislature afforded itself little time for thought as to precisely how and to whom the ban would be applied. While quick action alone does not indicate a punitive purpose, such action in the midst of a high-profile investigation involving child-care fraud suggests that the legislature's strong passions had been stirred.¹⁰⁵ The Ex Post Facto Clause was designed in part to protect against "those sudden and strong passions" that can inspire fast, well-intentioned action but yield arbitrary, punitive results.¹⁰⁶

One of the *Mendoza-Martinez* factors courts consider when deciding if a law is punitive is whether, in operation, it supports the traditional goals of punishment including deterrence and retribution.¹⁰⁷ A key indicator of the new caregiver law's implied punitive intent is the lack of a path to rehabilitation for those affected when such a path is available to others with arguably more serious past convictions.¹⁰⁸ The 2009 amendments to the caregiver law permanently bar those convicted

101. For an example of how aggressively some state politicians confronted the issue of fraud in the Wisconsin Works program, see Robin Vos, Editorial, *Welfare Fraud Culture Continues in Wisconsin*, J. TIMES (Racine, Wis.), May 26, 2010, at 7A, available at http://www.journaltimes.com/news/opinion/commentary-welfare-fraud-culture-continues-in-wisconsin/article_99c01458-6854-11df-a1b6-001cc4c002e0.html.

102. S. JOURNAL, 2009–10 Leg., 99th Sess., 347 (Wis. Oct. 5, 2009).

103. S. JOURNAL, 2009–10 Leg., 99th Sess., 411 (Wis. Nov. 5, 2009).

104. ASSEMB. JOURNAL, 2009–10 Leg., 99th Sess., 505–06 (Wis. Nov. 5, 2009).

105. The Legislative Reference Bureau drafting files contain e-mails sent from sponsoring senators' offices to the bill's drafter that speak to the legislation's high priority, referring to it as an "urgent bill" and noting the desire to make "public assistance fraud" a lifetime bar to employment as a caregiver. *E.g.*, E-mail from Carrie Kahn, Legislative Assistant to State Senator Bob Jauch, to Gordon Malaise, Senior Legislative Att'y, Legislative Research Bureau (Sept. 17, 2009, 14:25 CST) (available in Legislative Research Bureau Drafting Files for 2009 Act 076, #02 SB-331), available at http://docs.legis.wi.gov/2009/related/drafting_files/wisconsin_acts/2009_act_076_sb_331/02_sb_331/09_3492df.pdf.

106. See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137–38 (1810).

107. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963).

108. See WIS. STAT. § 48.685(5)(br) (2009–10).

of non-violent financial crimes from pursuing their profession yet permit rehabilitation for those convicted of abusing vulnerable adults, trafficking for a commercial sex act, or found by a government agency to have abused or neglected a child.¹⁰⁹ Even a person who gives a minor alcohol resulting in injury or death escapes with a five-year bar.¹¹⁰ A permanent bar is typically reserved for violent offenses including homicide, sexual assault, and kidnapping, as well as felony convictions for crimes against children under Wisconsin Statutes section 948.¹¹¹

The legislature imposed the permanent ban on those convicted of “fraudulent activity” in the midst of the *Milwaukee Journal Sentinel*’s investigation exposing a taxpayer fraud scheme. Yet the legislature continues to provide those convicted of certain violent crimes with a path to rehabilitation. This suggests that the permanent bar is primarily (albeit impliedly) punitive and retributive. There is no consideration of how old the conviction is, of the affected individual’s post-conviction behavior and success, or of how harsh the additional penalty will prove to be; and according to the Wisconsin Supreme Court, it is a *penalty* rather than a remedy.¹¹²

The bar also functions as a deterrent by ensuring that anyone ever convicted of misusing taxpayer funds will have one less opportunity to access such funds in the future. If an individual is guilty of misusing taxpayer funds in the past, the legislature implies via its permanent bar that such an individual will only re-offend. Thus the bar as currently applied functions as an added punishment for a previous conviction borne out of a fear of possible future criminal behavior. By serving these two traditional goals of punishment, the caregiver law betrays an implied punitive purpose with respect to those previously convicted of “fraudulent activity.” A court’s finding of such a purpose will end its inquiry and invalidate the law as *ex post facto*.¹¹³

109. See DEP’T CHILD. & FAMS., CHILD CARE CRIMES TABLE, 2–3 (2010), available at http://dcf.wisconsin.gov/childcare/licensed/pdf/2010_02_crimes_list.pdf [hereinafter CHILD CARE CRIMES TABLE]. Alma Brown makes this same argument in her brief to the Wisconsin Court of Appeals. Brief of Appellant Alma Brown at 30–31, *Brown v. State Dep’t of Children & Families*, Case No. 11-AP-1350 (Aug. 16, 2012) [hereinafter Brief of Appellant].

