COLLECTING CHILD SUPPORT FROM DELINQUENT PARENTS: A CONSTITUTIONAL ANALYSIS OF AN ARIZONA ENFORCEMENT MECHANISM

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Mrs. Flores, a psychologist licensed in Arizona, was threatened with loss of her license. She was not charged with incompetence or unprofessional conduct but with non-payment of child support.[1] She was the first individual targeted by an Arizona child support enforcement mechanism, Senate Bill (S.B.) 1382,[2] and the first to bring a legal challenge to the statute.[3] She lost her fight when an Arizona Superior Court Judge refused to protect her license holding the statute constitutional.[4]

State legislatures across the country have invested substantial time, energy and resources devising methods to collect child support from delin-

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1. As of November, 1990, Mrs. Flores owed $16,928.00 in back child support. Review Hearing, Theresa Pulley v. John Pulley, No. D-61990 (Ariz. Super. Ct. Dec. 12, 1990).

2. S.B. 1382, 39th Leg., 1990 Ariz. Legis. Serv. 309 [hereinafter S.B. 1382], amended the following sections of the Arizona Revised Statutes: 12-2452, 25-320 and 32-3501 (currently renumbered as 32-3701). Therefore, this Note will refer to S.B. 1382, when discussing the amended sections rather than addressing separately the various statutory provisions.

3. Lourdes Medrano Leslie, *Child-support Enforcers Target 1st Professional*, ARIZ. DAILY STAR, Jan. 6, 1991, at B1, col. 1. Mrs. Flores challenged S.B. 1382 as a violation of the Equal Protection Clause in the Fifth and Fourteenth Amendments to the United States Constitution, the Eighth Amendment Cruel and Unusual Punishment Clause, and ARIZ. CONST. art. II, § 313. She requested declaratory and injunctive relief. Verified Complaint, Flores v. Board of Psychologist Examiners, No. CV 90-33689 (Ariz. Super. Ct. April 24, 1991).

4. *Flores*, No. CV 90-33689. The court had no difficulty finding the statute constitutional because "[i]t is without question in the State's best interest to protect the welfare of its children by enacting legislation which enforces a parent's legal and moral obligation to support his or her minor children." *Id.* at 34. The court found the legislation a reasonable child support enforcement mechanism because it closed "a loophole in child support enforcement laws." *Id.* The court also found the legislation to be rationally related to professional character and fitness because "[i]f a professional is inclined to financially abandon her own flesh and blood, it is not unrealistic to assume that this same professional would turn away from her own client for little or no justification." *Id.* at 35. Ms. Flores' attorney, Ethan Steele, was unsurprised by this outcome stating, "[u]nder different circumstances, people might be disturbed or offended because of the statute.... But in a case where somebody doesn't pay child support, people are very unsympathetic. There are very few people out there who shed a tear over the decision." Lourdes Medrano Leslie, *Psychologist Loses Challenge to Sanctions for Delinquent Child Support*, ARIZ. DAILY STAR, May 9, 1991, at B4, col. 1.

quent parents.[5] Arizona's legislature has grappled with the issue for several years.[6] In June 1990, the Arizona legislature enacted a unique and controversial child support enforcement mechanism, which applies only to self-employed licensed professionals who are not subject to wage withholding.[7] Senate Bill 1382 denies, suspends, or revokes professional licenses of non-custodial parents who owe outstanding child support.[8]

This Note analyzes whether S.B. 1382 complies with the due process clause of the Fourteenth Amendment.[9] First, Section I traces the slow historical development of child support enforcement, from early non-recognition of

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5. For example, Suffolk County, New York implemented Education, Rehabilitation and Support Enforcement (ERASE) in April 1989. *Suffolk County, New York, Targets Hard Core Delinquents*, CHILD SUPPORT REP. (U.S. Dep't of Health & Human Servs., Office of Child Support Enforcement, Washington, D.C.), Oct. 1990, at 1, 5. ERASE educates delinquent parents about the importance of paying support and assists individuals unable to pay due to drug and alcohol abuse, mental health concerns and unemployment. *Id.* at 5. Through October 1990, 252 program participants paid support of over $300,000. *Id.* at 1.
Similarly, the Montgomery County, Tennessee Child Support Unit increased collections from $28,000 in 1982 to almost $2 million in 1990 from a transient population of migrant workers and servicemen. Lurene Sanders & Art Bieber, *From the Worst to the Best in Tennessee*, *id.* at 4. Additional staff, office equipment, and other program changes produced these results. *Id.* Other states have also advertised delinquent parents' identities through the media and posters, reported child support debts to credit bureaus, and intercepted lottery winnings to increase collections. *See generally* Mary Claire Arant, *Cracking Down on Delinquent Dads*, 16 ST. LEGIS. 32 (Sept. 1990).

6. In 1983, the Arizona legislature amended the Family Responsibility Act to allow for an *ex parte* order for assignment of wages (ARIZ. REV. STAT. ANN. § 12-2454.01 (1983 & Supp. 1991)), the provision of consumer credit reports (*id.* § 12-2459), and the disclosure of residence and business addresses of obligated parents by employers (*id.* § 12-2460). These and other amendments became effective on July 27, 1983. *See generally* Robert L. Gottsfield, *The Child Support Problem: Credible Threat and Use of Incarceration Works: Recent Tougher Bench and Bar, Legislative and Executive Responses*, 19 ARIZ. BAR J. 12 (1984). In August 1990, the legislature adopted a plan to prosecute for criminal contempt parents who were behind in payments of over $10,000. *State to Prosecute Parents for Non-child Support*, ARIZ. DAILY STAR, Aug. 30,.1990, at B5, col. 1. A Maricopa County Superior Court judge ruled the law unconstitutionally vague on January 15, 1992. Julie Szekely, *Child Support Services Increases Collections*, TUCSON CITIZEN, Jan. 18, 1992, at 5A, col. 3. Susan Agrillo, supervising attorney of the Pima County Attorney's Child Support Division, however, does not expect this ruling to negatively impact collections in Pima County because she predicts that higher courts will uphold the statute, and the Division does not make large collections as a result of filing criminal charges. *Id.*

7. Wage withholding is the most effective collection mechanism. *See* MARGARET CAMPBELL-HAYNES ET AL., CHILD SUPPORT REFERENCE MANUAL (1989). The authors conclude that "[i]ncome withholding is the most effective enforcement mechanism when an obligor has a regular source of income because it allows for the collection of current support and arrearages." *Id.* § VII, at 3. In Arizona, Maricopa County provides an example of this mechanism's success. In February 1990, the county reported a $23 million or 37% increase in child support collections resulting from mandatory wage withholding over a two year period. Letter from Judith Allen, Clerk of the Superior Court & B. Michael Dann, Chief Presiding Judge, to Senator John Mawhinney of the Arizona legislature (Feb. 27, 1990) (on file with the *Arizona Law Review*). A different enforcement mechanism is needed for self-employed professionals because they do not earn wages, and are therefore immune from wage withholding.

8. *See supra* note 2 and accompanying text.

9. "Nor shall any State deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV.

the support obligation to the present advancements in collection efforts. Next, Section II establishes the modern context in which the Arizona legislature enacted S.B. 1382, as well as describing the law's provisions and procedures. Finally, Section III raises potential federal constitutional challenges to S.B. 1382 and predicts their success based upon challenges made to analogous child support methods and licensure suspension cases.

In conclusion, S.B. 1382 will likely survive any constitutional challenge and prove to be an effective collection mechanism for those able but unwilling to pay support. The law, however, is misguided because of the harsh consequences it creates for individuals who are unable to pay support. It will deny them licenses and the opportunity to work. S.B. 1382, thus, will not collect support from these individuals; instead, the law will punish them. When the law becomes nothing more than a mechanism to punish delinquent parents, it loses its effectiveness as a child support enforcement mechanism, and both the delinquent parents and the children suffer. Society must intervene and provide for the children when the non-custodial parents cannot.[10] Otherwise the real goal of a law like S.B. 1382 is not to help the child but to punish the parent.

I. HISTORICAL DEVELOPMENT OF CHILD SUPPORT ENFORCEMENT

The modern zeal for child support enforcement developed slowly. Prompted largely by economic concerns, the federal government sought greater and more uniform state participation in the enforcement effort.[11]

Courts did not recognize the non-custodial parent's duty to pay child support until the end of the nineteenth century.[12] Thereafter, little concern for enforcing the delinquent parent's support obligation arose until the mid-1970's because government was providing the necessary support.[13] At this time, Congress enacted the Child Support Enforcement program (CSE)[14] to curtail

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10. *See* Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 1989 U. ILL. L. REV. 367. "Where we are now going [regarding child support enforcement] is wrong. ...[C]hildren have a right to a decent start in life. The right is the obligation of the father and equally of the mother, and in recognition of a primary and direct responsibility, equally the obligation of society." *Id.* at 398.

11. *See infra* text accompanying notes 14-23.

