A Case for Pregnancy-Based Unemployment Insurance

Mark R. Brown

Stetson University College of Law

Follow this and additional works at: https://repository.law.umich.edu/mjlr

Part of the Labor and Employment Law Commons, Law and Gender Commons, Legislation Commons, and the Social Welfare Law Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mjlr/vol29/iss1/4
A CASE FOR PREGNANCY-BASED UNEMPLOYMENT INSURANCE

Mark R. Brown*

Professor Brown argues that unemployment insurance laws should be amended to provide coverage to otherwise eligible, pregnant claimants. Under current law, women who quit because of pregnancy are either disqualified from receiving unemployment benefits altogether, or qualify only after childbirth. Those who are fired, meanwhile, often either cannot prove the motivation for their discharge or discover that they are disqualified because of their unavailability for work. Professor Brown uses a case study to illustrate the problems posed by pregnancy and unemployment insurance. He proposes model legislation that extends coverage to all pregnant claimants who temporarily separate from their employment.

INTRODUCTION

Although unemployment insurance laws vary from state to state, all follow the same basic theme. An involuntary separation from employment (firing) normally is compensable while a voluntary separation (quitting) is not. Exceptions exist. Willful misconduct and unavailability for work will disqualify an involuntarily discharged claimant, but even a voluntary quit may be compensable if the claimant had good cause to quit and remains willing and able to work.

Pregnancy-related firings are suspect under federal and state antidiscrimination laws, as well as most state unemployment insurance laws. With the United States Supreme Court's

---

* Professor of Law, Stetson University College of Law. B.S. 1981, University of Dayton; J.D. 1984, University of Louisville School of Law. I thank Mark Esterle, Jerry Hildebrand, Marty Malin, Debbie Maranville, and Richard McHugh for their thoughts and criticisms, and Denise Springer for her research assistance. Special thanks go to my former law school classmate, J. Gregory Clare, for his tireless efforts in Jenny Brown’s case.

decision in *Turner v. Department of Employment Security*"² and the enactment in the following year of § 3304(a)(12) of Title 26, the Federal Unemployment Tax Act (FUTA),³ it became clear that states could not single out pregnant workers for unfavorable treatment. Discriminatory state laws that had proliferated prior to 1975 were ostensibly rendered ineffective.⁴ States were left free, however, to treat pregnancy just as any other temporary disability.⁵ Because workers are often disqualified from receiving benefits during periods of disability, unemployment benefits are likely to be interrupted during and immediately after pregnancy, even if the claimant was fired solely because of her pregnancy.

Because employers seek to minimize their experience ratings⁶ and avoid potential liability under state and federal antidiscrimination laws, few are willing to admit to having discharged a worker because of her pregnancy. Employers are naturally encouraged to dissemble and argue either that they justifiably discharged the claimant or that the claimant voluntarily quit.⁷ Whether the claimant quit or was fired devolves into a question of credibility. Moreover, because pregnant claimants often bear the burden of proof and must overcome a built-in alibi—"she quit because she is pregnant"—they often face an uphill battle to make their case.

That pregnant claimants are wrongly denied unemployment benefits is beyond question. The issues that remain are how often this occurs and whether fine-tuning, as opposed to a

---

². 423 U.S. 44 (1975). The Court held that a Utah law that made women ineligible for unemployment compensation during the period surrounding childbirth is unconstitutional under the Due Process Clause of the Fourteenth Amendment. *Id.* at 46.


⁵. See *infra* notes 18–20 and accompanying text.

⁶. Most states charge employers an "experience-rated" tax which increases according to the amount of unemployment that they have caused in the past. ADVISORY COUNCIL ON UNEMPLOYMENT COMPENSATION, UNEMPLOYMENT INSURANCE IN THE UNITED STATES: BENEFITS, FINANCING, COVERAGE 73–76 (1995) [hereinafter ACUC REPORT].

⁷. See *id.* at 87. "It is clear that the goal of increasing employer involvement through experience rating has been achieved. The extent to which this is a positive outcome, however, is disputed." *Id.*
complete overhaul of the system, can eliminate the risk of error. Given the limited resources of most claimants, the burden of proof that they normally bear, the dynamics of the workplace, agency bias in favor of employers, gender bias, and concern over fiscal austerity, the number of improperly disqualified pregnant claimants is likely to be large. Thus, pregnant workers suffer a serious risk of losing legitimate claims for benefits.

Even if the current model worked and properly screened out undeserving pregnant workers, however, the result still would not be neutral. Women earn less and ascend less rapidly in the business world than do their male counterparts because they are more likely to have an interrupted work history. Professor Samuel Issacharoff and Elyse Rosenblum note that "the most significant factor causing the departure of women from the work force is the 'birth effect,' which appears at early stages of work force participation." They argue for a systemic response to gender-based discrimination in the workplace that recognizes women's unique role in childbirth. Issacharoff and Rosenblum note that although "[t]he simplest model to provide for maternity benefits is a governmental program funded through general revenues...[t]here is little purpose in suggesting benefits approaches whose political viability approaches absolute zero." Unemployment insurance therefore provides the more realistic alternative.

This Article argues that unemployment insurance presents an optimal model for dealing with the plight of pregnant workers. Workers who temporarily leave the labor force because of pregnancy should be granted unemployment benefits on the same terms as workers who either are fired or have


9. See Samuel Issacharoff & Elyse Rosenblum, Women and the Workplace: Accommodating the Demands of Pregnancy, 94 Colum. L. Rev. 2154, 2164 (1994). "[Y]oung women are prone to leaving the work force altogether for an extended period of time at a subsequent point in their employment...[T]he greater likelihood of women leaving the work force is highly correlated with an expected lower career-wage profile." Id.

10. Id. (footnote omitted).

11. Id. at 2215.
quit for good cause attributable to their employment. No distinction should be drawn between a pregnant worker who quits and a pregnant worker who is discharged. Ascribing fault in cases involving pregnancy borders on the arbitrary and at best results in a "he says, she says" hearing. The legal presumption should be that a worker who leaves employment while pregnant is entitled to the safety net of unemployment insurance.

Part I of this Article contrasts different states' approaches to pregnancy-related separations from work. Part II demonstrates how these states treat pregnant claimants through a case example. The Article traces this case's progress, from the initial determination to its final dismissal at the state supreme court, and critiques the arguments that influenced the final disposition. Part III makes arguments for and meets arguments against expanding benefits coverage for all pregnancy-based separations. This Article concludes with a proposal for a model unemployment insurance act that expands benefits to protect pregnant claimants.

I. THE CURRENT LAW OF VOLUNTARY SEPARATIONS

Section 3304(a)(12) of the FUTA states that "no person shall be denied [unemployment] compensation ... solely on the basis of pregnancy or termination of pregnancy."12 In Wimberly v. Labor and Industrial Relations Commission,13 the United States Supreme Court was asked to decipher the meaning of this provision: Was it meant to guarantee unemployment benefits to pregnant claimants who voluntarily leave work, or was it meant to insure that pregnant claimants are not treated differently from other claimants? The claimant in Wimberly, pursuant to company policy, had taken an unpaid maternity leave without any guarantee of future reinstatement.14 Following childbirth, the claimant returned to work only to find that her job was no longer available. At this point she applied for unemployment benefits, claiming that she was entitled to

14. 479 U.S. at 513.
compensation for the period after she had offered her services to her employer but was not rehired. The state unemployment agency denied her claim, as did the Supreme Court of Missouri, which ruled that a claimant is not entitled to benefits after leaving work "for reasons that, while perhaps legitimate and necessary from a personal standpoint, [are] not causally connected to the claimant's work or employer." This ruling did not violate § 3304(a)(12) because it denied benefits to all claimants who left work for reasons unconnected to their employment. Rather than requiring preferential treatment, the court concluded, § 3304(a)(12) only prohibits discrimination against pregnancy.

The United States Supreme Court affirmed. In a unanimous decision, the Court concluded that § 3304(a)(12) was intended merely to prohibit the unequal treatment of pregnant workers, not to insure that all discharges during pregnancy result in an award of unemployment benefits. The Court observed:

Most States regard leave on account of pregnancy as a voluntary termination for good cause. Some of these States have specific statutory provisions enumerating pregnancy-motivated termination as good cause for leaving a job, while others, by judicial or administrative decision, treat pregnancy as encompassed within larger categories of good cause such as illness or compelling personal reasons. A few States, however, . . . have chosen to define "leaving for good cause" narrowly. In these States, all persons who leave their jobs are disqualified from receiving benefits unless they leave for reasons directly attributable to the work or to the employer.

The Court's survey of state law leaves one with the mistaken impression that pregnancy is compensable under the unemployment insurance laws of most states. Nothing could be

15. Id. The trial court and the Missouri Court of Appeals concluded that the agency's decision conflicted with § 3304(a)(12). Id. at 513–14.
17. Id. at 349.
18. Wimberly, 479 U.S. at 511. Justice Blackmun did not participate in this decision.
19. Id. at 522.
20. Id. at 515–16 (footnotes omitted).
further from the truth. Nine jurisdictions have determined, either by legislation\(^{21}\) or by court decree,\(^{22}\) that pregnancy alone does not qualify a woman for unemployment benefits. The reasons vary, but more often than not pregnant claimants are denied benefits because state unemployment insurance laws require that good cause be attributable to\(^{23}\) or connected with\(^{24}\) employment. Because pregnancy is not normally attributable to employment or the employer, claimants are denied benefits regardless of whether pregnancy otherwise amounts to good cause.