110. See CHILD CARE CRIMES TABLE, *supra* note 109, at 1.

111. *Id.* at 1–3. Individuals carrying felony convictions for theft of telecommunications, commercial mobile service, video service, and satellite cable programming also face a permanent bar, but only for the licensee or certified provider. *Id.* at 3.

112. *Jamerson v. Dep’t of Children & Families*, 2013 WI 7, ¶ 2, 345 Wis. 2d 205, 824 N.W.2d 822.

113. See *State v. Rachel (In re Commitment of Rachel)*, 2002 WI 81, ¶ 22, 254 Wis. 2d 215, 647 N.W.2d 762 (citations omitted).

B. Considering Effects: The Mendoza-Martinez Factors and the Law's Over-Inclusive Application

Even if a court deems the new caregiver law to be civil and nonpunitive, it can still rule it violative of Wisconsin's Ex Post Facto Clause if its imposed sanctions are shown by the clearest proof to be "so punitive in form and effect as to render them criminal."¹¹⁴ Thus an analysis of the new caregiver law as ex post facto must now shift to the statute's effects resulting from its over-inclusive application. Although the law is fairly new, facts that speak to the licensure and employment ban's onerous effects have come to light in recent litigation.

Wisconsin courts weigh the subjective *Mendoza-Martinez* factors in this phase of the analysis.¹¹⁵ Some factors will support a finding that the new caregiver law's effects are punitive: it applies only to behavior that is already criminal,¹¹⁶ primarily to offenses that seem to require a finding of scienter,¹¹⁷ and it arguably promotes the traditional goals of punishment.¹¹⁸ Other factors could weigh in favor of the law's constitutionality: it can be viewed as advancing a non-punitive purpose such as protecting children or preventing fraud,¹¹⁹ and does not impose any physical restraint or sanction historically considered punishment.¹²⁰ Thus the analysis will likely turn on the remaining factor: whether the permanent bar is excessive in relation to the law's purported non-punitive purposes.

1. RETROACTIVE APPLICATION: DCF'S WIDE NET

DCF is the state agency responsible for administering the caregiver law.¹²¹ DCF was established in 2008 by Governor Jim Doyle to promote

114. *Hudson v. United States*, 522 U.S. 93, 104 (1997) (quoting *United States v. Ursery*, 518 U.S. 267, 290 (1996)).

115. *In re Commitment of Rachel*, 2002 WI 81 ¶ 43. No particular factor has been recognized as determinative. *Hudson*, 522 U.S. at 101 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963)).

116. See WIS. STAT. § 48.685(5)(br)(5) (2009–10).

117. The term "fraudulent activity" is not defined in the statute itself, and the Wisconsin Supreme Court has declined to define it in this context. *Jamerson*, 2013 WI 7, ¶ 73. However, the plain meaning of "an offense involving fraudulent activity" is one requiring proof of a knowing misrepresentation or omission made with the intent to defraud. See the definition of "fraud" in BLACK'S LAW DICTIONARY 731 (9th ed. 2009).

118. See *supra* Part II.A for a discussion of whether the law's operation will promote retribution and deterrence.

119. *Infra* Part II.C.

120. The United States Supreme Court has held occupational debarment to be non-punitive in banking and medical license revocation. *Hudson*, 522 U.S. at 104–05; *Hawker v. New York*, 170 U.S. 189, 199–200 (1898).