12. Donna Schuele, *Origins and Development of the Law of Parental Child Support*, 27 J. FAM. L. 807, 825 (1988-1989). According to Schuele, recognition of the noncustodial parent's duty to support the child did not occur until the end of the 19th century "because midway through the nineteenth century, legislatures began to settle the fundamental questions of the nature and extent of child support duties. Comprehensive divorce codes were created ... courts simply could order a father to pay child maintenance upon divorce." *Id.*

13. *See* Krause, *supra* note 10, at 370. "Twenty-five years ago, child support was not a public issue ... since the AFDC system was paying for the child, support enforcement seemed quite unnecessary." *Id.* at 370. As a result, the absent parent's support obligation was not often pursued, and when it was, the courts did not take it seriously and imposed only "token obligations, such as $10 per month." *Id.* at 371.

14. Social Security Act, Title IV-D, 42 U.S.C. §§ 651-667 (1988).

the mushrooming cost of Aid to Families with Dependent Children (AFDC).[15] CSE established a national child support program by providing incentives for state participation[16] and by requiring states to perform specific services to improve collection efforts.[17] State collection efforts, however, remained irregular.[18]

Congress responded by enacting the Child Support Enforcement Amendments, mandating states to use wage withholding and other proven enforcement mechanisms to collect support.[19] This program has successfully increased collections.[20]

Despite the program's success, approximately three million women and their children lived below the poverty level in 1986, further increasing AFDC expenditure levels.[21] As a result, Congress enacted the 1988 Family Support

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15. Congress enacted Title IV-A of the Social Security Act, 42 U.S.C. §§ 601-15 (1988) in 1935, creating the AFDC program. CAMPBELL-HAYNES, *supra* note 7, § III, at 1. This was an effort to provide some uniformity among state child support programs. *Id.* According to an address by Craig Hathaway, Office of Child Support Enforcement, Dep't of Health and Human Servs., at the Western Interstate Child Support Enforcement Council Annual Conference (Albuquerque, N.M. 1989), by 1973, the annual cost to the federal government of the AFDC program was $6.9 billion.

16. States were required to establish child support programs, referred to as IV-D programs, in order to receive federal AFDC funds. CAMPBELL-HAYNES, *supra* note 7, § III, at 2. As an additional incentive, states received 12% of collections made on behalf of AFDC families. Lowell H. Lima & Robert C. Harris, *The Child Support Enforcement Program in the United States, in* CHILD SUPPORT FROM DEBT COLLECTION TO SOCIAL POLICY 20, 27 (Alfred J. Kahn & Sheila B. Kamerman eds. 1988) [hereinafter CHILD SUPPORT].

17. States were required to provide the following services to both AFDC and non-AFDC families who sought assistance: location of absent parents, establishment of paternity, establishment of child support obligation, enforcement of support obligations, and collection of support payments. Lima & Harris, *supra* note 16, at 27. Non-AFDC families were included in order to increase support from delinquent parents and to decrease the need for public assistance. *Id.* at 26.

18. "Title IV-D did not require states to change any of their laws; states were to provide the four basic IV-D services (location of absent parents, establishment of paternity, establishment of a support award, and enforcement of a support award) to the extent they were able to under existing law. The result was dramatically uneven collections among the states." CAMPBELL-HAYNES, *supra* note 7, § III, at 2.

19. 42 U.S.C. §§ 651-667 (1988). States are required to utilize procedures that have been proven to work in other states if they wish to continue to receive AFDC funds. CAMPBELL-HAYNES, *supra* note 7, § III, at 2. Income withholding is activated when child support payments are in arrears by one month. *Id.* Other procedures that can be used for enforcement are interception of state income tax refunds, liens against property, posting of securities or bonds, and reporting to consumer credit agencies. *Id.* These procedures impact the self-employed who do not receive wages, but who have assets. *Id.* § VII, at 2.

20. Lima & Harris, *supra* note 16, at 41. Collections have increased from $2 billion in 1983 to $2.7 billion in 1985. The authors add, however, that although total program revenue has increased since the mid-70's, administrative costs rose more rapidly than AFDC collections between 1977 and 1981. *Id.* Since that time, collections have continued to increase and expenditures have slowed. *Id.* Some states are also better than others in securing collections. *Id.* The national average was 7.3% for recovering support, with individual state performances ranging from 16.1%, the average of the ten best states, to 4.0%, the average of the ten worst states. *Id.*

21. CAMPBELL-HAYNES, *supra* note 7, §VII at 1.

Act (FSA) to provide a more powerful collection tool.[22] FSA requires states to withhold wages immediately upon the issuance of every new court order for support.[23] This mechanism, however, only assures child support payments from wage-earners. Reaching the self-employed remains a problem.[24]

II. ARIZONA'S PROGRAM

Arizona recently addressed the problem of reaching self-employed individuals who owe child support. A new law targets self-employed professionals who fail to comply with court-ordered child support. S.B. 1382 specifies procedures to revoke the licenses of individuals registered in Arizona if they are at least one month behind in child support payments.[25]

A petition to enforce overdue child support triggers S.B. 1382.[26] The law allows "any person, agency, or entity providing support for a child or having physical custody of such child" to file the petition.[27] The superior court judge initially determines the non-custodial parent's arrearage in court-ordered child support.[28] If the parent is one month or more behind in payments and has or is seeking a professional license, the court may order the appropriate licensing board to hold a hearing concerning license suspension.[29] Within thirty days of the court order, the board must hold a hearing to determine whether the non-custodial parent is licensed and behind on child support

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22. Pub. L. No. 100-485, 102 Stat. 2343 (codified at 42 U.S.C. § 669 (1988)). In 1988, state collection efforts netted a total of $4.6 billion. Arant, *supra* note 5, at 32. Individual states boasted increases in child support ranging from a low of 41% in Connecticut to a high of 461% in Virginia. *Id.* Arizona collections at 64% were in the low range. *Id.*

23. The Act requires immediate income withholding for court orders that are issued or modified on or after November 1, 1990 for all AFDC individuals and non-AFDC individuals who are enrolled in the IV-D program, and in all child support cases issued or modified on or after January 1, 1994. 42 U.S.C. § 669; CAMPBELL-HAYNES, *supra* note 7, § III, at 7. Exceptions are made where there is good cause or the parties have reached an alternative agreement. Exceptions, however, are rare. Address by Craig Hathaway, *supra* note 15.

24. *See* CAMPBELL-HAYNES, *supra* note 7, § VII, at 1-2. Self-employed individuals pay themselves income rather than receive wages from employers. Their income, therefore, cannot be garnished by current child support enforcement mechanisms. This creates the loophole to which the *Flores* court referred. No. CV90-33689 (Ariz. Super. Ct. April 24, 1991).

25. ARIZ. REV. STAT. ANN. § 12-2452(D) (Supp. 1991). Arizona law contains a list of those professions licensed by the state and affected by S.B. 1382. *Id.* §§ 32-101 to -3701. The affected professions range from such diverse occupations as barbers and cosmetologists to architects and physicians. Attorneys, who are regulated by the Arizona Supreme Court rather than the legislature, are not included. The Arizona Supreme Court, however, has recently promulgated similar child support enforcement regulations governing attorneys. ARIZ. SUP. CT. R. 51 adds "Willful violation of a court order of a state, territory, or district of the United States including child support orders" to the list of grounds for discipline of attorneys.

26. ARIZ. REV. STAT. ANN. § 12-2452(D) (Supp. 1991).

27. *Id.* The court orders the non-custodial parent to attend the hearing. *Id.*

28. *Id.*

29. This order is discretionary and in addition to other enforcement action the court may take. *Id.* The judge's referral to the licensing board is a critical step in the procedure. Once the order is issued, the statute requires the board to suspend the license unless probation is indicated or the individual has paid all arrears before the licensure suspension hearing. ARIZ. REV. STAT. ANN. § 32-3701(A) (Supp. 1991).

payments.[30] If the individual fails to pay arrearages in full before the hearing, the board must either suspend the individual's license or place the individual on probation.[31] Before the board can lift the suspension, terminate probation, or issue a new license, the individual must comply with all court-ordered payments.[32]

S.B. 1382 passed through the legislature with little opposition.[33] Its few critics considered the bill too punitive, finding no link between licensure and non-payment of child support.[34] Others criticized the bill because it fails to reach self-employed, unlicensed individuals.[35] Still others were concerned that the law would hurt divorced individuals trying to support new families.[36]

Although S.B. 1382 received almost unanimous support in the legislature,[37] it could be subject to future constitutional challenges.[38] Critics could attack S.B. 1382 as violative of the due process clause of the Fourteenth Amendment because it deprives individuals of their licenses without providing constitutionally adequate procedures. Opponents could also contend that S.B. 1382 is an unreasonable licensure regulatory mechanism because compliance with child support obligations bears no rational relationship to professional competence. Furthermore, critics may argue that the state's interest in collecting child support is not compelling enough to overcome the individual's interest in supporting a current family by maintaining an occupational license.