Twelve additional states, though not specifically addressing pregnancy, require that good cause be attributable to employment.\(^{25}\) These jurisdictions presumably do not compensate

---


pregnancy-related separations because of the lack of a connection between pregnancy and employment. Excluding pregnancy from unemployment compensation coverage is permissible so long as all other nonoccupational illnesses and disabilities are likewise excluded.26

Thirteen states allow unemployment benefits for employee-initiated, pregnancy-related separations, at least under certain circumstances.27 A small handful of these states allow


26. Wimberly v. Labor and Indus. Relations Comm'n, 479 U.S. 511, 516-17 (1987). Because occupational illnesses and disabilities are connected with employment, they may support an award of unemployment benefits even in those jurisdictions that maintain a restrictive "connection" requirement. A problem arises, however, in proving that the claimant is "available" for work. If the disability renders the claimant unable to perform any work at all, she may be excluded altogether. If, on the other hand, the claimant is available to perform some other work, then she can recover unemployment benefits. See, e.g., Paschke v. Retool Indus., 519 N.W.2d 441, 442-43 (Mich. 1994) (suggesting that being disabled may be consistent with being "willing and able to work"). If the claimant also receives worker's compensation, courts often offset this against unemployment benefits. See, e.g., Ocean Manor Resort Hotel v. Garbalosa, 512 So. 2d 256, 257 (Fla. Dist. Ct. App. 1987). But see Wells v. Jones, 662 S.W.2d 849, 851 (Ky. Ct. App. 1983) (permitting no offset).

27. Compare ALA. CODE § 25-4-78(2)(a)(1) (1992 & Supp. 1995) (no disqualification if employee is "sick or disabled," notifies employer, and offers to return "as soon as . . . able to work") with Alabama Mills v. Carnley, 44 So. 2d 622, 626 (Ala. 1949) (holding that an employee has good cause to leave work because of pregnancy and qualifies for benefits once available to work). See also ARK. CODE ANN. § 11-10-513(b) (Michie 1987) ("No individual shall be disqualified under this section . . . if, after making reasonable efforts to preserve job rights, he left his last work because of illness, injury, pregnancy, or other disability."); CAL. UNEMP. INS. CODE § 1256 (West 1986 & Supp. 1996) ("An individual is disqualified . . . if . . . she left . . . her most recent work voluntarily without good cause . . . ."); CAL. CODE REGS. tit. 22, § 1256-15(b) (1995) (leaving work because of pregnancy can be good cause). Compare COLO. REV. STAT. § 8-73-108(4)(b)(i) (1986 & Supp. 1995) (entitled to full award if "[t]he health of the worker is such that the worker is separated from . . . her . . . employment and must refrain from working") with Frontier Airlines v. Industrial Comm'n, 734 P.2d 142, 144 (Colo. Ct. App. 1986) (holding that the employer's mandatory maternity leave policy constituted partial unemployment sufficient to entitle the claimant to benefits), appeal dismissed, 738 P.2d 1185 (Colo. Ct. App. 1987). See also IOWA CODE ANN. § 96.5(1)(d) (West 1984) (not disqualified if the individual "left employment because of illness, injury or pregnancy upon the advice of a licensed and practicing physician . . . or the employer consented to the absence"). Compare MASS. GEN. L. ch. 151A, § 25(e)(1) (1994) (no benefits for employee who has left "voluntarily without good cause attributable to the employing unit") with Director of Div. of Employment Sec. v. Fitzgerald, 414 N.E.2d 608, 610 (Mass. 1980) (refusing to apply § 25(e)(1) to female welder who left work because of her pregnancy). See also MO.
pregnant workers to quit or leave employment for medical reasons and still qualify for, if not immediately receive, benefits. Colorado, for example, provides benefits "to a worker who, either voluntarily or involuntarily, is separated from employment because of pregnancy and who otherwise satisfies the requirements [of the statute]."\(^{28}\) Although this language in isolation seems protective of pregnant workers, the availability for work requirement in Colorado can postpone an award of benefits until after childbirth.\(^{29}\)

Similarly, Texas law provides that "an individual who is available to work may not be disqualified for benefits because the individual left work because of: (1) a medically verified illness . . . ; (2) injury; (3) disability; or (4) pregnancy."\(^{30}\) Pregnant workers in Texas thus may quit and receive benefits only

REV. STAT. § 288.050.1(1)(c) (1994) (eligible if employee was "forced to leave her work because of pregnancy, notified employer of necessity as soon as practical under the circumstances, and returned to that employer and offered her services . . . as soon as she was physically able to return to work . . . but in no event later than ninety days after the termination of the pregnancy"). Compare N.C. GEN. STAT. § 96-14(1) (1995) (not disqualified if "an adequate disability or health condition . . . existed to justify . . . leaving," provided that "at a reasonable time prior to leaving, the individual gave the employer notice of his disability or health condition") with Sellers v. National Spinning Co., 307 S.E.2d 774, 776 (N.C. Ct. App. 1983) (denying benefits for leaving work because of pregnancy unless the claimant intends to return to work and takes "necessary minimal steps to preserve the employment relationship"); review denied, 311 S.E.2d 293 (S.C. 1984); compare N.Y. LAB. LAW § 593(1)(a) (McKinney 1988) (good cause required) with Kryjak v. Ross, 384 N.Y.S.2d 888, 888-89 (N.Y. App. Div. 1976) (holding that a pregnant claimant must seek work to be eligible for benefits) and Garrow v. Levine, 382 N.Y.S.2d 588, 589 (N.Y. App. Div. 1976) (holding that pregnancy is good cause for leaving work); compare PA. STAT. ANN. tit. 43, § 802(b) (1991) (voluntary quit because of a disability is "not a cause of a necessitous and compelling nature" where the employer is able to provide other suitable work) with Stankiewicz v. Unemployment Compensation Bd. of Review, 548 A.2d 366, 368 (Pa. Commw. Ct. 1988) (holding that a worker is not disqualified where she attempts to return after maternity leave, and no suitable work is available). See also TENN. CODE ANN. § 50-7-303(a)(1) (1991 & Supp. 1995) (a claimant who is separated for disability and pregnancy leave remains eligible for benefits where notice is given to the employer and claimant returns to work as soon as able); TEX. LAB. CODE ANN. § 207.045(d)(4) (West Supp. 1996). I have also included Kentucky in this category because of Piper v. Singer Co., 663 S.W.2d 761, 764-65 (Ky. Ct. App. 1984), which suggests that a pregnant worker can quit on the advice of her doctor and recover unemployment benefits. However, the opinion appears difficult to justify under Kentucky's unemployment insurance statute, which requires that good cause be attributable to the employment. See KY. REV. STAT. ANN. § 341.370(1)(c) (Michie 1990 & Supp. 1994).


29. A factor in this determination is whether the claimant is physically unable to perform work. Id. § 8-73-108(4)(j). In addition, a claimant who refuses suitable work is automatically disqualified for 20 weeks. Id. § 8-73-108(5)(a). Thus, the key to benefits is availability. Benefits are likely to be interrupted at some point during pregnancy and not continued until after childbirth.

30. TEX. LAB. CODE ANN. § 207.045(d) (West Supp. 1996).
if quitting is medically necessary and only so long as they otherwise remain available to work.

The remaining states that allow an immediate award of unemployment benefits to pregnant claimants do so in a fashion similar to Colorado and Texas. A pregnant claimant must remain available and able to work in order to receive benefits, a difficult standard to meet if the pregnancy-related separation must also be medically necessary. The result is that unemployment benefits are usually only available post-partum.

The most common approach among those states that do not disqualify voluntary, pregnancy-related separations provides

---

31. California, for example, allows benefits if a reasonable person genuinely desirous of remaining employed would have left work due to an undue risk of injury or illness caused by health reasons, or pregnancy, and the claimant has taken reasonable steps under the circumstances to preserve the employment relationship such as seeking sick leave where health factors are involved, or other leave, if available, or a transfer to other available work the claimant can perform.


Furthermore, California's regulations specifically address pregnancy. These regulations state:

If a claimant's leaving work is voluntary due to pregnancy, the leaving is with good cause if pregnancy rendered the claimant unable to continue work. This is usually established by a physician's advice but is also present if a claimant has a history of miscarriages or difficult pregnancies, or if there is a threat to the health or safety of the fetus, or if objective factors exist such as heavy lifting or other strenuous tasks which are required in the work.

Id. § 1256-15(d)(3). These provisions allow unemployment benefits only if the separation from employment is both medically necessary and the claimant remains available to do other work. A claimant who leaves work because of pregnancy in California will often file for disability benefits rather than unemployment benefits. See infra notes 38, 40 and accompanying text.

32. See Richard McHugh & Ingrid Kock, Unemployment Insurance: Responding to the Expanding Role of Women in the Work Force, 27 CLEARINGHOUSE REV. 1422, 1424 (1994) (“All states have unemployment statutes that require that claimants be available for work.”) (footnote omitted). The availability requirement might be a federal mandate. See infra notes 108-11 and accompanying text.

33. The most common case involves a pregnant worker who quits because of the physically strenuous nature of the employment but remains available to perform lighter work. See, e.g., Director of Div. of Employment Sec. v. Fitzgerald, 414 N.E.2d 608, 610–11 (Mass. 1980) (awarding unemployment benefits to a welder who quit after being refused maternity leave but was still available to perform lighter work); see also Piper v. Singer Co., 663 S.W.2d 761, 764–65 (Ky. Ct. App. 1984) (suggesting that benefits should be available to pregnant workers who leave work because of medical necessity).
unemployment benefits only after childbirth, once the mother again makes herself available for employment.\textsuperscript{34} For example, in response to \textit{Wimberly}, Missouri amended its unemployment insurance law so as not to disqualify a claimant who presents evidence supported by competent medical proof that she was forced to leave her work because of pregnancy, notified her employer of such necessity as soon as practical under the circumstances, and returned to that employer and offered her services to that employer as soon as she was physically able to return to work, as certified by a licensed and practicing physician, but in no event later than ninety days after the termination of the pregnancy.\textsuperscript{35}