121. See § 48.02(4).

“the safety, economic and social well-being of kids and families of the state,” and to manage, among other state services, the Wisconsin Works and the Wisconsin Shares programs.¹²² Under the law, DCF is required to revoke or deny a child-care provider’s certification or license if that provider has been convicted of any of the crimes specified in the statute.¹²³ Also affected are any individuals that qualify as caregivers—*anyone* who has “regular, direct contact with the children in care.”¹²⁴ In other words, “a person may not hold a license or certification, reside in, or work as a caregiver in a program” if he or she has ever been convicted of “fraudulent activity as a participant in a Wisconsin Works Program.”¹²⁵

Given that the statute does not contain an exception for prior convictions,¹²⁶ DCF has applied the law retroactively. Thus, the licensure ban applies to anyone licensed or certified to provide child care or who qualifies as a caregiver and has been convicted of “[a]n offense involving fraudulent activity as a participant in the Wisconsin Works program,”¹²⁷ a program encompassing a wide variety of benefits including food stamps, health care, and child support.¹²⁸ Rather than cite to specific criminal offense statutes or chapters, the new caregiver law employs narrative description,¹²⁹ resulting in a potentially wide scope.¹³⁰ Narrative description of the included crimes in conjunction with the undefined term “fraudulent activity”¹³¹ grants DCF a wide net to cast over the nearly 5,000 licensed child-care centers and day camps operating in Wisconsin,

122. Press Release, Office of the Governor, Governor Doyle Launches Department of Children and Families (June 30, 2008), *available at* http://dwd.wisconsin.gov/dwd/dwdhistory/Year_Pages/2000_2009/docs/63008_children_and_families.pdf.

123. *See* § 48.685(5)(br).

124. *Frequently Asked Questions*, *supra* note 15.

125. *See id.*

126. *See id.*

127. § 48.685(5)(br)(5).

128. *See* DEP’T CHILD. & FAMS., WISCONSIN WORKS (W-2) BENEFITS AND SERVICES (2011), *available at* http://dcf.wisconsin.gov/publications/pdf/DCF_P_dwsp11890.pdf.

129. § 48.685(5)(br). Angelia Jamerson makes a similar argument in her brief to the Wisconsin Supreme Court. Brief of Petitioner-Appellant Angelia Jamerson at 26, *Jamerson v. Dep’t of Children & Families*, No. 11-AP-593 (Aug. 2, 2012).

130. The Wisconsin Supreme Court has alluded to the fact that it is difficult to determine whether a particular crime falls within the new caregiver law’s scope without a hearing. *See Jamerson v. Dep’t of Children & Families*, 2013 WI 7, ¶¶ 5–6, 345 Wis. 2d 205, 824 N.W.2d 822.

131. *See* WIS. ADMIN. CODE DHS § 12.03 (2012); WIS. STAT. § 48.685(5)(br) (2009–10).

their employees, and anyone else on their premises who might qualify as a caregiver.¹³²

2. JUST THE FACTS: SHEDDING LIGHT ON THE LAW'S EFFECTS

Evidence of the onerous effects of DCF's retroactive use of its wide net has come to light in the four legal challenges that have resulted to date from the law's implementation in 2010. The facts established in these cases speak to the law's impact on child-care providers as well as caregivers and reveal how the law's application is over-inclusive given that a criminal conviction and not an individual assessment of risk is the sole basis for the ban. Although these cases share the common thread of taxpayer-funded services, they represent a variety of criminal actions that violated state law to varying degrees. These cases all involve convictions that are at least two decades old.

Angelia Jamerson's day-care license was revoked and her center shut down in late January 2010 because of two 1991 convictions allegedly involving public assistance benefits.¹³³ Whether Ms. Jamerson's convictions actually involved public benefits remained an open question,¹³⁴ but DCF dismissed her appeal of the revocation decision without a hearing.¹³⁵ She waited three years without a license before the Wisconsin Supreme Court granted her a contested case hearing.¹³⁶

In 1986, Sonja Blake was charged with a felony violation of Wisconsin Statute section 49.12(9) (1985–86).¹³⁷ As a result, her child-care center was closed and her certification permanently revoked in 2010.¹³⁸ In Ms. Blake's case, she was receiving public assistance when she was given a used car.¹³⁹ She did not report the gift and eventually pled no contest to a misdemeanor under former Wisconsin Statutes

132. See JILL D. CHASE, ANNUAL REPORT: CHILD CARE LICENSING & CERTIFICATION ACTIVITY – JANUARY THROUGH DECEMBER 2012, at 6 (2013); see also *Child Care Directories*, WIS. DEP'T CHILD. & FAMS., (Oct. 10, 2012), <http://dcf.wisconsin.gov/childcare/licensed/Directories/CC-Directories.HTM>.