III. CONSTITUTIONAL CHALLENGES TO S.B. 1382

The Fourteenth Amendment to the United States Constitution guarantees an individual's freedom from deprivation of life, liberty, or property by state action without due process of the law.[39] Due process challenges to state legislation are twofold. The first arises when a state violates an individual's substantive due process rights.[40] Second, an individual can bring a procedural

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30. *Id.*

31. Probation is provided for up to two years when suspension would create an extreme hardship to either the licensee or the people he or she serves. ARIZ. REV. STAT. ANN. § 32-3701(B) (Supp. 1991).

32. If the probationer does not provide monthly proof of compliance with court-ordered support, the license is automatically suspended. ARIZ. REV. STAT. ANN. § 32-3701(D) (Supp. 1991).

33. Telephone interview with Arlene Yager, Administrative Assistant to Sen. John Mawhinney (Sept. 13, 1990); *Minutes of the Arizona Senate Committee on the Judiciary* (March 5, 1990), at 13-14; *Minutes of the Arizona House Committee on the Judiciary* (April 2, 1990), at 3-4; *Minutes of the Arizona House Committee on Human Resources and Aging* (April 5, 1990), at 4-5.

34. Telephone interview, *supra* note 33.

35. *Id.*

36. *Id.*

37. *Id.*

38. Although Mrs. Flores, the psychologist who lost her license at the superior court level, lost this battle, she may appeal. *Flores*, No. CV90-33689. Other individuals may also bring future challenges.

39. "[N]or shall any State deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, § 1.

40. According to Nowak, Rotunda, and Young, substantive due process "may protect certain fundamental rights or void arbitrary limitations of individual freedom of action." JOHN

due process challenge when a state deprives that individual of a constitutionally protected life, liberty, or property interest through unfair procedures.[41] Opponents may challenge S.B. 1382 on both grounds because arguably the new law infringes on both substantive and procedural rights. Before one can consider the validity of these constitutional challenges, however, one must first determine whether possession of a professional license or employment is a constitutionally protected interest.

A. The Due Process Threshold Question of Liberty or Property

Government action which threatens a constitutionally protected liberty or property interest activates due process.[42] Therefore, individuals who have had their licenses revoked or have been denied the right to work may assert a due process claim only if the Constitution protects those rights. An analysis of Supreme Court case law reveals that the right to possess a professional license is a constitutionally protected property interest and is therefore subject to due process analysis.[43]

The United States Supreme Court initially interpreted the due process clause as protecting only "rights" and not "privileges."[44] This doctrine gave the states broad discretion to deprive individuals of interests such as those found in occupational licenses.[45]

The Court later shifted away from its earlier rights/privileges analysis. In *Bell v. Burson*, the Court provided individuals more protection from state action by requiring constitutional protections for "important" interests regard-

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E. NOWAK ET. AL., CONSTITUTIONAL LAW § 13.1, at 452 (3d ed. 1986). The authors also state, "[C]ourts use the concept of substantive due process to review the ability of government to restrict the freedom of action (regarding life, liberty or property) of all persons." *Id.* § 11.4, at 350. The authors provide an example as follows: "[I]f a state prohibited all persons from purchasing or using a certain drug or medicine, a challenge to that law would be based on substantive due process." *Id.*

41. The Due Process Clause also guarantees that "each person shall be accorded a 'certain' process if they are deprived of life, liberty or property ... [t]he individual has a right to a fair procedure." *Id.*

42. "The requirements of due process apply only to the deprivation of interests encompassed within the Fourteenth Amendment's protection of liberty and property...." Board of Regents v. Roth, 408 U.S. 564, 569 (1972). A deprivation of life also invokes due process protection. U.S. CONST. amend. XIV, § 1. Since loss of an occupational license does not implicate this type of right, the loss of life is not addressed in this Note.

43. *See infra* text accompanying notes 44-96.

44. NOWAK, *supra* note 40, §13.2, at 453. Rights, which were viewed as entitlements, could not be denied without providing due process, but privileges, which were not entitlements, could be abrogated without any process at all. *Id.* The authors provide the following example: "[W]hen a policeman lost his job for engaging in political activities, the Supreme Court of Massachusetts upheld the dismissal. As Justice Oliver Wendell Holmes noted: 'The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.'" *Id.*

45. *Id.* In *Barsky v. Board of Regents*, the United States Supreme Court upheld the suspension of a physician's license because the Court considered it a privilege "lawfully prohibited by the state except upon the conditions it imposes." 347 U.S. 442, 451 (1954). According to Van Alstyne, the right-privilege distinction "excuse[d] government from having to provide any justification for forbidding ... (... those to whom it extended any kind of license or assistance) from pursuing what would otherwise be protected by the ... fourteenth amendment." William W. Van Alstyne, *Cracks in the "New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 445 (1977).

less of the right-privilege distinction.[46] In *Bell*, the Court protected an individual's interest in his driver's license.[47] Bell was a minister who needed his driver's license in order to serve three rural counties in Georgia.[48] After Bell was involved in an accident, his driver's license was suspended pursuant to a Georgia statute.[49] The Court held the statute violated the minister's procedural due process rights because he was deprived of an "important" interest, "essential in the pursuit of (his) livelihood," without a hearing.[50]

The next year, the Court took a more restrictive stance in *Board of Regents v. Roth*.[51] Roth was hired to teach for one year at Wisconsin State University-Oshkosh.[52] The University denied him employment after the first year without providing any justification for its action or an opportunity for a hearing.[53] Roth challenged the University's decision as violating procedural due process.[54] The district court granted summary judgment for Roth on the procedural claim and ordered the University to provide a hearing and an explanation for his dismissal.[55] The Seventh Circuit Court of Appeals affirmed the lower court's ruling.[56]

The United States Supreme Court reversed the summary judgment and held that Roth was not deprived of a constitutionallly protected interest.[57] He did not have a property interest in continued employment, but rather only a unilateral expectancy.[58] The Court designated only liberty and property as constitutionally protected interests[59] and defined property narrowly under state

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46. 402 U.S. 535 (1971). "(T)he general proposition (is) that relevant constitutional restraints limit the state power to terminate an entitlement whether (it) is denominated a 'right' or a 'privilege.'" *Id.* at 539.

47. *Id.*

48. *Id.*

49. *Id.* The statute was the Motor Vehicle Safety Responsibility Act, GA. CODE. ANN. § 92A-6 (1979). If a driver was involved in an accident resulting in an injury and could not provide proof of ability to cover the damage, that individual's license was suspended, regardless of fault. *Id.*

50. *Bell*, 402 U.S. at 539. The Court explained: "Once licenses are issued ... their continued possession may become *essential in the pursuit of a livelihood*. Suspension of issued licenses thus involves state action that adjudicates *important interests* of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." *Id.* (emphasis added).

51. 408 U.S. 564, 570 (1972) ("the range of interests protected by procedural due process is not infinite").

52. *Id.* at 568.

53. *Id.* at 569.

54. Roth also claimed a First Amendment violation. *Id.* at 568.

55. *Id.* at 569.

56. *Id.*

57. *Id.* "[T]he respondent surely had an abstract concern in being rehired, but he did not have a *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment." *Id.* at 578 (emphasis in original).

58. The Court stated: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577.

59. *Id.* at 569.

law.[60] Subsequent cases continued to defer to state law definitions of constitutionally protected property interests.[61] Thus, *Roth* permits states to differentiate constitutionally protected property interests from mere unilateral expectancies, which are not subject to constitutional protections.

The Supreme Court addressed the question of occupational licenses as property in *Barry v. Barchi*.[62] The New York State Racing and Wagering Board summarily suspended Barchi's horse trainer's license pursuant to state law.[63] The statute allowed license suspensions to remain in effect indefinitely until the Board issued a final order.[64] Barchi brought a procedural due process claim against the state's summary procedure.[65] The district court found the law violated procedural due process because it provided neither a pre-suspension nor a prompt post-suspension hearing.[66] The case went on direct appeal to the United States Supreme Court.[67] The Court affirmed in part, reversed in part, and remanded.[68]

The Court upheld the summary suspension and post-suspension hearing, but concluded that Barchi was due a "sufficiently timely" post-suspension hearing that the law did not allow.[69] The Court found that state law gave Barchi a property interest in his license.[70] The law allowed Barchi to keep his license absent certain circumstances, thereby creating this property interest.[71]

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60. *Id.* at 577. "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.*

61. *See, e.g.*, Perry v. Sindermann, 408 U.S. 593 (1972) (teacher could have property interest in his employment based on tenure implicit in faculty guide and other university guidelines, even though no explicit tenure system existed); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) (security guard classified as civil servant under state law had property interest in his job and should have been afforded "constitutionally adequate procedures" before dismissal). Other cases, such as Arnett v. Kennedy, 416 U.S. 134 (1974), and Bishop v. Wood, 426 U.S. 341 (1976), addressed situations when state law not only provided the basis for a property interest in employment, but also mandated the actual termination procedure. *Loudermill* finally rejected this "bitter with the sweet" approach, stating that due process "is conferred, not by legislative grace, but by constitutional guarantee. ...[The legislature] may not constitutionally authorize the deprivation of [a property] interest, once conferred, without appropriate procedural safeguards." *Loudermill*, 470 U.S. at 541.

62. 443 U.S. 55 (1979).