\textsuperscript{34} Compare ALA. CODE § 25-4-78(2)(a)(1), (4) (1992 & Supp. 1995) (no disqualification if "sick or disabled," have notified employer, and offer to return "as soon as . . . able to work") with Alabama Mills, Inc. v. Carnley, 44 So. 2d 622, 626 (Ala. 1949) (holding that a woman has good cause to leave because of pregnancy and qualifies for benefits once available to work). See also ARK. CODE ANN. § 11-10-513(b) (Michie 1987) ("No individual shall be disqualified under this section . . . if, after making reasonable efforts to preserve job rights, he left his last work because of illness, injury, pregnancy, or other disability."); IOWA CODE § 96.5(1)(d) (1983) (not disqualified if "forced to leave her work because of pregnancy . . . and returned to that employer . . . as soon as she was physically able to return to work"); MO. REV. STAT. § 288.050(1)(c) (1994) (not disqualified if "left employment because of . . . pregnancy . . . and after recovering from the . . . pregnancy . . . work was not available"). Compare N.C. GEN. STAT. § 96-14(1) (1995) (not disqualified if claimant "leaves work due solely to a disability . . . or other health condition" provided that "at a reasonable time prior to leaving, the individual gave the employer notice of his disability or health condition") with Sellers v. National Spinning Co., 307 S.E.2d 774, 776 (N.C. Ct. App. 1983) (requiring claimants to take steps "to preserve the employment relationship" in order to qualify for benefits). See also TENN. CODE ANN. § 50-7-303(a)(1) (Supp. 1995) (claimant not disqualified because of disability or pregnancy where notice is given to employer and claimant returns to work as soon as able). But compare PA. STAT. ANN. tit. 43, § 802(b)(1991) (no disqualification where "necessitous and compelling . . . [p]rovided, [t]hat a voluntary leaving work because of a disability if the employer is able to provide other suitable work, shall be deemed not a cause of a necessitous and compelling nature") with Stankiewicz v. Pennsylvania Compensation Bd. of Review, 548 A.2d 366 (Pa. Commw. Ct. 1988) (holding that a worker is not disqualified where she attempts to return after maternity leave and no suitable work is available).

\textsuperscript{35} MO. REV. STAT. § 288.050(1)(c) (1994) (applicable to claims filed after December 31, 1988). The exact period covered by the unemployment benefits is uncertain under this particular provision. One might argue that after satisfying the stated conditions the claimant should receive benefits retroactive to the date of separation. Because the claimant is not able to work or available for work, however, she cannot be found eligible for benefits for the weeks prior to her offer to return to work. See id. § 288.040(1)(1).
Similarly, Iowa’s unemployment compensation law provides that no disqualification will occur if

[t]he individual left employment because of illness, injury or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of the necessity for absence immediately notified the employer, or the employer consented to the absence, and after recovering from the illness, injury or pregnancy, . . . the individual returned to the employer and offered to perform services and the individual’s regular work or comparable suitable work was not available, if so found by the department, provided the individual is otherwise eligible. 36

Provisions such as those of Missouri and Iowa have the same effect as unpaid disability leave statutes, which require the employer to rehire the previously disabled worker. The employer’s failure to rehire the worker is considered the

36. IOWA CODE § 96.5(1)(d) (1983). One might argue that, under Iowa law, the claimant is entitled to benefits during maternity leave. In Butts v. Iowa Department of Job Service, 328 N.W.2d 515, 516 (Iowa 1983), the claimant quit work because of pregnancy, delivered her baby, and then offered to return to work. Because her employer refused to rehire her, the unemployment agency began paying benefits as of the date of the employer’s refusal. Id. The claimant then sued to recover benefits for the period after she quit work and before her employer refused to rehire her. Id. The agency argued that it had denied benefits to the claimant during her maternity leave because she failed to follow strictly the requirements of § 96.5(1)(d). She did not submit medical proof when she left, nor did she submit evidence or certification of recovery from her doctor until five months after delivery, and she did not offer to return until five months after delivery. Id. at 517. The court noted in affirming the denial of benefits that “[t]hese failures were the [agency’s] sole basis for denying benefits.” Id.

It seems odd that the agency relied on these alleged procedural defaults to deny benefits during the claimant’s maternity leave, unless § 96.5(1)(d) was intended to confer benefits during maternity leave as well as after when the claimant is refused further employment. See Radford, supra note 4, at 568 n.269. Because the agency awarded benefits to the claimant after the employer refused to reinstate her, however, its reliance on alleged procedural defaults is not convincing. If the defaults precluded benefits during maternity leave, they just as easily could have precluded them after the claimant’s return to work. The only sensible explanation for the agency’s action is that it interpreted § 96.5(1)(d) to permit benefits only after the employer rejects the mother’s offer to return to work. The court’s example in Butts seems to corroborate this interpretation: “[U]nder the statute a woman who works until the week before delivery (leaving on her doctor’s advice), and returns four weeks later (with a doctor’s approval) will then receive benefits if she is denied re-employment.” 328 N.W.2d at 517–18.
equivalent of a discharge, entitling the claimant to unemployment benefits.\textsuperscript{37}

Five states\textsuperscript{38} and Puerto Rico\textsuperscript{39} have established mechanisms whereby disabled workers, though not qualifying for unemployment benefits, receive temporary disability payments during their separation from employment. California, for instance, provides temporary assistance to those unable to work because of "[i]llness or injury, whether physical or mental, including any illness or injury resulting from pregnancy, childbirth, or related medical condition."\textsuperscript{40} Rhode Island similarly provides disability benefits to "an otherwise eligible individual who is unemployed due to sickness resulting from pregnancy, childbirth, miscarriage or abortion."\textsuperscript{41}

Additionally, at least five other states do not disqualify workers who separate from their employment because of non-occupational disabilities.\textsuperscript{42} These states presumably also allow

\begin{footnotesize}

\begin{itemize}
  \item[37.] Note that a question arises with the recent adoption of the Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C. §§ 2601-2654 (1994)). The Act provides that employees of private-sector employers, employing 50 or more employees, who have worked for 12 continuous months, are entitled to 12 weeks unpaid leave during certain family emergencies. See 29 U.S.C. § 2612(a)(1). Refusals to abide by this federal policy are unlawful, and employees have a private right of action against the employer for violations. See id. § 2617(a). The question is whether an employer's refusal to grant this statutorily required unpaid leave necessarily amounts to good cause attributable to employment which would justify a voluntary separation. If so, then the employer's refusal to grant unpaid maternity leave should result in an award of unemployment benefits under even the most draconian state unemployment laws, at least post-partum when the mother is again "available" to work.
  \item[39.] P.R. LAWS ANN. tit. 29, § 467 (1995). Puerto Rico requires employers to pay the claimant half the wages that she would otherwise have earned for an eight week period. Id.
  \item[40.] CAL. UNEMP. INS. CODE § 2626(b)(1).
  \item[41.] R.I. GEN. LAWS § 28-41-8(a).
  \item[42.] DEL. CODE ANN. tit. 19, § 3315(1) (1995) ("[I]f an individual has left work involuntarily because of illness, no disqualification shall prevail after the individual becomes able to work."); KAN. STAT. ANN. § 44-706(a)(1) (1993) ("An individual shall not be disqualified...if...forced to leave work because of illness or injury upon the advice of a licensed and practicing health care provider and, upon learning of the necessity for absence, immediately notified the employer thereof, or the employer consented to the absence, and after recovery from the illness or injury...the individual returned to the employer and offered to perform services and the individual's regular work or comparable and suitable work was not available."); MONT. CODE ANN. § 39-51-2302(2) (1995) (no disqualification if the claimant left employment "because of personal illness or injury...upon the advice of a licensed and practicing physician and, after recovering from his illness or injury...returned to his employer
\end{itemize}
\end{footnotesize}
unemployment benefits for pregnancy-related disabilities, at least once the claimant can reestablish her availability to work. Indiana, for example, provides that "[a]n individual whose unemployment is the result of medically substantiated physical disability and who is involuntarily unemployed after having made reasonable efforts to maintain the employment relationship shall not be subject to disqualification."43

Thirteen jurisdictions do not address pregnancy, do not explicitly provide for disability leave, and do not require a connection between good cause and employment.44 Four of these states likely would hold that disability or illness amounts to good cause under certain circumstances.45 Because the FUTA

and offered his service and his regular or comparable suitable work was not available"); WASH. REV. CODE § 50.20.050(2)(b) (1994) (no disqualification where "[t]he separation was because of the illness or disability of the claimant . . . if the claimant took all reasonable precautions . . . to protect his or her employment status by having promptly notified the employer of the reason for the absence and by having promptly requested reemployment when again able to assume employment"); WYO. STAT. § 27-3-311(a)(i) (1991) (disqualified if claimant left work "voluntarily without good cause attributable directly to his employment, except for bona fide medical reasons"); cf. MD. CODE ANN., LAB. & EMP. § 8-1001(c)(ii) (Supp. 1995) (good cause can be unrelated to employment if "of such necessitous or compelling nature that the individual has no reasonable alternative other than leaving employment").


45. Mississippi provides that a claimant must have "good cause" for voluntarily leaving employment and expressly excepts from good cause "marital, filial and domestic circumstances and obligations." MISS. CODE ANN. § 71-5-513A(1)(a) (1995). The statute then exempts pregnancy from this exception. Id. By negative implication, one might argue that pregnancy amounts to good cause.

Utah provides that "[a] claimant shall not be denied eligibility for benefits if the claimant leaves work under circumstances of such a nature that it would be contrary to equity and good conscience to impose a disqualification." UTAH CODE ANN. § 35-4-405(1)(b) (1994). It has been suggested that illness falls into this exception. See Champlin Petroleum Co. v. Department of Employment Sec., 744 P.2d 330 (Utah Ct. App. 1987) (affirming a determination that mental illness is not just cause for dismissal).


mandates equal treatment, these states should also make unemployment benefits available for pregnancy leave, at least to the extent that pregnancy makes the separation from employment medically necessary. The requirement that workers remain available for work, however, would likely prevent an expectant mother from recovering unemployment benefits until after childbirth. To the extent that they allow benefits to these claimants, these states fall into a model similar to that in Colorado and Texas.

From this brief description of unemployment compensation law in the United States, one learns that maternity leave in the vast majority of jurisdictions does not result in an award of unemployment benefits. Twenty-one states consider pregnancy to be unrelated to employment and noncompensable. The bulk of states provide unemployment benefits either only after childbirth once the claimant's former employer has refused re-employment, or during the period that the claimant is unable to perform her current job because of the pregnancy but is still available to perform some other work. Because such circumstances occur only occasionally, the result is that unemployment benefits are paid in these states, if at all, only postpartum.