133. *Jamerson*, 2013 WI 7, ¶ 23.

134. *Id.* ¶ 74.

135. *Id.* ¶ 2.

136. *Id.*

137. *Blake v. Racine Cnty. Human Servs. Dep't*, 2013 WI App 45, ¶ 3, 347 Wis. 2d 499, 831 N.W.2d 439.

138. *Id.* ¶ 4.

139. *Id.* ¶ 5.

section 49.12(9).¹⁴⁰ This misdemeanor conviction for a non-violent offense remains the only one Ms. Blake carries.¹⁴¹

DCF revoked Alma Brown's child-care license in 2010 because of her 1991 conviction for a failure to report income while receiving food stamps.¹⁴² Ms. Brown earned the income at issue as a temporary holiday worker at Marshall Fields over a period of several years.¹⁴³ As a result, she was convicted of a felony under former Wisconsin Statute sections 49.12(6) and (1) and 943.20(3)(c).¹⁴⁴ Like Ms. Blake, Ms. Brown has only one conviction for a non-violent offense.¹⁴⁵ During the ten years Ms. Brown provided child care, she was never the subject of any complaint of fraud or abuse.¹⁴⁶

Licensed child-care providers are not the only individuals who have felt the harsh effects of enforcement. In 2011, Jacqueline Brister was fired from her job as a bus driver for a child-care center as a result of her 1981 conviction for public assistance fraud.¹⁴⁷ Although Ms. Brister was not a licensed or certified child-care provider, her regular and direct contact with children receiving services from her employer qualified her as a caregiver.¹⁴⁸ A DCF compliance visit to her employer's premises prompted her termination after DCF representatives noted that the employer may not have fully investigated her background check results.¹⁴⁹ After a brief investigation, the employer determined that Ms. Brister's conviction barred her from working as a caregiver and fired her.¹⁵⁰ No records of Ms. Brister's 1981 conviction are extant,¹⁵¹ but she nonetheless felt the full brunt of the law.

140. *Id.* ¶¶ 3, 5.

141. Brief of Appellant Sonja Blake at 4, *Blake v. Racine Cnty. Human Servs. Dep't*, 2013 WI App 45, 347 Wis. 2d 499, 831 N.W.2d 439 (No. 12-AP-31).

142. *Brown v. State Dep't of Children & Families*, 2012 WI App 61, ¶¶ 5–6, 341 Wis. 2d 449, 819 N.W.2d 827.

143. *Id.* ¶ 4.

144. *Id.* ¶ 5.

145. Brief of Appellant Alma Brown at 5, *Brown v. State Dep't of Children & Families*, No. 11-AP-1350 (Aug. 16, 2012).

146. *Id.* at 3.

147. *Brister v. Penfield Childrens' Ctr.*, No. 11-CV-16915, at 2 (Milwaukee Cnty. Cir. Ct. Jan. 23, 2013) (decision and order granting summary judgment in favor of defendants). Although Ms. Brister was not fired by DCF, a DCF inspection of her employer's premises set the event in motion. Brief for Respondent, *supra* note 18, at 1–2.

148. *Frequently Asked Questions*, *supra* note 15.

149. Brief for Respondent, *supra* note 18, at 1–2.

150. *Id.*

151. *Id.* at 2.

3. A BURDENSOME, OVER-INCLUSIVE APPLICATION

The new caregiver law determines who can work as a caregiver “based not on a particularized determination of the risk the person poses to society but rather on the criminal statute the person was convicted of violating.”¹⁵² This over-inclusive application has been burdensome and confusing for caregivers, license and certification holders and applicants, as well as DCF and the courts.¹⁵³ Some individuals may not realize that their convictions are now barring offenses under the new caregiver law because the convictions are years or even decades old and any records have been destroyed, leaving only a reference on their state criminal history background checks. Some may not think they engaged in “fraudulent activity,” believing that such activity would involve intent to deceive rather than inadvertent omission. They may have invested time and money in obtaining a license or certification only to have it granted and eventually revoked or never granted at all.