63. *Id.* at 59. The New York State Racing and Wagering Board suspended Barchi's license after post-racing testing of his horse detected drugs. *Id.* Under New York law, this finding established a rebuttable presumption that the trainer was responsible. *Id.*

64. *Id.* at 60. The Board was required to issue a final order within 30 days after a post-suspension hearing for which no time-frame was set. *Id.* at 61.

65. *Id.*

66. *Id.* at 62-63.

67. *Id.* at 63.

68. *Id.* at 68.

69. *Id.* at 65.

70. *Id.* at 64.

71. *Id.* "[S]uspension may ensue only upon proof of certain contingencies.... Accordingly, state law has engendered a clear expectation of continued employment of a license absent proof of culpable conduct by the trainer." *Id.* at 64 n.11. The law allowed the Board to suspend a license if a horse was drugged, and the trainer negligently failed to prevent the drugging. *Id.*

Thus, state law gave Barchi an entitlement to his license by limiting the Board's discretion to revoke licenses.[72]

Arizona law limits licensing boards' discretion to revoke occupational licenses. Title 32 of the Arizona Revised Statutes specifies reasons for licensure suspension for the various occupations it regulates.[73] Therefore, as in *Barchi*, Title 32 creates an entitlement or property interest.[74] Although Arizona's statutory language seems to create a constitutionally protected property interest in an occupational license, it is also possible that a liberty interest exists in the right to work.

In *Meyer v. Nebraska*,[75] the United States Supreme Court held unconstitutional a Nebraska statute that allowed only the English language to be taught to public school children below the eighth grade. The Court found that the statute unconstitutionally infringed upon a protected liberty interest and was not reasonably related to a legitimate state purpose.[76] The Court defined liberty interests broadly as "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[77] The right to work, although not the liberty interest addressed by the Court in this case,[78] was included as part of a long list of recognized liberty interests.[79]

In *Schware v. Board of Bar Examiners*,[80] the United States Supreme Court held that the New Mexico State Bar's refusal to allow an individual to practice law denied the applicant due process. The New Mexico Board of Bar Examiners denied Rudolph Schware admission to the State Bar because he lacked moral character.[81] The Board based its finding primarily on Schware's past Communist Party affiliation and use of aliases.[82] The Court reasoned that Schware was morally fit to practice law based on the facts and had been denied due process.[83] The Court did not specifically analyze

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72. "Barchi ... has asserted a legitimate claim of entitlement...." *Id.*

73. For example, regarding architects, § 32-128 provides that the board may take disciplinary action for the following reasons:

1. Fraud or misrepresentation in obtaining a certificate.
2. Gross negligence, incompetence, bribery, or other misconduct in the practice of his profession.
3. Aiding and abetting an unregistered person to evade the provisions of this chapter.
4. Violation of the rules and regulations of this board.

ARIZ. REV. STAT. ANN. § 32-128(B) (1986). S.B. 1382 provides the additional reason of child support arrearages. *See* ARIZ. REV. STAT. ANN. § 12-2452(D) (Supp. 1991).

74. 443 U.S. at 64.

75. 262 U.S. 390 (1923).

76. *Id.* at 403. The protected liberty interest was "education and the acquisition of knowledge." *Id.* at 400.

77. *Id.* at 399.

78. *Id.*

79. *Id.*

80. 353 U.S. 232 (1957).

81. *Id.* at 234-35.

82. *Id.* at 238. Schware used aliases to prevent anti-semitism from interfering with his job and his efforts to unionize his workplace. *Id.* at 236.

83. *Id.* at 247. "There is no evidence in the record which rationally justifies a finding that Schware was morally unfit to practice law." *Id.* at 246-47.

whether a liberty or property interest was involved,[84] and refused to characterize employment as either a right or a privilege.[85] The Court required states to provide due process when denying an individual the right to practice an occupation[86] regardless of the "right-privilege" distinction.[87]

The Supreme Court mandated due process protection for an individual seeking admission to the bar in *Willner v. Committee on Character and Fitness*.[88] Nathan Willner passed the bar exam in 1936 but failed the certification of character and fitness to practice law.[89] The New York State Bar denied Willner's application without providing reasons for denial or a hearing.[90] Citing *Schware*, the Court found that the state must meet procedural due process requirements, including notice of the reasons for denial and a hearing, before it can exclude an individual from an occupation.[91]

A lawyer seeking admission to the Arizona Bar is also entitled to due process protections.[92] In *Application of Jack Levine for Admission to the State Bar of Arizona*, an attorney appealed from a denial of admission to the Bar.[93] The Arizona Supreme Court granted him admission,[94] reasoning that the practice of an occupation was a right[95] worthy of due process protection.[96]

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84. *Id.*

85. *Id.* at 239. The Court stated: "We need not enter into a discussion whether the practice of law is a 'right' or 'privilege'." *Id.* at 239 n.5.

86. "A state cannot exclude a person from the practice of law or from any other occupation in a manner that contravenes the Due Process ... Clause of the Fourteenth Amendment." *Id.* at 238-39.

87. "Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons." *Id.* at 239 n.5.

88. 373 U.S. 96, *reh'g denied*, 375 U.S. 950 (1963).

89. *Id.* at 100.

90. *Id.* at 101.

91. *Id.* at 102.

92. *See In re* Levine, 97 Ariz. 88, 397 P.2d 205 (1964).

93. *Id.* at 89, 397 P.2d at 206. He was denied admission because he did "not possess the sense of public responsibility which a lawyer should have." *Id.* at 90, 397 P.2d at 206. Mr. Levine had previously worked for the FBI in New York. After investigating, the Committee on Examination and Admissions labeled him a "dissembler" because while seeking reinstatement, he had pledged loyalty to the Bureau. *Id.* at 93, 397 P.2d at 208. After he was denied reinstatement, however, he made false charges against the Bureau. *Id.* at 90, 397 P.2d at 206.

94. Id. at 89, 397 P.2d at 206. The court did not agree that Levine lacked the moral character to practice law although he may have made some factually false statements in his criticism of the FBI. *Id.* at 93, 397 P.2d at 208. The court reasoned that the First Amendment protects speech criticizing the conduct of public officials without first guaranteeing the truth of all statements. *Id.* at 97, 397 P.2d at 211.

95. *Id.* at 90-91, 397 P.2d at 206-07. The court explained: "[W]e have held the practice of law rises above that of a mere privilege. For those who have the necessary qualifications, it is a right. The right to practice law is neither greater nor less than the right to engage in other occupations...." *Id.* (citation omitted).

96. The court stated: "[W]e believe that there is inherent in our democratic system the right to compete freely on an equal basis for the material goods of existence and that the right is protected by the due process and equal protection clauses of the Fourteenth Amendment." *Id.* at 91, 397 P.2d at 207.

Due process protections apply only when state action infringes a constitutionally protected liberty or property interest. The United States Supreme Court considers the right to work or possess a license as both a protected property interest and a liberty interest. Thus, an individual whose license has been revoked by S.B. 1382 may assert a due process claim, because the revocation affects his or her right to work.

B. Procedural Due Process

Critics may attack the procedures in S.B. 1382 as violative of the due process clause of the Fourteenth Amendment because the right to possess one's license is a protected liberty or property interest. A procedural due process claim arises when the government deprives an individual of a liberty or property interest without notice and an opportunity to be heard.[97] Notice must provide the individual with a chance to raise objections.[98] Some courts have interpreted notice to include a list of all possible defenses.[99]

Any claim that S.B. 1382 does not meet procedural due process requirements will most likely fail because it provides delinquent parents both notice and a hearing.[100] Furthermore, a challenge that notice is constitutionally inadequate for failing to list all possible defenses will also likely fail. The Ninth Circuit Court of Appeals, although possibly requiring a listing of all possible defenses in a tax-intercept case,[101] did not mandate this requisite in a tort judgment garnishment.[102]

Constitutionally sound procedures require notice and a hearing either before or after the deprivation of the liberty or property interest.[103] Pre-

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97. Fuentes v. Shevin, 407 U.S. 67, *reh'g denied*, 409 U.S. 902 (1972). In *Fuentes*, the United States Supreme Court invalidated two state statutes which allowed for a summary seizure of an individual's property based only upon approval by a clerk. *Id.* at 96-97. The Court held that the state must provide notice and an opportunity to be heard before depriving an individual of his or her property. *Id.* The Court did not mandate the type of notice or hearing required, leaving that to each state legislature. *Id.*

98. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

99. *See, e.g.*, Wagner v. Duffy, 700 F. Supp. 935, 942-43 (N.D. Ill. 1988).

100. If an individual is at least one month in arrears on child support and is licensed in Arizona, the court may order a licensure suspension hearing. The licensing board then has thirty days to provide the licensee notice and a hearing. ARIZ. REV. STAT. ANN. §§ 12-2452, 32-3701 (1986 & Supp. 1991).

101. The "tax-intercept" cases involve the seizure of an individual's federal tax refund to pay overdue child support. The court distinguished this line of cases because the tax-intercept program provides few procedural protections and implicates the rights of the innocent spouse who files jointly with the recalcitrant spouse. *See* Duranceau v. Wallace, 743 F.2d 709, 713 (9th Cir. 1984).