II. DISCHARGE AND DISSEMBLE

Employers have a natural incentive to bend facts in order to avoid unemployment compensation awards. Most states use an experience-rated system to tax employers, which raises an employer's tax rates according to the number of compensable claims for which they are liable. In order to avoid higher tax rates, employers very often challenge claims to unemployment insurance benefits by asserting that the employee quit

47. *See, e.g.*, Sellers v. National Spinning Co., 307 S.E.2d 774, 776 (N.C. Ct. App. 1983) (holding that pregnancy does not necessitate benefits unless the claimant is available to return to work).
48. A pregnant worker in one of these jurisdictions conceivably could be awarded unemployment benefits immediately after leaving work if she is unable to perform her usual work but is still available to perform "lighter" or different work. *See supra* notes 28–33 and accompanying text.
49. *ACUC REPORT*, *supra* note 6, at 43.
voluntarily. As demonstrated in Part I of this Article, this argument proves successful in many states. A woman who voluntarily quits because of her pregnancy, even when medically necessary, cannot recover benefits in almost half of the states.\textsuperscript{50}

Although anecdotes seldom sustain an argument, they can identify a problem. The following anecdote involves a pregnant worker caught in a web of private-sector pregnancy discrimination and public-sector bureaucratic malaise. It illustrates the plight of many working women. Unlike their male counterparts who need not quit work to start a family, women often must choose between pregnancy and employment.

\textbf{A. Brown v. Kentucky Unemployment Insurance Commission}

Prior to becoming pregnant in early 1992, Jenny Brown\textsuperscript{51} was employed for approximately two years by Craig Mueller, a chiropractor in Louisville, Kentucky.\textsuperscript{52} In July 1992, Brown’s employment with Mueller was reduced to part-time status, in part, because she informed Mueller that she expected to take maternity leave.\textsuperscript{53} In response to Brown’s complaint about her reduction in hours, Mueller advised Brown that “if she were going to file a discrimination complaint . . . he wanted her resignation.”\textsuperscript{54} Brown then quit her job in response to Mueller’s demand and applied for unemployment insurance benefits later that day.\textsuperscript{55} Mueller

\textsuperscript{50} See supra notes 21–26 and accompanying text.

\textsuperscript{51} Jenny Brown is my sister-in-law. I assisted in preparing and arguing Ms. Brown’s case before the Kentucky Unemployment Insurance Commission, the Jefferson Circuit Court, and the Kentucky Court of Appeals.


\textsuperscript{53} See id. at 1–2.


\textsuperscript{55} Referee Decision, \textit{Brown}, AD No. 92-7696A, at 2. Brown also pursued a state-law pregnancy discrimination claim against Mueller for pregnancy discrimination and ultimately prevailed. Eighteen months after first receiving the complaint, the
contested the claim, arguing that Brown had voluntarily and inexplicably quit.

Because Kentucky's unemployment insurance law provides that voluntary separations from employment are compensable only if supported by "good cause attributable to the employment," Brown would be disqualified from receiving benefits notwithstanding her pregnancy if the local Division of Unemployment Insurance believed Mueller's defense. On September 10, 1992, six weeks after her separation, a hearing was held on Brown's unemployment insurance claim. Five days later, the referee denied Brown's claim for unemployment benefits. The referee entered the following findings:

On April 17 [Brown] informed Dr. Mueller that she was pregnant and that her child was due on December 19. Later, she indicated to Dr. Mueller her intent to leave her employment with the birth of her child, expressing the hope that later she could return to work there on a part-time basis. That notice of intent to leave her employment played a part in Dr. Mueller's decision . . . that effective August 3, claimant would revert to part-time status working five hours a day, three days a week. The principal reasons [sic] for this however was that [the] office staff was to [be] reorganized which included the hiring of an administrative assistant in the office. . . . [T]he administrative assistant to be hired would be taking on some of claimant's duties.

It is claimant's understanding that Dr. Mueller's wife, Lynne, was office manager . . . [o]n the same day she received [notice of Mueller's decision, claimant] telephon[ed] Ms. Mueller at home to express her displeasure at being reduced to part time work.

Irritated at what he called claimant's going behind his back, Dr. Mueller sent her a memo to clarify the situation:


56. KY. REV. STAT. ANN. § 341.370(1)(c) (Michie 1994).
that his decision she would now work part-time was final and not negotiable. [In] communications between them thereafter... Dr. Mueller expressed his concern as to claimant's commitment as an employee with her reluctant acceptance at [sic] her upcoming reassignment and that he would be uncomfortable if, . . . as she had suggested, she might file a discrimination complaint against him. . . . [H]e told her that he would consider continuing to work full-time but that this would likely require a reduction of her hourly pay rate . . . . She left the office shortly thereafter and filed her application for unemployment benefits later that day.  

Based on these findings, the referee ruled that Brown

left this suitable work voluntarily without good cause. . . .

The employer's intent to reduce [her] to part-time work . . . was based on legitimate business needs and concerns and not because she was pregnant. . . . It has been ruled consistently by the Unemployment Insurance Commission in this type [of] case that a quitting because of reduced hours of work is a disqualifying quitting without good cause. Beyond that, claimant was on notice at the last that her employer was willing to consider allowing her to continue working full-time, she electing to leave before fully and fairly exploring that reasonable alternative to quitting. A worker does not have good cause to leave if there are reasonable alternatives to loss of employment.  

Brown appealed the referee's decision to the Kentucky Unemployment Commission which, on November 9, 1992, almost four months after Brown's separation, ruled that she was entitled to benefits. Although the Commission accepted the bulk of the referee's factual findings, it added:

Dr. Mueller told claimant that if she were going to file a discrimination complaint against him, then he wanted her

58. Id. at 1–2.
59. Id. at 2–3.
resignation. During this same conversation, the possibility of claimant continuing to work full-time was discussed. However, it was clear that her wages were going to be reduced an undetermined amount, but substantially more than . . . if she were permitted to work full-time. Believing that such a reduction in pay would be discriminatory, claimant still planned on filing a discrimination complaint even if she were permitted to work full-time. Therefore, claimant quit her employment in response to Dr. Mueller's statement that if she were going to file a discrimination complaint then he wanted her resignation. . . . Further, by forcing claimant to choose between her employment and filing a discrimination complaint, Dr. Mueller created a work environment so onerous and burdensome that claimant had no reasonable alternative but to quit her employment.61

Mueller did not appeal this award.

Between the time she left Mueller's employment and the November award, Brown received no unemployment benefits.62 Because of her pregnancy and the financial constraints placed on her family, Brown accepted a temporary, part-time position with Dr. Louis Heuser in mid-October 1992.63 She worked in this office until she learned that the Commission had awarded her benefits.64 Because of the award, her pregnancy, and the job's part-time nature and lower pay, Brown did not intend to return to the office after November 12.65 She delivered her baby on December 18, 1992.

On March 17, 1993, the Division of Unemployment Services redetermined that Brown was disqualified from receiving future benefits and that she would have to repay benefits

61. Id. at 1-2.
63. Id. at 2.
64. Referee Decision, Brown v. Heuser, AD No. 92-07696BA, at 2 (Ky. Div. of Unemployment Ins., Dep't for Employment Servs. May 26, 1993) (on file with the University of Michigan Journal of Law Reform). Ms. Brown informed the Unemployment Commission in writing, through its local office, of all income that she had received while working in this office, and corresponding deductions were made from the benefits that she later received. Id.
65. Id.
A Case for Pregnancy-Based UI

retroactive to November 12, her last day of work in the physician's office. The reasons for the disqualification were her voluntary termination of employment and her failure to report this separation to the Division. Brown contested the determination, and a hearing was held on May 20, 1993. Six days later, the referee ruled again against Brown, concluding that Brown "voluntarily left the employer without good cause attributable to the employment" and that the employment was suitable notwithstanding its part-time nature. Additionally, the referee found that Brown had refused full-time employment, a conclusion based on Brown's failure to prove the opposite. The referee found against Brown on this issue because "the testimony between claimant and the employer's office manager on this determinative point is at equipoise, and because claimant bears the burden of proof [,which] she has not overcome.

Brown again appealed to the Commission and argued that: (1) the hearing officer incorrectly saddled her with the burden of proof; (2) even full-time employment in the physician's office was not suitable because it paid substantially less than did her prior job; and (3) she did not formally quit until after her daughter's birth on December 18, meaning that her disqualification should only have occurred, if at all, over a month later. On July 30, 1993, the Commission affirmed the referee's decision, concluding that: (1) the referee correctly assigned the burden of proof to Brown; (2) Brown was disqualified for quitting, even though the work that she quit was part-time work that paid substantially less than her prior employment; and (3) her disqualification began upon her last day of work, November 12, and not when she formally quit.

---

66. Id. at 1–2.
67. Id. at 1.
68. Id. at 2–3.
69. Id. at 3.
70. Brief for Jenny G. Brown at 1–5, 11–12, Brown v. Heuser (Ky. Unemployment Ins. Comm'n July 30, 1993) (AD No. 92-07696BA) (on file with the University of Michigan Journal of Law Reform). Brown's second employer assumed that she was on maternity leave during this period and would return to work following childbirth. See Referee Decision, Brown, AD No. 92-07696BA, at 2. If the referee had accepted this third argument, Brown might have retained one month of benefits.
71. Cf. Order, Brown v. Heuser, AD No. 92-07696BA, at 2 (on file with the University of Michigan Journal of Law Reform) ("When a worker has quit employment the burden of proof is upon the worker to show good cause attributable to the employment for doing so. The burden shifts to the employer in a discharge issue.")
Brown was obligated to accept part-time work in the first instance and whether even full-time employment resulted in substantially reduced wages were not considered. Moreover, in response to the argument that Brown did not quit until she notified her employer, the Commission stated:

Even if we were to rule, as counsel now argues, that [the] claimant did not quit until she failed to return to work after her baby was born, we would also rule that she was on a maternity leave, and not eligible for benefits . . . during the duration of that leave.