Employers may also find that the law creates more difficulties than it resolves. An employee initially deemed employable and hired years ago is suddenly unemployable and must be fired despite the employer’s investment in hiring and training.¹⁵⁴ It may not be clear to an employer who decides whether a conviction is a barring offense.¹⁵⁵ Such circumstances are disruptive for the employer who must undertake a hiring process in order to replace a reliable employee. Co-workers may also view the situation as unfair. Replacing the employee could also prove more difficult if fewer candidates can qualify for licensure or certification or as a caregiver under the law, thus reducing the applicant pool. Even children and parents can be affected when a familiar face disappears from a day-care center, perhaps prompting them to seek a more stable child-care service.¹⁵⁶

152. *Doe v. State*, 189 P.3d 999, 1014 (Alaska 2008). The Wisconsin Supreme Court was similarly troubled by the fact that the imposition of a lifetime ban under the new caregiver law hinges *solely* on whether or not a person carries a qualifying conviction. *Jamerson v. Dep’t of Children & Families*, 2013 WI 7, ¶ 2 n.3, 345 Wis. 2d 205, 824 N.W.2d 822.

153. DCF can only enforce the law as written. The law’s over-inclusive application can be attributed in part to the lack of guidance regarding what “fraudulent activity” entails.

154. This is the circumstance in *Brister*: Ms. Brister was fired after a routine inspection by DCF that flagged her once-irrelevant prior conviction as a possible barring offense. Brief for Respondent, *supra* note 18, at 1–2.

155. *Id.* Ms. Brister’s employer made the decision to fire her after reviewing her criminal history background check generated by the Wisconsin Department of Justice Crime Information Bureau (CIB), but the initial prompting came from DCF. *Id.*

156. If they can find one—the fact that the law’s initial implementation resulted in the shutdown of over 170 child-care centers probably made it more difficult for some

Finally, the courts and DCF have borne the burden of determining the law's appropriate scope. Given that "fraudulent activity" is not defined in the statute and the relevant crimes are not cited by statute or chapter,¹⁵⁷ DCF has been faced with deciding how and when to apply the law with little guidance from the legislature. The resulting litigation is undoubtedly time-consuming for DCF and the Wisconsin Department of Justice that defends the agency, as well as for the courts that must hear and decide the cases.

C. The Decisive Factor: The Law's Excessive Effect in Relation to Its Purported Nonpunitive Purposes

Even if one believes that the legislative intent in passing the caregiver law was legitimate, regulatory, and nonpunitive, there is no rational connection between the law's conceivable purposes and its ultimately punitive effect. There are two primary goals associated with the caregiver law's license ban: protecting children and preventing misuse of taxpayer funds.¹⁵⁸ Given that the law prescribes license revocation administered by a state agency,¹⁵⁹ it is possible to argue that the legislature did not expressly intend to create a criminal proceeding. However, even if the law is civil in nature, its effect increases the quantum of punishment and is sufficiently punitive as to overcome any nonpunitive legislative purpose, thus still running afoul of the Ex Post Facto Clause.¹⁶⁰

1. THE LAW'S EFFECT IS NOT RATIONALLY RELATED TO CHILD PROTECTION

The goal of protecting children from harm is admirable, but the new caregiver law as currently applied is not rationally related to it and yields punitive results. None of the affected individuals who have brought suit

families to access convenient, affordable care. *See* Rutledge & Diedrich, *supra* note 9, at A1.

157. *See* WIS. STAT. § 48.685(5)(br) (2009–10); WIS. ADMIN. CODE DHS § 12.03 (2012).

158. DCF has stated that the fundamental purpose of the caregiver law is to protect and safeguard children. Lisa Kaiser, *Response from DCF on Child Care License Revocations*, EXPRESSMILWAUKEE (Mar. 11, 2010), <http://expressmilwaukee.com/blog-5030-response-from-dcf-on-child-care-license-revocation.html>. The goal of protecting taxpayer funds from fraud is discussed in *Brown*, 2012 WI App 61, ¶¶ 39–40, 341 Wis. 2d 449, 819 N.W.2d 827.