102. The *Duranceau* court did not follow the line of tax-intercept cases requiring more extensive notice-giving procedures because the statute in *Duranceau* provided "more elaborate notice than most of the statutes challenged in the cases concerning post-judgment seizures." *Id.* Duranceau's notice contained statutory excerpts including notice of a wage exemption that did not apply to the garnishment of his tort judgment, and a statement that "a debtor may seek judicial relief 'on the basis that no support is due and owing,'" thus providing adequate notice. *Id.* at 713-14.

103. *See Fuentes*, 407 U.S. at 96 (requiring notice and a hearing before replevin of assets); Mitchell v. Grant, 416 U.S. 600 (1974) (judicial control of the process plus immediate post-seizure hearing provides sufficient due process in sequestration of assets).

judgment seizures have traditionally mandated both notice and a hearing before the property is seized.[104] No similar requirement pertains to post-judgment seizures because the judgment creditor has already appeared in court and been heard.[105] Although the validity of post-judgment seizure procedures has been challenged,[106] Arizona applies minimal due process procedures to post-judgment garnishments,[107] unless the debtor's assets are protected by a state or federal exemption.[108]

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104. *See, e.g.*, the following cases addressing pre-judgment seizure of property: Connecticut v. Doehr, 111 S. Ct. 2105 (1991) (absent a showing of exigent circumstances, a statute regarding pre-judgment attachment of real estate must provide for notice and a hearing before seizure in order to conform with due process requirements); North Georgia Finishing v. Di-Chem, 419 U.S. 601 (1975) (requiring notice and hearing or protection similar to that required in *Mitchell* before garnishment of bank account could occur); *Fuentes*, 407 U.S. 67 (requiring a hearing prior to pre-judgment replevin of assets); Sniadach v. Family Fin. Corp, 395 U.S. 337 (1969) (requiring a hearing prior to wage garnishment).

105. Endicott-Johnson Corp v. Encyclopedia Press, 266 U.S. 285 (1924). The Supreme Court did not require notice or a hearing before a writ of garnishment was issued because the judgment-debtor had been "granted an opportunity to be heard and has had his day in Court" at the Judgment. *Id.* at 288.

106. *See* Douglas B. Neagli & Matthew B. Troutman, *Constitutional Implications of the Child Support Enforcement Amendments of 1984*; 24 J. FAM. L. 301, 305 (1986), in which the authors note the Supreme Court's departure from the categorical analysis reflected in *Endicott*," and movement toward balancing competing interests to determine procedural due process requirements. They also discuss lower court cases that "have also substantially eroded the Endicott-Johnson analysis." *Id.* at 308. *But see* Diana Gribbon Motz & Andrew H. Baida, *The Due Process Rights of Post-Judgment Debtors and Child Support Obligors*, 45 MD. L. REV. 61, 63 (1986), where the authors contend, "It is not at all clear that this [rejection of the *Endicott-Johnson* rationale by the Supreme Court] is so." However, they acknowledge the fact that "recent cases reject the Endicott-Johnson rationale," with Arizona being an exception. *Id.* at 67. *See* Neeley v. Century Fin., 606 F. Supp. 1453 (D. Ariz 1985).

107. *See Neeley*, 606 F. Supp. at 1469-70. In *Neeley*, a class action suit challenged Arizona's post-judgment garnishment procedures, which did not provide the judgment debtor with any notice or a prompt post-judgment hearing before seizure of his assets. The court stated that since *Endicott* had never been overruled by the Supreme Court, "it must still be considered the law." *Id.* at 1462.

No further notice or opportunity for a hearing was required in *Huggins v. Deinhard*, where the court ordered a child support judgment debtor's bank account garnished in order to pay overdue support. 134 Ariz. 98, 103, 654 P.2d 32, 37 (Ct. App. 1982). In *Knight v. DeMarcus*, no further notice was required in order to execute a judgment, once notice of the judgment was properly given. 102 Ariz. 105, 107, 425 P.2d 837, 839, *cert. granted sub nom.* Hanner v. DeMarcus, 389 U.S. 926 (1967), *cert. dismissed*, 390 U.S. 736, *reh'g denied*, 392 U.S. 917 (1968).

The Arizona Supreme Court, in *Sanchez v. Carruth*, considered a due process challenge to a writ of garnishment as a means of enforcing child support provisions of a divorce decree. 116 Ariz. 180, 568 P.2d 1078 (1977). The court held that due process did not require notice and an opportunity for a hearing because the garnishment was based upon a prior judgment establishing the child support obligation. *Id.* at 181-82, 568 P.2d at 1080. At least one Arizona court has also applied the rationale of *Endicott-Johnson* in a foreclosure case. In *Cagel v. Carlson*, the docketing of a judgment was sufficient to put the judgment debtor on notice of a subsequent execution sale without requiring any further personal notice. 146 Ariz. 292, 297, 705 P.2d 1343, 1348 (Ct. App. 1985), *cert. denied*, 476 U.S. 1108 (1986).

108. In *Neeley*, the court described the rationale behind the exemptions exception as follows, "[t]here can be no doubt that the various federal and state exemption statutes are designed to protect certain assets against creditor's claims. These statutes create a protected property interest which requires a certain amount of due process prior to its deprivation." 606 F.

S.B. 1382 meets the general requirements of procedural due process for pre-judgment seizure cases and exceeds those for post-judgment seizure because it provides both notice and a hearing before the deprivation occurs.[109] Opponents of the law, however, may try to attack the notice as constitutionally inadequate,[110] as a result of its failure to inform the delinquent parent of possible defenses to non-payment.[111]

The Federal District Court for the Northern District of Illinois, in *Duffy*, held notice of a pending tax intercept insufficient because it failed to list defenses.[112] The Illinois Department of Public Aid intercepted tax refunds of eighteen individuals who failed to pay past due child support.[113] The notice informed the individuals only that action was pending.[114] The court required that notice provide a listing of defenses, reasoning that a better informed individual is less likely to suffer the risk of erroneous deprivation.[115] At least one jurisdiction, then, requires the state to provide greater protections to the individual before the deprivation of property or liberty occurs.

A jurisdiction requiring less protection is the Ninth Circuit, which addressed the adequacy of notice in *Duranceau v. Wallace*.[116] The court upheld a Washington statute that allowed garnishment of a tort judgment to

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Supp. at 1461. Exempt assets are "certain types of property, including, but not limited to wages, social security benefits, supplemental security income benefits, various pension benefits, etc." *Id.* at 1460. When the garnished assets are exempt, the district court applies a balancing test "of the competing interests to the property" to determine the amount of notice due. *Id.* at 1462.

109. *See supra* text accompanying notes 103-05. Arizona law mandates that notice and a hearing occur within 30 days after the court orders the professional licensing board to conduct a hearing regarding licensure suspension. ARIZ. REV. STAT. ANN. § 32-3701(A) (Supp. 1991).

110. *Mullane* provides general guidance regarding constitutionally adequate notice. 339 U.S. at 314. Justice Jackson, delivering the opinion of the Court stated, "notice (must be) reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections." *Id.*

111. In *Wagner*, the U.S. district court struck down a statute governing a tax intercept program for collecting overdue child support because it failed to provide adequate notice by not listing common defenses to the challenged action. 700 F. Supp. 935. As a practical matter, however, "[t]he availability of defenses to the enforcement of child support actions has been greatly diminished in the last five years by virtue of congressionally mandated state law." Victoria S. Williams, *Defenses to Enforcement of Child Support Orders, in* CAMPBELL-HAYNES, *supra* note 7, § VII, at 44. "Congressionally mandated state law" refers to the Bradley Amendment of 1986 and the Child Support and Enforcement Amendments (CSEA) of 1984. *Id.* The Bradley Amendment "requires states ... to provide that support installments are vested as they fall due and are therefore judgments entitled to full faith and credit." CAMPBELL-HAYNES, *supra* note 7, § III, at 3. The Bradley Amendment does not allow retroactive modification of support orders, thus "prevent[ing] courts and administrative agencies from forgiving child support arrears as a result of an obligor's defense raised in an enforcement action." *See* Williams, *supra*. Regarding income withholding, as mandated by the CSEA of 1984, 42 U.S.C. §§ 651-669 (1988), "[o]nce income withholding has been initiated, the obligor's only defense ... is a mistake of fact (e.g., incorrect identification of the obligor; arrears did not actually accrue; mistake in the amount of current support)." Williams, *supra*. These two developments "should cause many of the traditional defenses to fail." *Id.*

112. 700 F. Supp. at 948.

113. *Id.* at 937.

114. *Id.* at 943.