Brown's subsequent appeal to the Jefferson Circuit Court proved successful. On February 2, 1994, the court reversed the Commission's ruling because it found that the law "makes it clear that in a disqualification case . . . it is the employer who must bear the burden [of proof]." The court did not reach any of the other issues raised by Brown, finding that they had become moot.

The Commission appealed to the Kentucky Court of Appeals, arguing that the burden of proof should have been placed on Brown to show that she had good cause to quit. Brown cross-appealed, asserting that quitting unsuitable employment does not disqualify an otherwise eligible claimant from receiving benefits. The Kentucky Court of Appeals ruled for the Commission on both points: first, it concluded that Brown properly

---

72. Cf. id. ("Here there was no reduction in wages unilaterally enforced by the employer; claimant merely accepted new work at less per hour and on a part-time basis.").

73. Id.


75. Id. at 5.


bore the burden of proving that she was not disqualified from receiving benefits; next, it held that because Brown had accepted intervening employment, she "[was] precluded from now claiming that the employment . . . was unsuitable and, hence, that she was entitled to quit that employment without being disqualified from receiving unemployment benefits."

### B. Critique of Brown v. Kentucky Unemployment Insurance Commission

Jenny Brown's case exposes serious flaws in what should be a gender-neutral compensation system. First, the strong bureaucratic preference for "managerial prerogatives" and "business needs" often overcomes empathy for pregnant workers. The referee in Brown v. Mueller, for example, concluded as a factual matter that Brown's demotion was motivated, in part, by her impending maternity leave. As a legal matter, however, rather than simply recognize that the causal connection between Brown's demotion and pregnancy rendered Mueller's decision unlawful, the referee rationalized that "legitimate

---

79. *Id.* at 7.
business needs and concerns" were the true culprits. In effect, the referee balanced Brown's right not to be discriminated against because of her pregnancy against Mueller's business needs and found the latter the weightier of the two. The referee apparently was not persuaded that an employer might not have the right to replace immediately a pregnant worker who would be taking a maternity leave in the not-too-distant future.

Second, the Commission applied an unconstitutional presumption when it ruled that Brown was on maternity leave from her last day of work until the day she officially quit her employment with Heuser. Brown testified that she was both able and available to work during this period, and her testimony was not contradicted at the referee hearing. In order to overcome this testimony, the Commission used a long-established presumption and societal belief that pregnant women are not able to work. Of course, presumptions of this nature are invalid, but administrators of formal law often have difficulty overcoming ingrained stereotypes.

The decision can also be criticized on ostensibly gender-neutral grounds. The second referee forced Brown to prove a negative, that she was not disqualified from receiving benefits. Contrary to forcing opponents to disprove facts, burdens of proof are usually assigned to the proponent of a particular result "who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion." The relevance of the unsuitability of Brown's intervening employment was not

82. Referee Decision, Brown, AD No. 92-7696A, at 3.
84. See Turner v. Department of Employment Sec., 423 U.S. 44, 46 (1975) (holding that the presumption that a pregnant worker is unavailable for work is an invalid conclusive presumption).
85. MCCORMICK ON EVIDENCE § 337 (Edward W. Cleary ed., 3d ed. 1984). Kentucky case law provides that the burden of proving eligibility rests on the claimant while the burden of proving disqualification falls on the employer. E.g., Brown Hotel v. Edwards, 365 S.W.2d 299, 301 (Ky. 1963). Although reported decisions in Kentucky are silent on the situation presented in Brown's case—where the claimant is eligible, accepts work elsewhere, and then quits—a good argument can be made that the subsequent intervening termination, as a disqualifying event, should be proved by the employer. The willingness of the hearing officer, the Commission, and the Court of Appeals to force the claimant to prove a negative—that she was not disqualified—notwithstanding the general rule to the contrary, certainly draws into question their empathy for displaced workers.
addressed by the Commission and was dismissed by the courts. The accepted view in virtually every other state that has considered the issue is that accepting and quitting unsuitable employment that pays substantially less than the claimant’s former employment will not disqualify the claimant from receiving benefits to which she otherwise would have been entitled. Although these unanimous holdings were presented to the Kentucky Court of Appeals, the court made no mention of them in its opinion.

The irony, of course, is that had Brown been awarded the benefits to which she was entitled in the first place, she would not have accepted employment that paid substantially less and would not have been disqualified from compensation. The referee’s initial denial of benefits, likely based on stereotypical views about pregnancy and the workplace, forced Brown into a Catch-22 situation: Await proper enforcement without means of support or accept marginal employment and forfeit benefits.


88. Although Brown did not have to accept unsuitable employment, the Commission insisted that quitting unsuitable employment disqualified Brown, and the court of appeals agreed. See Brown, Nos. 94-CA-519-MR, 94-CA-605-MR, at 7.
Because unemployment insurance laws are structured to accommodate men, there is a strong likelihood that many working mothers have experiences similar to Brown's. As Professor Maranville explains

[O]ur current legal system often affects women differently, and less favorably, than men, and especially disadvantages the majority of women whose lives are significantly affected by their roles as mothers. . . . [T]he disfavored situation of women often results because laws implicitly have been structured to fit male life patterns—male norms that are not stated as such, but are instead mistaken for the inevitable, natural state of being.

The distinction between workers who "choose" to quit and those who are "forced" out of the workplace, either by their employer or their health, is inapposite in the context of pregnancy. The male free-will paradigm that distinguishes quits from discharges does not work for pregnancy because a pregnant worker who becomes pregnant will interrupt her work history for some period of time. Moreover, that interruption usually proves consequential. Because a true choice does not exist for pregnant workers, free will should be abandoned as not particularly useful to the calculus. The law instead should look beyond worker motivation and focus on the consequences of unemployment.

III. ARGUMENTS FOR AND AGAINST UNEMPLOYMENT BENEFITS FOR PREGNANCY-BASED SEPARATIONS FROM EMPLOYMENT

A. Doctrinal Arguments

Extending unemployment coverage to pregnancy presents no momentous legal obstacles. Two distinct doctrinal arguments


91. See infra notes 128–43 and accompanying text.
issues arise, the first one constitutional and the second one statutory, but neither can be sustained. First, it might be argued that extending unemployment insurance coverage to pregnancy as opposed to all nonoccupational disabilities and illnesses discriminates against male workers in violation of the Equal Protection Clause. The Supreme Court has ruled, however, that because men and women differ biologically in terms of childbirth, different treatment is permissible for pregnant workers. In *Geduldig v. Aiello*, the Court upheld a California disability program that exempted pregnancy from coverage. Justice Stewart, writing for the majority, explained:

[The program] does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification . . . . Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.93

A similar result was reached in *Michael M. v. Superior Court*, albeit with different reasoning. In *Michael M.*, a plurality of the Court sustained a California statutory rape law that punished only males for having sexual intercourse with females under eighteen years of age.95 Notwithstanding the fact that the law facially discriminated against males, Justice Rehnquist found the law permissible because females, he argued, are naturally deterred from underage sexual relations by the fear of pregnancy, while males are not.96 Males

---

93. *Id.* at 497 n.20.
95. *Id.* at 476.
96. *Id.* at 473. Justice Stewart concurred on the basis of his decision in *Geduldig*: "Young women and men are not similarly situated with respect to the problems and risks associated with intercourse and pregnancy, and the statute is realistically
therefore could be singled out for distinct treatment in an effort to achieve equal deterrence.

Geduldig and Michael M. support the proposition that pregnancy, as a constitutional matter, is an adequate basis for treating men and women differently. Men and women are biologically different with respect to pregnancy, thus justifying distinct treatment, and even when men and women are considered similar in other areas, they may still be treated differently to achieve an egalitarian result. Thus, in light of Geduldig and Michael M., equal protection should not be an obstacle, even when pregnancy is used to benefit rather than penalize women.

A more nettlesome question is whether extending unemployment insurance coverage to pregnant workers violates the

related to the legitimate state purpose of reducing those problems and risks." Id. at 479 (Stewart, J., concurring).

97. See, e.g., Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 728 (1982) ("In limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened.").

98. If constitutional law speaks to the matter at all, it can be read to direct that unemployment insurance not be denied because of pregnancy. A persuasive argument may be made that the fundamental right to bear children, e.g., Eisenstadt v. Baird, 405 U.S. 438 (1972), coupled with the doctrine against unconstitutional eligibility criteria, e.g., Sherbert v. Verner, 374 U.S. 398 (1963), prohibits the government from denying unemployment insurance to claimants who choose to procreate. See Judith O. Brown et al., The Failure of Gender Equality: An Essay in Constitutional Dissonance, 36 BUFF. L. REV. 573, 635 (1987) (arguing that Sherbert v. Verner may be read to require unemployment insurance for pregnant workers, but is not read this way because of "deeply held assumptions and values, which are not sex-neutral"). For example, in Sherbert, the Supreme Court ruled that a state could not deny unemployment benefits to a claimant who refused to work on her Sabbath. 374 U.S. at 410. Notwithstanding that the state applied a religiously neutral rule—the good cause requirement for voluntary separations—the Court found that the application of the rule indirectly burdened the claimant's religion. Id. at 403. Applying the rule against unconstitutional conditions, the Court held that the state could not condition unemployment compensation on the forfeiture of a fundamental right. Id. at 410; accord Frazee v. Illinois Dept' of Employment Sec., 489 U.S. 829 (1989) (holding the same notwithstanding the absence of a formal religion); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd. of the Indiana Employment Sec. Div., 450 U.S. 707 (1981). But cf Employment Div. v. Smith, 110 S. Ct. 1595 (1990) (holding that a religiously neutral law is not unconstitutional where the asserted right is a right to ingest peyote). The similar argument is that unemployment insurance benefits may not be conditioned on a forfeiture of the fundamental right to bear children. Although the analogy to Sherbert would seem strong, the Supreme Court overlooked it in Wimberly v. Labor and Industrial Relations Commission, 479 U.S. 511 (1987), and rejected it in the context of the fundamental right to choose an abortion in Harris v. McRae, 448 U.S. 297 (1980). Given Wimberly and Harris, the likelihood of success for this argument is small.
statutory mandates of the FUTA.\textsuperscript{99} Two arguments arise that might limit state legislation that aids pregnant workers. First, § 3304(a)(12) might be read to require strict neutrality in terms of gender and pregnancy. Second, a broad interpretation of § 3304(a)(4) could prohibit states from compensating workers who are not continuously available for employment, the result of which would be a federally mandated forfeiture of benefits during at least part of a claimant's pregnancy.