159. WIS. STAT. § 48.685(5)(br) (2009–10).

160. *See Riley v. New Jersey State Parole Bd.*, 32 A.3d 190, 197 (N.J. Super. Ct. App. Div. 2011).

have been accused or convicted of harming children,¹⁶¹ calling into question the viability of a conviction for “fraudulent activity” as an indicator for future abusive behavior.¹⁶² Instead, the ban has resulted in experienced, trusted caregivers and child-care providers permanently losing their employment or their businesses, leaving them unable to provide a valuable service to children and their parents.¹⁶³ The connection, if any, between the ban and protecting children is so tenuous that the *Brown* court gave it only a passing mention when it upheld the law’s constitutionality, preferring to focus instead on the relationship between the law and protecting taxpayer funds.¹⁶⁴

2. THE LAW’S EFFECT IS NOT RATIONALLY RELATED TO PROTECTING TAXPAYER FUNDS FROM MISUSE

It is equally admirable for the legislature to strive to prevent individuals from defrauding the Wisconsin Shares program, but the ban’s over-inclusive application impedes its effectiveness in meeting this goal as well.¹⁶⁵ The state has an interest in “preventing further fraud to the Wisconsin Shares program,”¹⁶⁶ but this interest is not rationally related to the license ban when it is applied retroactively.

The law creates a classification not related to fraud prevention by revising the qualifications to be a licensed or certified child-care provider.¹⁶⁷ Under Wisconsin Statute section 48.685(5), anyone operating a child-care center with more than four unrelated children must be licensed and thus must satisfy the background check requirements regardless of whether the provider was ever a participant in the Shares program.¹⁶⁸ A provider need not have participated in the Shares program

161. If they had been, they may have been able to escape a permanent licensure ban. For example, individuals found by a government agency to have abused or neglected a child can still pursue a path to rehabilitation. See CHILD CARE CRIMES TABLE, *supra* note 109, at 2–3.

162. For example, Ms. Blake successfully operated her child-care business without complaint for more than a decade before her license was revoked by DCF. Kaiser, *supra* note 158.

163. This effect was noted almost immediately by one of Act 76’s cosponsors, Representative Tamara Grigsby of Milwaukee, who lamented after the law passed that “good providers” were being “disqualified from working in the child care field” despite “years of providing a good service and quality care.” *Id.*

164. *Brown v. State Dep’t of Children & Families*, 2012 WI App 61, ¶ 40, 341 Wis. 2d 449, 819 N.W.2d 840.

165. For a discussion of the ban’s over-inclusive application, see *supra* Part II.B.

166. *Brown*, 2012 WI App 61, ¶ 40.

167. See 2009 Wis. Act 76 (codified in scattered sections of WIS. STAT. chs. 20, 48, 49, 111, 120). Alma Brown makes this same argument in her brief to the Wisconsin Court of Appeals. Brief of Appellant, *supra* note 109, at 29.

168. WIS. STAT. § 48.65(1) (2009–10).

or received any taxpayer funds to fall under the permanent bar.¹⁶⁹ The only requirement is that the provider carries one of the enumerated or described convictions.¹⁷⁰

In addition, the law affects individuals who had no access to or control over their employer's or state funds. Although some providers owned their own child-care centers,¹⁷¹ others did not. Ms. Brister was merely a van driver¹⁷² and thus had no control over her employer's finances and little, if any, opportunity to defraud the state. The legislature has made a blanket assumption that anyone convicted of "fraudulent activity" while participating in a public assistance program will seek to defraud the state again, regardless of the circumstances of conviction and post-conviction behavior. Given that the law has been applied broadly, there has been no consideration afforded to whether or not an affected individual ever had the capacity to defraud the Wisconsin Shares program while working as a caregiver.

When the law is applied, the effect is excessively punitive in relation to its purported non-punitive goals. Even the *Brown* court, which upheld the law as constitutional, noted its harshness.¹⁷³ Not only are employees like Ms. Brister losing their jobs,¹⁷⁴ but business owners are as well,¹⁷⁵ resulting in the closure of child-care centers and fewer options for families seeking child-care services.¹⁷⁶ Those individuals who are permanently banned for working as caregivers may also find it burdensome to retrain for work in an alternate field due to age, lack of resources and opportunity, or other factors. Financial difficulties may result, further burdening the individual and his or her family. Such a punitive effect is sufficient to outweigh any stated civil intent and thus violates the Ex Post Facto Clause.

D. A Trio of Potential Remedies

The caregiver law's defects can be resolved by relieving the law's most burdensome impacts and bringing its effect more closely in line with its purposes.¹⁷⁷ Given the general importance of the goals of

169. § 48.685(5)(br).