115. *Id.*

116. 743 F.2d 709.

pay overdue child support.[117] After the Department of Social and Health Services sent the delinquent defendant an order requiring this payment, it ordered the City of Tacoma, the garnishee, to pay a portion of Duranceau's tort judgment as child support.[118] The delinquent father claimed that the notice was "defective" because it failed to apprise him of "his right to assert all his defenses."[119] The court held the notice was adequate because it informed Duranceau that he could assert the defense that "no support was due and owing."[120] In addition, the first notice had apprised him of the wage exemption, though the second one had not.[121] Thus, in *Duranceau*, the Ninth Circuit did not mandate a listing of all possible defenses for adequate notice.[122]

S.B. 1382 likely provides for adequate notice. The law mandates that notice and a hearing occur within thirty days of the time the court, in its discretion,[123] orders a license suspension hearing.[124] The notice comes in the form of an Order to Show Cause, which states that the individual who is ordered to appear before the licensing board must do so, unless he or she can show cause why his or her license should not be suspended absent proof of payment of all past due child support.[125] As in *Duranceau*, the licensee receives notice that full payment of past due child support is a defense to licensure suspension.

Therefore, since S.B. 1382 provides for adequate notice and a hearing before the deprivation occurs, it will likely survive a procedural due process

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117. *Id.* The statute passed due process scrutiny because "Duranceau received adequate notice of the impending seizure, possible defenses, and the manner of asserting those defenses." *Id.* at 714.

118. *Id.* at 710.

119. *Id.* at 711. In dicta, the court highlighted the need to inform the debtor of the right to assert defenses in situations where "the defense ... is designed to protect the debtor's subsistence." *Id.* at 712.
Since the denial or revocation of a professional license could deprive a licensee of his livelihood, his very subsistence could be in jeopardy. This aspect of S.B. 1382 could add strength to any constitutional challenge. The provision in S.B. 1382 to allow for probation in place of suspension in cases of "extreme hardship," however, might temporarily mitigate this harsh result.

120. *Duranceau*, 743 F.2d at 713.

121. The first notice was directed at garnishment of Duranceau's earnings, to which the wage exemption applied. *Id.*

122. *Id.*

123. The decision to refer the delinquent parent for licensure suspension is totally discretionary. Arizona law provides, "the court ... *may* direct the licensing board or agency to conduct a hearing ... concerning the suspension of the license." ARIZ. REV. STAT. ANN. § 25-320(I) (Supp. 1991) (emphasis added). Additionally, S.B. 1382 provides no guidelines to the court in determining what enforcement method to order, possibly creating a notice problem to child support obligors who do not know ahead of time which enforcement method a judge will order. Once the judge orders the licensure suspension hearing, the licensing board must either suspend the license, causing the individual to lose his or her job, or issue probation, unless child support has been paid in full by that time. ARIZ. REV. STAT. ANN. § 32-3701(B) (Supp. 1991).

124. ARIZ. REV. STAT. ANN. § 32-3701(A) (Supp. 1991).

125. *Cf.* Order to Show Cause, *In re* Flores, Board of Psychologist Examiners of the State of Arizona (No. 90-46).

constitutional challenge. Even if S.B. 1382 survives procedural due process scrutiny, it could also be challenged on substantive due process grounds.

C. Substantive Due Process

S.B. 1382 may also be challenged on substantive due process grounds. This inquiry focuses on whether government action infringes on constitutionally protected life, liberty or property interests.[126] Courts apply either low level or heightened scrutiny to state action such as S.B. 1382 depending upon the characterization of the right at issue.[127] If S.B. 1382 is deemed to infringe on a fundamental right, such as freedom in family relationships,[128] the courts must apply heightened scrutiny.[129] If the law is characterized as impacting a lesser right or an economic right, such as the right to work and maintain an occupational license, courts have historically applied a more deferential level of scrutiny, such as the rational basis test.[130]

Cases challenging the constitutionally of other types of license revocations and other methods of enforcing child support obligations indicate the level of scrutiny courts have imposed. The United States Supreme Court applied heightened scrutiny to a case in which the fundamental right to marry was conditioned upon the payment of child support.[131] Rational basis scrutiny has generally been applied in cases involving an economic right such as a license.[132]

D. Heightened Scrutiny

When a state law intrudes upon a fundamental right, heightened scrutiny requires the law in question to further a compelling or important state interest.[133] Child support enforcement case law requires the application of heightened scrutiny to an enforcement mechanism that impinges on a fundamental right.[134]

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126. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494 (1971). In *Moore*, a city housing ordinance violated substantive due process because it infringed a constitutionally protected liberty interest in "freedom of personal choice in matters of marriage and family life." *Id.* at 499. The ordinance prevented a non-nuclear family, comprised of a grandmother, her son and two grandsons, from living together. *Id.* at 496 n.1.

127. Justice Powell applied heightened scrutiny to strike down the housing ordinance in *Moore*, stating, "When a city undertakes such an intrusive regulation of the family, ... the usual judicial deference to the legislature is inappropriate." *Id.* at 499. Justice Powell characterized the right involved as "the sanctity of the family." *Id.* at 503. Justice White did not agree that heightened scrutiny was merited and reasoned that the ordinance did not violate due process because it was "not wholly lacking in purpose or utility." *Id.* at 550 (White, J., dissenting). He described Mrs. Moore's liberty interest as merely an "interest in having the offspring of more than one dependent son live with her." *Id.*

128. *See* Prince v. Massachusetts, 321 U.S 158, *reh'g denied*, 321 U.S. 804 (1944).

129. *See infra* text accompanying notes 133-54.

130. *See infra* text accompanying notes 155-84.

131. *See* Zablocki v. Redhail, 434 U.S. 374 (1978).

132. *See, e.g.*, Barsky v. Board of Regents, 347 U.S. 442 (1954).

133. *See Zablocki*, 434 U.S. at 388 (non-custodial child's welfare considered a "legitimate" and "substantial" state interest).

134. *Id.*

In *Zablocki v. Redhail*, the United States Supreme Court held unconstitutional a Wisconsin statute that denied Mr. Redhail the right to remarry unless he obtained a court order permitting him to marry.[135] The law allowed only non-custodial parents whose child support obligations were satisfied to obtain the court's permission to marry.[136] Redhail could not get a court order allowing him to marry because he was both unable to pay child support and unemployed.[137] He brought a class action suit in federal district court claiming the statute violated both equal protection and due process.[138] The lower court invalidated the law on equal protection grounds.[139] The United States Supreme Court affirmed the lower court's decision.[140]

The Supreme Court applied heightened scrutiny because the statute "significantly" interfered with the fundamental right to marry.[141] Heightened scrutiny requires the legislation to further "sufficiently important" state interests, and the means must be narrowly drawn to achieve the ends.[142] Though child support and welfare were accepted as "legitimate and substantial" interests,[143] the Court struck down the statute because it was not closely tailored to achieve these interests.[144] The statute only prevented individuals who were unable to pay child support from exercising the fundamental right to marry, it did not achieve the state's objective of collecting child support.[145] The Court held that even if an individual could afford to pay child support, the law seriously impinged on the fundamental right to marry.[146] In any event, the state could employ less restrictive methods of collection, such as wage assignments, civil contempt proceedings, and criminal penalties, to achieve its goal.[147]

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135. *Id.* at 377.
136. *Id.*
137. Redhail was a minor and still in high school when he was ordered to pay $109 a month child support. *Id.* at 377-78.
138. *Id.* at 378.
139. The *Zablocki* opinion does not address the disposition of the due process claim. *Id.* at 383.
140. *Id.* at 382.
141. *Id.* at 383. Justice Marshall, delivering the opinion for the Court, applied equal protection analysis rather than substantive due process in *Zablocki*. *Id.* at 384. Justice Stewart, in a concurring opinion, disagreed that equal protection analysis was appropriate:
To hold ... that the Wisconsin statute violates the Equal Protection Clause seems to me to misconceive the meaning of that constitutional guarantee. The Equal Protection Clause deals not with substantive rights or freedoms but with invidiously discriminatory classifications. ... The problem in this case is [one] ... of unwarranted encroachment upon a constitutionally protected freedom. I think that the Wisconsin statute ... exceeds the bounds of permissible state regulation of marriage, and invades the sphere of liberty protected by the Due Process Clause of the Fourteenth Amendment.
Id. at 391-92 (Stewart, J., concurring) (citations omitted).
142. *Id.* at 388. "When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."
143. *Id.*
144. *Id.* at 388-89.
145. *Id.* at 389.
146. *Id.* at 387.
147. *Id.* at 389-91.

If opponents can successfully challenge S.B. 1382 as infringing on a fundamental right, courts would apply heightened scrutiny, and the law would likely fail, as the statute did in *Zablocki*.[148] Although the state's interest in collecting child support might be considered compelling, S.B. 1382 may fail because it is not narrowly tailored to meet the state's goal without impinging on a fundamental right. The dispositive issue is whether S.B. 1382 interferes with a fundamental right. When an individual's license is revoked for failure to pay support and he or she loses employment, the direct impact is economic, which implicates an ordinary rather than a fundamental right.[149] This analysis taken one step further, however, may implicate a fundamental right.