Yet neither argument is convincing. Although the Supreme Court has left open the question whether § 3304(a)(12) allows special treatment for pregnancy,\textsuperscript{100} the literal language of § 3304(a)(12) indicates that Congress did not intend to foreclose assistance to benign pregnant workers. The provision states that "no person shall be denied [unemployment] compensation . . . solely on the basis of pregnancy or termination of pregnancy."\textsuperscript{101} The proscription of § 3304(a)(12), therefore, prohibits disadvantageous treatment for pregnancy, but says nothing about beneficial treatment.\textsuperscript{102} Requiring strict neutrality from a fair reading of § 3304(a)(12) would require reading the words "or allowed" into the statute immediately following the word "denied," a clearly contrived result.

The Pregnancy Discrimination Act (PDA),\textsuperscript{103} which amended Title VII, uses more gender-neutral language than that found in the FUTA and yet has been interpreted to allow special treatment for pregnancy. In \textit{California Federal Savings & Loan v. Guerra}, the Supreme Court found that the PDA was not intended to prevent states from requiring that employers provide pregnant workers unpaid leave and reinstatement following pregnancy.\textsuperscript{104} The relevant language in the PDA provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all

\textsuperscript{100} \textit{See Wimberly}, 479 U.S. at 521–22 (holding that § 3304(a)(12) does not mandate preferential treatment for pregnancy but not reaching whether state preferences are permitted).
\textsuperscript{101} 26 U.S.C. § 3304(a)(12).
\textsuperscript{102} \textit{See Christine N. O'Brien & Gerald A. Madek, Pregnancy Discrimination and Maternity Leave Laws}, 93 DICK. L. REV. 311, 325 (1989). "[I]n post-Guerra America, the sexes need not be treated equally in terms of disability, because women are more regularly disadvantaged by pregnancy disability without job protection than are men by any sex specific disability." \textit{Id}.
\textsuperscript{104} \textit{See 479 U.S. 272, 287–88 (1987).}
employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work.” 105 If “shall be treated the same” allows benign treatment for pregnancy, 106 then “shall [not] be denied compensation” 107 should also permit accommodating treatment.

Whether § 3304(a)(4) of the FUTA requires that claimants remain “available” to work is a more amorphous question. Section 3304 says nothing about availability. Yet an argument may be fashioned from the wording and intent of § 3304 to support availability as a federal mandate. The § 3304(a)(1) requirement that unemployment compensation be paid through “unemployment offices,” 108 for example, has been interpreted to mean that only those actively seeking and able to work are entitled to benefits. 109 Additionally, the limited exemption for payments made “to individuals with respect to their disability” 110 might be interpreted to imply that states violate the FUTA when they make payments to disabled, or unable and hence unavailable, claimants outside the terms of the exemption.

Because the FUTA’s express terms do not require that a claimant remain available, and because the federal courts have not been forced to resolve the issue, the matter remains unsettled. 111 Assuming that federal law requires availability, the question then becomes what that mandate means. Specifically, would a federal availability requirement preclude states from providing benefits to pregnant claimants pre-partum? In light of the broad contours of the FUTA, its insistence on uniformity only where necessary, 112 and a historical experience that

106. See Guerra, 479 U.S. at 287.
108. Id. § 3304(a)(1).
109. See Gladys Harrison, Eligibility and Disqualification for Benefits, 55 YALE L.J. 117, 119 (1945) (“The worker to be eligible must be 'available for work.' The federal sanction behind such provisions is the requirement that public employment offices be utilized in the claims-payment process.”) (footnote omitted).
110. 26 U.S.C. § 3304(a)(4)(A) (“An amount equal to the amount of employee payments into the unemployment fund of a state may be used in the payment of cash benefits to individuals with respect to their disability, exclusive of expenses of administration . . . .”).
111. All states require, however, that claimants remain available. See supra note 32.
112. In Ohio Board of Employment Services v. Hodory, 431 U.S. 471 (1977), the Court noted: “The plan for unemployment compensation . . . contemplates that the States shall have broad freedom to set up the type of unemployment compensation they wish . . . . All matters in which uniformity is not absolutely essential should be left to the States.” Id. at 483.
affords states latitude in fashioning their unemployment insurance laws, the answer should be no. Regardless of a federal mandate to compensate only “available” claimants, states should be legally competent to define “availability” so as not to exclude pre-partum compensation.  

If uncertainty clouds the propriety of state action, rather than deny benefits to otherwise worthy pregnant claimants, the better course is to amend the FUTA to make it clear that pre-partum unemployment insurance is permissible. Better yet, Congress should pass legislation requiring unemployment insurance for pregnancy-based separations from employment.

B. Normative Arguments for Extending Benefits

The primary normative arguments in favor of unemployment insurance for pregnancy-based separations from employment are threefold: insurance would (1) foster gender equality in the workplace by accommodating biological and sociological differences between men and women; (2) ameliorate the effect that pregnancy has on poverty; and (3) safeguard pregnant workers who fall into anomalous gaps in current laws, either because the law offers no protection or because it is simply under-enforced.

1. Fostering Gender Equality—Congress has summarized the problems of working parents, especially women, in the Family and Medical Leave Act:

---

*Hodory* involved a worker furloughed from his employment because of a strike at another U.S. Steel plant. *Id.* at 473. The worker had been denied unemployment insurance benefits because, according to the state, his unemployment was caused by a labor strike. He sued in federal court and argued that the state was required by the FUTA to compensate him. *Id.* at 475. In particular, he argued that because he was involuntarily unemployed he was entitled to benefits as a matter of federal law. *Id.* at 482. The Supreme Court rejected this argument, finding that the state could choose to insure the worker but also might choose not to. See *id.* at 484. The suggestions found in congressional reports that only “involuntarily unemployed” workers be compensated were only “an expression of caution that funds should not be dispensed too freely, and is not a direction that funds must be dispensed.” *Id.*

113. For example, whether a pregnant worker is “available” might be assessed by focusing on her intent to return to work after childbirth. See *infra* note 182–86 and accompanying text. If so, a worker’s pregnancy and temporary absence from the work force need not mean that she is unavailable.

The number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly;\textsuperscript{115}

\ldots

The lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting;\textsuperscript{116} [and]

\ldots

Due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men . . . .\textsuperscript{117}

Various statistics confirm these findings. In 1970, women comprised only 38\% of the labor force.\textsuperscript{118} By 1993, the number had grown to 46\%.\textsuperscript{119} The percentage of women participating in the labor force also continues to grow: In 1970, only 43\% of America's women were working; in 1993 that rate had climbed to 58\%.\textsuperscript{120} The participation rate of married mothers, meanwhile, increased to 68\% in 1992.\textsuperscript{121}

Professor Maureen E. Lally-Green reports that the number of single-parent households has increased because of the high rate of divorce and out-of-wedlock births.\textsuperscript{122} In 1987, 19\% of mothers aged eighteen to forty-four were single.\textsuperscript{123} Moreover, the median annual income for families was $40,422 when the wife was in the labor force and $26,652 when she was not.\textsuperscript{124} Based on this data, Professor Lally-Green concludes that "parents in most families work, and most do so because they must."\textsuperscript{125}

\begin{itemize}
\item[\textsuperscript{115}] Id. § 2601(a)(1).
\item[\textsuperscript{116}] Id. § 2601(a)(3).
\item[\textsuperscript{117}] Id. § 2601(a)(5).
\item[\textsuperscript{118}] See U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 395 (1994).
\item[\textsuperscript{119}] See id.
\item[\textsuperscript{120}] Id.
\item[\textsuperscript{121}] WOMEN'S BUREAU, U.S. DEPT OF LABOR, 1993 HANDBOOK ON WOMEN WORKERS: TRENDS AND ISSUES 10 (1994) [hereinafter WOMEN WORKERS].
\item[\textsuperscript{123}] Id.
\item[\textsuperscript{124}] Id.
\item[\textsuperscript{125}] Id. (emphasis added); see also Women's Income No Luxury, Poll Finds, ST. PETERSBURG TIMES, May 11, 1995, at 3A (reporting a poll indicating that "[m]ore than
That women, including women who are mothers, work—and must work—seems clear. Also clear are the adverse effects that pregnancy and employers' attitudes have on women in the workplace. Everyone is familiar with the wage gap that divides men and women in the workplace. What is not fully understood is the cause of this phenomenon. Issacharoff and Rosenblum report that the chronic wage gap between men and women is in large part attributable to greater male seniority. Wage differentials can be explained largely by women's greater tendency, both real and imagined, to interrupt their careers. "[T]he greater likelihood of women leaving the work force is highly correlated with an expected lower career-wage profile." The increased hazard rate for women, in turn, is very likely explained by the "birth-effect." "Having children makes it more likely that women will leave the work force altogether or switch to part-time employment." Uninsured women are then left with unequal means to compete with their male counterparts. Women spend more time searching for employment and lose continuous work force participation. Lower wages and less seniority result.

Because the private market has not adjusted to this problem, laws must be designed to cushion the blow that unemployment forces on pregnant workers. Roughly half of those employed by small businesses, who disproportionately tend

---

half the employed women surveyed—including single and married women—said they provided at least half of their household's income. . . . Even among married women, 48 percent said they provided half or more of the family income*.

126. *See Issacharoff & Rosenblum, supra note 9, at 2160.

127. *Id.

128. *Among more experienced workers, women are "significantly more likely than men to quit not only a particular job, but to leave the work force altogether." *Id. at 2163.