170. *Id.*

171. For example, Ms. Brown. See Brief of Appellant, *supra* note 109, at 3.

172. Brief for Respondent, *supra* note 18, at 3.

173. *Brown v. State Dep't of Children & Families*, 2012 WI App 61, ¶¶ 40, 43, 341 Wis. 2d 449, 819 N.W.2d 827.

174. Brief for Respondent, *supra* note 18, at 1–2.

175. See Brief of Appellant, *supra* note 141, at 3.

176. Over 170 centers have been closed since the law took effect. Rutledge & Diedrich, *supra* note 9, at A1.

177. Such modifications were unsuccessfully attempted only one month after the law first took effect when Senators Kathleen Vinehout and Lena Taylor introduced 2009

protecting children and preventing fraud, the caregiver law should not be completely overturned. A law with a remedial retroactive effect, even an inconvenient one, is not necessarily *ex post facto*—the key is whether a law’s effect is, in operation, *excessively* punitive or retributive in relation to its purpose. It is a matter of degree. A trio of possible remedies exists: an exception for prior convictions, a decrease in the amount of time the ban is in effect post-conviction, and a path to rehabilitation. Although each is imperfect, each can ameliorate the law’s effect by limiting its scope enough to target with greater precision the individuals most likely to commit the abuses that the legislature wished to avoid.

1. CREATING AN EXCEPTION FOR PRIOR CONVICTIONS

One of the simplest yet least politically viable methods for alleviating the most onerous facet of the new caregiver law is to eliminate its retroactive application altogether by creating an exception for prior convictions. Those individuals who are convicted after the law has taken effect are on sufficient notice to consider the impact of conviction on their professional lives before entering a plea, for example. An exception for prior convictions will avoid the unfortunate circumstance of revoking an otherwise competent provider’s license or certification, or preventing a caregiver from working because of a conviction that could be decades old and that was handed down without consideration of a possible future license ban.

A well-crafted exception is not necessarily a blanket or incautious one. It can be limited to cases involving non-violent convictions, where the individual has completed his or her sentencing, and where no complaints have been made about the individual’s interaction with children. By considering an individual’s risk to society and post-conviction behavior more carefully before applying the ban, the law’s effect would seem less excessive and thus be less likely to violate the *Ex Post Facto* Clause.

2. DECREASING THE BAN TO FIVE YEARS AFTER SENTENCE COMPLETION

If an exception for prior convictions proves politically unviable, the impact of the new caregiver law can also be ameliorated by changing the categorization of its bar from permanent to one that is in effect for five

Senate Bill 642 that would have reduced the ban for “fraudulent activity” from a permanent one to one lasting five years post-conviction. S.B. 642, 2009–10 Leg., 99th Reg. Sess. (Wis. 2009), *available at* <https://docs.legis.wisconsin.gov/document/proposaltext/2009/REG/SB642.pdf>. The bill did not pass. S. JOURNAL, 2009–10 Leg., 99th Sess., 728 (Wis. Apr. 28, 2010).

years after the individual's completion of his or her sentence. Convictions affecting caregivers and child-care providers are categorized by the severity of the bar DCF is required to impose.¹⁷⁸ There are four categories: a bar with rehabilitation, a bar for five years after completion of sentence, a permanent bar, and a permanent bar affecting licensees or certified providers only.¹⁷⁹

Although this remedy may be more politically viable than a blanket exception and would ameliorate the consequences of the law as currently applied, it is an imperfect solution. Changing the new caregiver law's bar from permanent to a five-year bar would help eliminate from its scope those individuals, including everyone currently challenging the law in court, with convictions that are so old as to be arguably irrelevant indicators of future behavior. However, many individuals with more recent convictions will find themselves barred for at least five years without an opportunity to show that they pose no risk of committing more fraudulent acts. Without individualized consideration of risk, the law's scope remains excessively broad and sufficiently out of sync with its purposes to potentially offend the Ex Post Facto Clause.

3. ALLOWING REHABILITATION

Perhaps the most politically viable potential remedy for the law's burdensome, retroactive effect is to allow affected individuals to pursue a path to rehabilitation. Although individuals would initially be barred from working as caregivers and face some disruption in their lives, they would be afforded an opportunity to demonstrate that they pose no risk. This option would allow DCF some flexibility with regard to the law's enforcement. Rehabilitation is already available under the law to those who have perpetuated some violent offenses.¹⁸⁰ This process allows the permanent ban to remain in place while making affected individuals personally responsible for showing that they are no longer (if they ever were) a threat.