By revoking an individual's license, S.B. 1382 may prevent an individual from supporting a current family due to job loss.[150] Thus, the law could interfere with family relationships, a fundamental right.[151] Furthermore, this individual would remain unable to pay child support. S.B. 1382, under these conditions, is not closely tailored to achieve the state's objective, which is to provide support to the non-custodial children.[152] Instead, courts could require the state to utilize less restrictive methods of collecting child support from self-employed professionals, such as civil contempt, criminal penalties, and asset garnishment.[153] Although opponents may challenge S.B. 1382 as impinging a fundamental right to family relationships, the Arizona courts are more likely to apply a rational basis analysis because the law denying a license more directly impacts an economic right.[154]

E. Rational Basis Analysis

If the Arizona courts view the licenses revoked by S.B. 1382 as ordinary property rights, the rational basis test will apply.[155] This test requires merely a rational connection between legislation and the government's pur-

148. *Id.* at 390.

149. *See* NOWAK, *supra* note 40, at 351.

150. S.B. 1382 does not expressly and directly impact family relationships. Rather, the loss of employment flowing from the loss of an occupational license could indirectly harm a family, thus affecting family rights. This characterization is weakened, however, when the non-custodial parent does not support a new family or is not prevented from marrying. The Court in *Zablocki* would allow states to promulgate "reasonable" regulation of the right to marry that did not "significantly interfere with decisions to enter into the marital relationship." 434 U.S. at 386.

151. In *Zablocki*, Justice Marshall characterized "family relationships" as a fundamental right. *Id.*

152. Where the individual is able to pay support, S.B. 1382 might actually achieve its objective of child support payment.

153. The following mechanisms provide effective enforcement methods for self-employed individuals: civil or criminal contempt proceedings, liens, bonds, and other securities, attachments and full IRS collection. *See* CAMPBELL-HAYNES, *supra* note 7, § VII, at 2.

154. Justice Rehnquist's dissent in *Zablocki* may more accurately predict how the current Court would conduct its contemporary constitutional analysis. 434 U.S. at 407 (Rehnquist, J., dissenting). According to Justice Rehnquist, the Wisconsin statute would pass a rational basis test because it is rationally related to the state's "exceptionally strong" interest in collecting child support. *Id.* at 408.

pose.[156] S.B. 1382 will likely withstand constitutional scrutiny under this deferential standard because the standard allows all but completely irrational laws to survive.[157] Opponents may try to defeat S.B. 1382, however, by claiming that there is no rational connection between the law and a legitimate state purpose. Under this analysis, S.B. 1382 is irrational because it fails to achieve its objective as a child support enforcement mechanism when an individual is unable, rather than just unwilling, to pay. Additionally, as a licensure regulatory mechanism, S.B. 1382 does not regulate on the basis of professional competence.[158] Instead it regulates licenses based upon an individual's ability or willingness to meet a financial or moral obligation.[159]

S.B. 1382 cannot be criticized as a totally irrational child support enforcement mechanism for those who can afford to pay.[160] The most obdurate recalcitrant might be moved to meet a past due support obligations faced with the threat and stigma of peer review in a license revocation proceeding.

The law, however, is overinclusive because it is premised on the assumption that all self-employed licensed professionals in Arizona are simply unwilling, not unable, to pay.[161] Not all occupations affected by S.B. 1382 are equally lucrative. They include those at the lower end of the economic ladder, such as security guards,[162] as well as those at the high end, like physicians.[163]

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155. *Cf.* Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 83, 83-84 (1978). The standard of review articulated in *Duke Power* applies to the government's ability to regulate economic interests, such as stimulating economic activity and business. *See id.* at 83.

156. *Id.* at 84.

157. *Duke Power* called for deference to Congress unless its judgment was "demonstrably arbitrary or irrational." *Id.* at 84.

158. *See infra* text accompanying notes 174-83.

159. Failure to meet the financial obligation of paying child support for at least one month triggers S.B. 1382. ARIZ. REV. STAT. ANN. § 12-2452(D) (Supp. 1991). That the child support obligation is also a moral commitment is reflected in the court's opinion regarding Mrs. Flores, the psychologist who was thousands of dollars in arrears in meeting her child support obligation. The court stated: "It is without question in the State's best interest to protect the welfare of its children by enacting legislation which enforces a parent's legal and moral obligation to support his or her minor children." *Flores*, No. CV90-33689 (Ariz. Super. Ct. April 24, 1991), at 34.

160. In *Zablocki*, Justice Stewart was primarily concerned about the Wisconsin statute's effect on those unable to pay child support. He stated:

The Wisconsin law ... flatly denies a marriage license to anyone who cannot afford to fulfill his support obligations. ...[A]s applied to those who can afford to meet the statute's financial requirements but choose not to do so, the law advances the State's objectives in ways superior to other means available to the State. ... Insofar as it applies to indigents, the state law is an irrational means of achieving these objectives of the State.

434 U.S. at 394 (Stewart, J., concurring).

Justice Powell would have allowed a statute similar to S.B. 1382 had it regulated only those able to pay. *Cf. id.* at 396 (Powell, J., concurring).

161. If this were not the underlying assumption, opponents might question the law's real goal. Is the goal really to collect past due support, or simply to punish a morally reprehensible segment of society?

162. *See* ARIZ. REV. STAT. ANN. §§ 32-2601 to -2631 (1986 & Supp. 1991).

163. *See* ARIZ. REV. STAT. ANN. §§ 32-1401 to -1436 (1986 & Supp. 1991). Commentators, however, provide conflicting information regarding the non-custodial parent's ability to pay. Krause writes, "I fear that our current emphasis on enforcing the father's obligation is clouding our judgment as to how much money we can realistically expect fathers to pro-

The law may be under-inclusive as well because it does not apply to attorneys, many of whom can afford to pay child support.[164]

Child support enforcement mechanisms that penalize[165] persons financially unable to pay past due support may be criticized as irrational because they are not effective.[166] These mechanisms take away the individual's means to pay child support by restricting his or her ability to work.[167] Individuals unable to pay will either lose their licenses to work or be placed on probation.[168] Probation does not ameliorate the law's impact, because an individual's inability to pay child support remains constant absent changed

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vide." *See* Krause, *supra* note 10, at 379. In contrast, Weitzman reviewed various studies regarding the non-custodial parent's ability to pay and concluded that 73% of men in California had the ability to pay. Lenore J. Weitzman, *Child Support Myths and Reality*, *in* CHILD SUPPORT, *supra* note 16, at 251, 257. A Michigan study by Chambers found that 80% of men would be well-off even if they paid their support. A Canadian study echoed Chambers' findings. *Id.*

164. The Arizona Supreme Court, however, has adopted regulations similar to S.B. 1382 for attorneys. ARIZ. SUP. CT. R. 51.

165. One commentator is concerned about the impact of child support enforcement mechanisms on the non-custodial parent. Eva Rubin writes, "New and very troublesome questions of public policy are beginning to arise in cases dealing with child support. ...[T]here are practical reservations about tough child support laws and the methods that can be used to make moral obligations binding on recalcitrant parents." EVA R. RUBIN, THE SUPREME COURT AND THE AMERICAN FAMILY 198 (1986).

166. Justice Stewart, concurring in the judgment in *Zablocki*, characterized Wisconsin's statute in that case as irrational because it penalized persons financially unable to pay past due support. 434 U.S. at 395 (Stewart, J., concurring). Justice Powell, concurring in the judgment, invalidated the statute because it affected those unable to pay. *Id.* at 398 (Powell, J., concurring). Therefore, some judges in the past have invalidated statutes which penalized people who were financially unable to pay child support.

167. Justice Stevens, also concurring in *Zablocki*, had a similar concern about the Wisconsin statute. He questioned its rationality because of its discriminatory impact and its inability to meet statutory objectives. 434 U.S. at 406 (Stevens, J., concurring). Because the rich could afford to pay child support, they would be allowed to marry, while the poor would not. *Id.* Individuals who might improve their financial status through marriage, would not be allowed to do so, thereby prohibiting them from paying child support. *Id.* at 405. "To the extent that the statute denies a hard-pressed parent any opportunity to prove that an intended marriage will ease rather than aggravate his financial straits, it not only rests on unreliable premises, but also defeats its own objectives." *Id.*

168. ARIZ. REV. STAT. ANN. § 32-3701(B) provides:

If at the hearing the board determines that the suspension of the license ... would create an extreme hardship to either the licensee ... or persons who[m] the licensee ... serves, the board *may*, in lieu of suspension, allow the licensee ... to continue to practice his profession on probation. Probation shall be conditioned on full compliance with the court order ... the probation period shall not exceed two years and the terms of probation shall provide for automatic suspension of the license ... if the licensee ... does not provide monthly proof to the board of full compliance with the court order.

ARIZ. REV. STAT. ANN. § 32-3701(B) (Supp. 1991) (emphasis added).