129. *Among entry-level workers, "the expected tenure of a woman at her first full-time job was virtually identical to that of a man." *Id.

130. *Id. at 2164.

131. *Id. at 2165 (footnote omitted).

132. *See O'Brien & Madek, supra note 102, at 320 ("The woman who is not guaranteed a return to her old job must engage in a job search and her family can suffer real economic hardship, if the woman worker has no unemployment compensation.") (internal quotation omitted).

133. *Issacharoff & Rosenblum, supra note 9, at 2166.


135. *In small establishments, defined as those employing fewer than 100 employees, only 53% of employees are provided any sick leave at all. U.S. BUREAU OF THE
to be women, and one-third of those employed in medium and large businesses are not entitled to any paid disability or maternity leave whatsoever. Moreover, privately negotiated disability policies often suffer several drawbacks, including durational eligibility requirements, no coverage for part-time employees, and inadequate benefits.

Although the number of businesses offering unpaid leave is increasing and probably will increase with the adoption of the Family and Medical Leave Act (FMLA), unpaid leave does not address the problems of lower-echelon employees who cannot financially afford unemployment. Professor Maria O'Brien Hylton has observed that "in the case of parental leaves there is every reason to believe that the increased costs will be borne primarily by low-skill female employees—those least likely to be able to take advantage of the legislation." Hence, notwithstanding the FMLA's good intentions, it is not a panacea for the poor.

Social equity demands that pregnancy-based interruptions of employment be financially accommodated. Although any

CENSUS, supra note 118, at 434. In medium and large businesses, those employing 100 or more employees, the figure rises to 67%. Id.
136. O'Brien & Madek, supra note 102, at 328.
137. See supra note 135.
138. Under the terms of the Pregnancy Discrimination Act, private disability plans covering temporary disabilities must also include maternity leave. See Dowd, supra note 134, at 708-09. However, "the best estimates of the availability of maternity leave indicate that fully one-quarter of all employers do not provide any maternity leave." Id. at 710.
139. Id. at 711-12.
140. In 1991-1992, the rate for unpaid maternity leave was 37% for large and medium-sized companies and 18% for small companies, compared to only 2% paid maternity leave for small, medium, and large businesses. U.S. BUREAU OF THE CENSUS, supra note 118, at 434.
142. See Brown et al., supra note 98, at 581 ("Since women are often in low paying, non-unionized jobs, they are likely to receive little help from such a policy.") (footnote omitted).
144. Issacharoff and Rosenblum explain:

If the objective of a regulatory intervention into the employment market is to allow women the opportunity for career-wage profiles comparable to those of men, . . . the predictable mid-career interruptions caused by pregnancy must be accommodated under a regulatory scheme aimed at protecting the ability of
number of mechanisms might be created to protect continuing and equal participation of women in the work force, Issacharoff and Rosenblum argue persuasively that "an insurance model for pregnancy leave based on the unemployment insurance system" provides the most realistic alternative. Because the unemployment insurance system is extant and requires only minimal modification, and because it affords the advantage of socializing monetary costs, this Article joins that endorsement.

2. Pregnancy and Poverty—A startling phenomenon has been the "feminization of poverty" during the last two decades. "The feminization of poverty is characterized as such because of the increase in the number of families consisting of a single mother and her children with no husband present." The Department of Labor reports that although women make up 51.3% of the population, they make up 57.7% of the population below the poverty line. Even more disturbing is the fact that 99% of the increase in families in poverty between 1970 and 1990 was an increase in poor families headed by females. While married-couple families had a poverty rate of 5.7% in 1990, the poverty rate for families with a female head of household was 33.4%. Nearly 53% of all poor families were headed by a female with husband absent.

Welfare no longer appears to be a politically viable concept. Alternatives to welfare include employment and unemployment insurance. Because society has yet to find the solution to unemployment—that is, the market cannot employ everyone—some form of unemployment insurance is necessary to avoid casting a larger percentage of the American population into poverty. I do not intend to reinvent the unemployment insurance wheel. Suffice it to say that, given the significant

women to continue their career work force participation through the predictable periods of fertility.

Issacharoff & Rosenblum, supra note 9, at 2171.
145. Id. at 2215.
146. Brown et al., supra note 98, at 585–86.
147. WOMEN WORKERS, supra note 121, at 37.
148. Id. "There are more than a third . . . as many poor women as there are poor men." Id.
149. Id. at 38.
150. Id. at 39.
151. Id.
correlation between single mothers and poverty, unemployment insurance might wisely and frugally be directed toward pregnant workers. The elimination of even a small degree of poverty should be worth the cost.

3. Deconstructing Distinctions—States that provide unemployment benefits to pregnant claimants uniformly require that the separation from employment be medically necessary and that the pregnant claimant remain available to work. The net effect is unpaid maternity leave, with unemployment benefits available only post-partum. This practice appears to be the conventional wisdom. Even Issacharoff and Rosenblum propose a post-partum model, with unemployment benefits being paid “twelve weeks post-partum, . . . with pre-partum complications treated under normal disability programs.” The problem with Issacharoff’s and Rosenblum’s proposal is that only a handful of states compensate disabled or pregnant workers. In the vast majority of states, a worker who takes a medically necessary leave will not receive state-sponsored disability payments. Private arrangements may of course be made for paid disability leave, which cannot discriminate against pregnancy, but a large number of employees have

153. Interestingly, the Frazier-Lundeen Bill, also known as the Workers’ Bill, which was the forerunner to the FUTA, provided protection for maternity leave. See H.R. 2827, 74th Cong., 1st Sess. § 3 (1935).

154. Cf. Hylton, supra note 143, at 518 (“[T]here can be little question but that the costs of unemployment or underemployment are not borne exclusively by those most directly affected. . . . [T]he nexus between high rates of unemployment and violent crime is well established and obviously affects us all.”).

155. See supra notes 26–35 and accompanying text.

156. Issacharoff & Rosenblum, supra note 9, at 2217. They argue for more compensation, however, so that unemployment benefits equal “two-thirds of average taxable earnings for the past twenty-six weeks of employment.” Id; see also Esterle, supra note 13, at 713 (“In modern times, the pregnant woman needs the assistance of unemployment benefits once she is ready to return to work.”).

157. By “disabled,” I am referring to nonoccupational illnesses and injuries. Occupational illnesses and injuries may support awards of unemployment benefits because of the connection with employment. See supra note 26. Note, however, that the claimant must remain available for work. For this reason, occupational illnesses and injuries are normally compensated under relevant workers’ compensation laws. Supra note 26.

158. See supra notes 38–45 and accompanying text.

159. See Dowd, supra note 89, at 121 (“[E]mployers are not required to provide [disability leave], nor are they required to provide benefits sufficient to cover all pregnancy-related disability. Rather, courts have read the PDA to require only the same disability coverage (or lack thereof) as that provided to male employees.”) (footnotes omitted). The Pregnancy Discrimination Act (PDA) provides that “women affected by pregnancy . . . shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs.” 42 U.S.C.
failed to negotiate protection.\textsuperscript{160} Moreover, private coverage assumes that the worker remains employed;\textsuperscript{161} as demonstrated in Jenny Brown’s case,\textsuperscript{162} employers are not adverse to discharging pregnant employees.\textsuperscript{163}

If unemployment insurance is to achieve the dual objectives of fostering gender equality and obviating the feminization of poverty, coverage must be afforded pre-partum as well as post-partum. The anomaly of providing coverage post-partum, but not pre-partum, serves no legitimate purpose. Instead, a pregnant claimant forced from the labor market because of medical necessity should qualify for unemployment benefits pre-partum during her period of unavailability as well as post-partum. Benefits should continue after childbirth either until the claimant is able to locate suitable work or until the twenty-six week eligibility window closes. Of course, this does not address

\textsuperscript{160} Half of those employees working for small businesses, and one-third of those working for medium and large employers, are not entitled to paid disability leave. See \textit{supra} notes 135–38 and accompanying text.

\textsuperscript{161} At least outside the coverage of the FMLA, “disability leave usually does not guarantee job security. Thus, under existing policies and legislation, childbirth often results in loss of employment or of employment status.” Dowd, \textit{supra} note 89, at 122.

\textsuperscript{162} \textit{See supra} Part II.

\textsuperscript{163} This is true notwithstanding Title VII. Because the restrictions of the PDA are limited to employers with 15 or more employees, small businesses are not covered. Moreover, today’s federal courts are not prone to give the PDA a broad, protective reading. In Troupe v. May Department Stores, 20 F.3d 734 (7th Cir. 1994), a pregnant worker was fired the day before she was to begin a paid maternity leave, allegedly because of repeated tardiness, but rather, according to Troupe, because her employer “did not expect her to return to work after her maternity leave was up.” \textit{Id.} at 737. Accepting as true Troupe’s testimony that her employer fired her because the company did not expect her back after her maternity leave, Judge Posner concluded that no prima facie case of pregnancy discrimination had been established:

\small

We must imagine a hypothetical [man about to take extended leave for a kidney transplant]. If [the employer] would have fired our hypothetical [man], this implies that it fired Ms. Troupe not because she was pregnant but because she cost the company more than she was worth to it.

\textit{Id.} at 738. Troupe’s failure to disprove this hypothetical with evidence that an employee with leave similar in length to hers had not been fired “doomed her case.” \textit{Id.} at 739.
pregnant workers who leave the workplace before their maternity leave becomes necessary. I hope to show below, however, that they should be insured.

C. Normative Counter-Arguments

1. Penalizing Faultless Employers—One counter-argument to my proposal is that it penalizes faultless employers. As the argument goes, a worker's pregnancy is not the fault of her employer and the employer should not be penalized by being held accountable—via a higher experience rating—for the worker's unemployment. The rejoinder to this argument is threefold. First, unemployment insurance was not originally envisioned as a fault-based system, nor is it a function of employer-based fault today in a majority of states. In 1938, only two states focused on the employer's fault by requiring that good cause for quitting be “attributable to” the employer, and most states still do not require employer-based fault. Consequently, the argument that compensating pregnant claimants improperly holds employers strictly liable proves too much. The fact is that employers often are held liable for unemployment benefits even though they are not at fault.