DCF has existing review and rehabilitation procedures in place that, upon successful completion, permit individuals to request reinstatement of their caregiver license or certification.¹⁸¹ The applicant applies for reinstatement, is given ninety days to provide DCF with any requested materials, and is granted a rehabilitation review meeting.¹⁸² The applicant bears the burden of demonstrating by clear and convincing evidence that

178. See generally CHILD CARE CRIMES TABLE, *supra* note 109.

179. *Id.*

180. See *id.* at 2–3.

181. *The Rehabilitation Review Process*, WIS. DEP'T CHILD. & FAMS. http://dcf.wisconsin.gov/rehab_review/process.htm (last visited Aug. 15, 2013).

182. *Id.*

he or she has been rehabilitated.¹⁸³ The meeting can result in complete or conditional approval of reinstatement, denial, or deferral for up to six months.¹⁸⁴

Senators Kathleen Vinehout and Lena Taylor attempted to carve a path to rehabilitation for individuals affected by the new caregiver law, but they were unsuccessful in part because they acted too soon after initial passage, when emotions were still running high.¹⁸⁵ They introduced 2009 Senate Bill 642 approximately one month after the law took effect in 2010.¹⁸⁶ Representative Grigsby simultaneously introduced an identical bill in the Assembly.¹⁸⁷ Had the bill been enacted, the period of debarment would have been reduced to five years measured from the date of conviction, and rehabilitation would have been available.¹⁸⁸ These amendments were introduced due to recognition that the caregiver law's impact was too burdensome and over-inclusive for those convicted of public assistance fraud or other non-violent financial crime.¹⁸⁹

The proposed amendments to Act 76 should have been granted more careful consideration and may be better received now that three years of enforcement have revealed a need for change. A path to rehabilitation would grant DCF the flexibility to decide when license revocation would actually serve the interests of the state rather than just increase the quantum of punishment without great impact on the law's goals. If a bar reduction to five years seems too incautious, let the ban remain permanent, but only in those cases where the individual cannot show that he or she poses no risk to society under DCF's criteria. A blanket permanent ban applied retroactively without an individualized assessment of risk or any possibility of a waiver or rehabilitation is over-inclusive and sufficiently punitive to violate the Ex Post Facto Clause.

183. *Id.*

184. *Id.*

185. It is likely that the law did not pass because many of its sponsors' colleagues remained firm in their support for Act 76. *See, e.g., Vos, supra* note 101, at 7A. Vos argues that Grigsby's bill "clearly illustrates the want by some to let fraud in these programs continue." *Id.*

186. The bill was introduced on March 24, 2010. S.B. 642, 2009–10 Leg., 99th Reg. Sess. (Wis. 2009), available at <https://docs.legis.wisconsin.gov/document/proposaltext/2009/REG/SB642.pdf>.

187. ASSEMB. B. 887, 2009–2010 Leg., 99th Reg. Sess. (Wis. 2009), available at <https://docs.legis.wisconsin.gov/document/proposaltext/2009/REG/AB887.pdf>.

188. *Id.*

189. *See Wisconsin Early Childhood, Another Public Hearing for Child Care Waiver Law*, WECA, (Mar. 29, 2010), <http://blog.wisconsinearlychildhood.org/2010/03/29/another-public-hearing-for-child-care-waiver-law/>.

CONCLUSION

Ex post facto laws are disfavored because they are unpredictable and fundamentally unfair. In the wake of a blistering investigation that exposed significant fraud in the Wisconsin Shares program, the legislature responded with the best of intentions. Yet strong passions do not always yield effective legislation. Revoking an individual's ability to pursue his or her profession and thus make a living is indeed "a serious action."¹⁹⁰ When construed broadly and applied retroactively, the law has devastating consequences that seem excessively punitive in relation to its purported goals. Its administration has thus proven burdensome for DCF and the courts, as well as for employers, employees, and families. Although the legislature's stated intent is admirable, the law's effects are sufficiently arbitrary and onerous to exceed its designation as a civil remedy. When applied retroactively, the law as currently written violates Wisconsin's Ex Post Facto Clause.

190. *Jamerson v. Dep't of Children & Families*, 2013 WI 7, ¶ 2 n.3, 345 Wis. 2d 205, 824 N.W.2d 822.