Even though probation is allowed in hardship situations, if the individual is unable or unwilling to pay past due support once probation ends, the license is ultimately revoked. Income and wage garnishments do not have such a strong power to effect earning potential as S.B. 1382. Unlike S.B. 1382, income and wage garnishment as child support enforcement mechanisms deprive the individual of only a portion of his or her income. A portion of wages and other exempt income is protected by the Consumer Credit Protection Act, 15 U.S.C. § 1673(b) (1988). *See* Neagli & Troutman, *supra* note 106, at 303.

economic circumstances and is not remedied by probation.[169] Additionally, probation is not mandated by the law and will not be granted in all situations.[170]

Critics may challenge S.B. 1382 as an irrational child support enforcement mechanism because it affects those least able to pay. Another challenge might target the law's irrationality as a license regulatory mechanism. Licensure regulatory mechanisms rarely fail the rational basis test because legislatures have broad discretion to regulate professions.[171] Under this test, the Court requires only a rational connection between a regulation and an individual's fitness to practice an occupation.[172] Opponents might argue, however, that S.B. 1382 is an irrational license regulatory mechanism because child support payment, as a requisite to obtain or maintain a professional license, has no bearing on an individual's competence to practice an occupation. Courts have not upheld all legislative efforts to regulate professions.[173]

In Arizona, however, Mrs. Flores unsuccessfully argued that her failure to pay child support had no rational connection to her professional fitness.[174] She had never been charged with professional inadequacy or the inability to provide therapy to her clients.[175] The Arizona Superior Court found no merit in this argument stating, "[t]he failure of a professional to financially support

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169. The major benefit of probation, when an individual is unable to pay support, would accrue to the individual's client, who would not be deprived of professional services possibly for two years. ARIZ. REV. STAT. ANN. § 32-3701(B) (Supp. 1991).

170. *Id.* This section provides that "the board *may*, in lieu of suspension, allow the licensee or certificate holder to continue to practice his profession on probation. *Id.* (emphasis added).

171. The United States Supreme Court, in *Barsky*, upheld the suspension of a physician's license because he was convicted of not producing papers subpoenaed by the Committee on Un-American Activities. 347 U.S. 442. Justice Burton for the majority stated, "It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there." *Id.* at 449.

172. *Schware*, 353 U.S. at 239. "A state can require high standards of qualification, such as good moral character or proficiency ... but any qualification must have a rational connection with the applicant's fitness or capacity to practice." *Id.* Even though *Schware* addressed an applicant's denial of admission to the bar, the "rational connection" standard has been generalized to all professions. 53 C.J.S. *License* § 39, at 380 (1987). Similarly, the Supreme Court upheld an Oklahoma statute regulating eye care licensure because it had a rational relationship to the state's objective. Lee Optical of Oklahoma v. Williamson, 348 U.S. 483, *reh'g denied*, 349 U.S. 925 (1955).

173. *See, e.g., Schware*, 353 U.S. 232 (Rudolph Schware's application for admission to the New Mexico State Bar was denied on the grounds of poor moral character because he was a past member of the Communist party. His denial was overturned because the state qualifications lacked a rational connection with his fitness to practice the profession); Cord v. Gibb, 254 S.E.2d. 71, 73 (Va. 1979) (overturning a denial of admission to the bar based on poor moral character evidenced by Cord's living arrangement. "While Cord's living arrangement may be unorthodox and unacceptable to some segments of society, this conduct bears no rational relationship to her fitness to practice law.").

174. Mrs. Flores, a psychologist, relied on Huls v. Arizona St. Bd. of Osteopathic Examiners, 26 Ariz. App. 236, 547 P.2d 507 (1982), in support of her argument. *Flores*, No. CV90-33689. In *Huls*, the Arizona Court of Appeals held the Board justifiably suspended Dr. Huls' license for failure to take sufficient post-graduate training because the "prohibited conduct [bore] a reasonable relationship to objectives of the profession." 26 Ariz. App. at 238, 547 P.2d at 509. Mrs. Flores contended that child support obligations, unlike professional training, do not have a relationship to her profession's objectives. *Flores*, No. CV90-33689, at 34.

his or her child clearly demonstrates ... a lack of appropriate character and fitness of the subject professional. If a professional is inclined to financially abandon her own flesh and blood, it is not unrealistic to assume that this same professional would turn away from her own client for little or no justification."[176]

In *Flores*, a professional license was ordered suspended for moral reasons having no connection with technical competence.[177] The Arizona Superior Court upheld this order.[178] Additional Arizona cases that allow revocation of professional licenses on moral grounds, however, have required a more direct connection between the prohibited conduct and technical competence to practice a profession.[179]

In *Aiton v. Board of Medical Examiners*, a physician advertised a false cure to increase his business.[180] The state revoked his license due to this unprofessional conduct which made him unfit to practice medicine.[181]

The Arizona Supreme Court also upheld the revocation of an accountant's professional certificate in *Hilkert v. Canning*.[182] The accountant allegedly falsified an audit, which the board considered "discreditable to the accounting profession."[183]

The immoral acts in these cases are closely connected to the actual practice of the individual's profession. In license revocation cases, Arizona courts have required a rational connection that directly equates to an individual's ability to perform his or her occupation. The *Flores* holding may not withstand appeal on this basis. Given the state's broad discretion in regulating

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175. Verified Complaint at 3-4, *Flores*, No. CV90-33689.

176. *Flores*, No. CV90-33689. Is it really realistic to assume that professionals with domestic problems will treat clients in the same manner.
At least one other jurisdiction has found a rational connection between payment of child support and fitness to practice a profession. In *Beasley*, a bar applicant failed to pay court-ordered child support payments during law school and was later denied admission to the state bar. *In re* Beasley, 252 S.E.2d 615 (Ga. 1979). The Georgia Supreme Court upheld the denial because the applicant's failure to satisfy legal obligations indicated a lack of moral character to practice law. *Id.* at 617.

177. *See supra* text accompanying notes 174-76.

178. *See supra* note 4 and accompanying text.

179. Arizona law lists moral reasons as grounds for license revocations for many, but not all, professions covered by Title 32. *See generally* ARIZ. REV. STAT. ANN. §§ 32-101 to -3701 (1986 & Supp. 1991). For example, the Board of Chiropractic Examiners may take disciplinary action against a chiropractor for engaging in "unprofessional or dishonorable conduct of a character likely to deceive or defraud the public or tending to discredit the profession." *Id.* § 32-924(5) (Supp. 1991).
Ironically, the drafters of S.B. 1382 did not contemplate the inclusion of attorneys, who are held to a higher moral standard than most professionals.

180. 13 Ariz. 354, 114 P. 962 (1911).

181. *Id.* at 358, 114 P. at 963. State law gave the Board of Medical Examiners the power to revoke a license due to "grossly immoral or unprofessional conduct." *Id.* at 357, 114 P. at 962. The court did not define immoral conduct, preferring to leave that decision to the licensing board. It stated that unprofessional conduct was "some act or conduct that would in the common judgment be deemed 'unprofessional' or 'dishonorable.' ... In determining whether a party is guilty of such conduct, there is a broad field for the exercise of judgment and discretion by the board." *Id.* at 359-60, 114 P. at 963.

182. 58 Ariz. 290, 119 P.2d 233 (1941).

183. *Id.* at 293, 119 P.2d at 235.

occupational licenses[184] and Arizona's commitment to enforce child support obligations,[185] future Arizona courts are likely to find a rational connection between fitness to practice a profession and willingness to meet moral obligations. Thus S.B. 1382 will stand as a rational license regulatory mechanism.

IV. CONCLUSION

S.B. 1382 has recently survived constitutional attack.[186] Opponents may again bring procedural and substantive due process challenges to S.B. 1382 because it deprives individuals of their property or liberty interest in occupational licenses and employment. Whether S.B. 1382 will survive these challenges is speculative. Based on challenges made to analogous child support enforcement methods and license suspension cases, however, S.B. 1382 will likely survive both procedural and substantive due process challenges.

A procedural due process challenge will fail because S.B. 1382 provides both notice and a hearing, thus meeting the basic constitutional requirements. The statute also provides adequate notice even though it fails to list all possible defenses required by some jurisdictions but not by Arizona.

S.B. 1382 will withstand a substantive due process challenge if courts deem the licenses threatened by failure to pay child support as ordinary property rights, subject only to rational basis scrutiny. Although child support enforcement case law invalidates enforcement mechanisms that impinge upon fundamental rights, the right to maintain an occupational license is not substantially the same, even though inability to work could interfere with family relationships.

S.B. 1382 may also be challenged as an irrational law under the rational basis analysis. Even though it threatens those least able to comply with the support obligation with loss of employment, courts are likely to view S.B. 1382 as rational because it allows them to work on probation. S.B. 1382 will also survive any challenge that it is an irrational licensure regulatory mechanism, because legislatures have broad discretion in this area.

S.B. 1382 will likely survive all challenges and prove to be an effective collection mechanism from those able but unwilling to pay. It will not, however, promote the collection of child support from individuals who are unable to pay. It will punish them by depriving them of their livelihood, leaving society to support both the non-custodial parent and the child.

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184. *See supra* note 171 and accompanying text.

185. S.B. 1382 exists because the Arizona legislature wishes to crack down on recalcitrant parents. In *Flores*, the court stated, "Arizona recognizes the obligation of child support as superior to all other financial obligations." No. CV90-33689, at 34 (citing Jorgensen v. Jorgensen, 131 Ariz. 271, 273, 640 P.2d 202, 204 (Ct. App. 1982)).

186. *See id.*