Second, the argument for fault does not respond to the question of when unemployment compensation should be paid: pre- or post-partum. Because my suggestion to compensate pre-partum as well as post-partum claimants would only shift benefits forward, and not increase the total amount paid, those

164. See Casebeer, supra note 152, at 336–37.
165. Id. at 330.
166. For example, a large number of states compensate, albeit post-partum, pregnant claimants who quit work because of medical necessity even though neither the pregnancy nor the medical necessity is the employer’s fault. See supra notes 27–36 and accompanying text.
167. Of course, this does not address the broader question of whether unemployment insurance should be based solely on the employer’s fault. My point is that the system currently is not truly fault based in most states; thus, singling out pregnancy for fault-based treatment makes no sense. Cf. Martin H. Malin, Unemployment Compensation in a Time of Increasing Work-Family Conflicts, 29 U. Mich. J.L. Ref. 131, 152 (1996) ("Courts are fond of saying that the disqualification standards ensure that UI benefits are paid only to workers who are unemployed through no fault of their own. The concept of fault, however, does not describe the disqualification standards with sufficient precision to be helpful.") (footnote omitted).
states which already allow benefits post-partum should have little or no complaint. I recognize that there is some risk of increased benefits if pre-partum unemployment is covered in addition to post-partum unemployment. However, given that women and mothers work today because they must, the fear that women will become pregnant and quit work to receive unemployment insurance is overstated. Hence, the likelihood that the total amount of pregnancy-related benefits paid would increase because pre-partum separations are included is also overstated. Benefits now expire after twenty-six weeks, and experience teaches that pregnancy on average causes unemployment for only half of that time. Granted, those states which do not compensate pregnancy-related separations would incur a greater expense, but a financial complaint is different from one based on the moral imperative of fault.

Third, pregnancy-related unemployment insurance need not and should not be experience rated; fault would then prove to be irrelevant. The Advisory Council on Unemployment Compensation has observed that "states have a significant amount of freedom in deciding what percentage of their benefit costs will be experience-rated and what percentage will be socialized." Experience rating is not necessary for pregnancy-related unemployment claims because employers equally risk that a worker will become pregnant and separate from the workplace. Pregnancy falls beyond the employer's control and, as Issacharoff and Rosenblum have observed, "[T]here is no evidence that women are likely to have children specifically to collect pregnancy leave benefits .... The cost of compensating pregnant claimants should follow the risk, which is the same for all employers. The cost should therefore be borne equally. Indeed, experience rating in the pregnancy context

168. See supra note 125 and accompanying text.
169. See ACUC REPORT, supra note 6, at 33. Massachusetts and Washington allow benefits for 30 weeks. Id. at 39 n.5.
170. See infra notes 184–85 and accompanying text.
171. ACUC REPORT, supra note 6, at 85. Socialized unemployment insurance currently includes: "(1) payments to workers who quit their last job, (2) dependents' benefits, (3) payments to workers who are enrolled in approved training, (4) erroneous benefit payments that are not recovered, and (5) the state share of the Extended Benefits program." Id. at 78.
172. Issacharoff & Rosenblum, supra note 9, at 2216.
173. The cost, of course, would increase, but it would be borne equally. That compensating pregnancy-related separations will cost more is certainly a valid concern. But see infra notes 192–96 and accompanying text (estimating low costs of expanded coverage).
might create a disincentive to hiring women.\textsuperscript{174} It should therefore be avoided.

A related claim is that pregnancy insurance will increase the "moral hazard" of beneficiaries triggering benefits on purpose. Knowing that she will receive unemployment compensation after becoming pregnant, the argument goes, a woman is encouraged to become pregnant in order to quit her job.\textsuperscript{175} Again, Issacharoff and Rosenblum have found no evidence supporting the proposition that women will get pregnant in order to quit their jobs and collect unemployment insurance.\textsuperscript{176} Indeed, the notion is counterintuitive when stated in gender-neutral terms. Women are no more likely to become pregnant to collect unemployment insurance than are men intentionally to risk disability for the same reason.

One might also argue that women will be encouraged to abuse the unemployment insurance system by taking and quitting jobs to subsidize existing pregnancies. For instance, "a nonworking woman in the early stages of pregnancy, or intending to become pregnant, may use a pregnancy insurance system as a form of welfare-type subsidy simply by finding employment."\textsuperscript{177} To combat this possibility, Issacharoff and Rosenblum urge the adoption of the Canadian "magic ten" rule, which requires that the claimant work for her employer for ten weeks prior to conception to qualify for benefits.\textsuperscript{178} Pre-employment pregnancy, or pregnancy within ten weeks of the job's commencement, would disqualify the claimant.

What then of the pregnant worker who is fired or forced to quit because of her pregnancy and who cannot demonstrate that her separation is medically necessary? As in the case of Jenny Brown,\textsuperscript{179} that unemployment compensation should be paid does not mean that it will. Employers can bend the facts of any given case to avoid liability, and pregnancy itself can be used as probative evidence that the claimant left work voluntarily. In the absence of medical necessity, a voluntary separation would disqualify the claimant from receiving benefits.

\textsuperscript{174} See infra notes 199–203 and accompanying text.
\textsuperscript{175} Cf. Malin, supra note 167, at 155 (discussing moral hazard problems).
\textsuperscript{176} Issacharoff & Rosenblum, supra note 9, at 2216.
\textsuperscript{177} Id. at 2217–18.
\textsuperscript{178} Id. at 2218.
\textsuperscript{179} See supra Part II.
Professor Martin Malin has observed that the current unemployment laws generate anomalous results in the context of familial obligations. Malin notes, for example, that an employee who quits because of family responsibilities which the employer refuses to accommodate is disqualified from receiving benefits, while the same employee who is fired for tending to these responsibilities is not.\footnote{180} Peculiar conclusions are, of course, not the hallmark of a stable legal system and should be avoided whenever possible. Disqualifying a pregnant claimant who allegedly has quit without a medically verifiable reason will only encourage anomaly. The current net of disqualification is already cast wide enough to achieve disconcerting conclusions. Given current attitudes about pregnancy and mothers’ “proper” place in the labor market, easily manipulable distinctions should be eliminated wherever possible. One such distinction exists between a claimant fired and one voluntarily separated from employment because of pregnancy. Although perhaps workable in theory, the distinction should be dismissed as too difficult to prove and too trivial to be important. Rather, unemployment insurance coverage should be provided to all pregnant workers who leave the labor force, whether because of discharge, medical necessity, or personal preference.\footnote{181}

Admittedly, this proposal carries with it problems that one would prefer to leave behind. For instance, a malingerer might take advantage of the system by quitting work upon discovery of her pregnancy. Such a hypothetical, though not outside the realm of possibility, runs counter to experience. Women and mothers work because they must.\footnote{182} Few women will take solace in the fact that they can become pregnant, quit their job, temporarily receive a small percentage of their pay,\footnote{183} and forfeit

\footnote{180. Malin, supra note 167, at 174.}
\footnote{181. This assumes, of course, that the pregnant claimant is otherwise qualified under the relevant unemployment insurance provisions. I am not alone in making this recommendation. Although they do not elaborate the details of their proposal, Professors O'Brien and Madek have urged “a new national priority for parental leave with some wage replacement.” O'Brien & Madek, supra note 102, at 311. They argue that “[s]ociety gains by providing unemployment compensation benefits for eligible women who are willing to work but who are forced to leave their jobs because of pregnancy.” Id. at 319.}
\footnote{182. See supra notes 114–25 and accompanying text.}
\footnote{183. Benefits are normally limited to 50% of a worker's average gross wage, with the amount capping at between $116 and $335 per week. ACUC REPORT, supra note 6, at 34.}
whatever benefits package they might have through their employer. The experience in California,\textsuperscript{184} for example, teaches that time away from work because of medically necessary maternity leave is shorter than time away for all other disabilities.\textsuperscript{185} Because women do not use pregnancy to avoid work any more than men use illness or injury, one would not expect women inordinately to abuse the unemployment insurance system.

Moreover, the twenty-six week window for benefits should discourage a hasty separation from employment. The knowledge that unemployment benefits will expire before or shortly after childbirth if the claimant quits early, coupled with the reality that new work is difficult to find—especially late in the pregnancy—should encourage pregnant claimants to continue working as long as possible. Pregnant workers quitting their jobs simply to receive unemployment benefits will not be common.

Motivational distinctions in the context of pregnancy-related separations from employment are exaggerated and arbitrary. A pregnant woman who is fired is just as much out of work as one who quits. Both face an uncertain future in the labor force and both risk falling into poverty. Some, like Jenny Brown,\textsuperscript{186} will be denied benefits notwithstanding wrongful discharge. To avoid anomalous results and guard against wrongful denials, unemployment benefits should be extended across the board in cases of pregnancy-based separations.

2. Costs in Dollars—An immediate concern over extending unemployment benefits to pregnancy is financial: How much will it cost? Monetary costs, of course, will differ between states that currently award benefits to pregnant claimants post-partum and those that do not insure pregnancy at all. Increased costs for the former should prove marginal because in most instances only the timing of the benefits will change; because of the twenty-six week cap, paying benefits earlier should not increase the total payout. Still, because I propose to

\textsuperscript{184} California compensates pregnancy as a disability. See supra notes 31, 40 and accompanying text.

\textsuperscript{185} The average disability leave based on pregnancy in California in 1994 was 10.84 weeks. Memorandum from Jeanne Hughes, California Disability Insurance Branch, Health and Welfare Agency, to Professor Mark R. Brown 5 (Feb. 22, 1995) (on file with the University of Michigan Journal of Law Reform). During that same period, the average for all disabilities, including pregnancy compensated by the state plan, was 12.88 weeks. Id. at 4.

\textsuperscript{186} See supra Part II.
insure all pregnancy-related separations, as opposed to only medically necessary separations, a raw dollar increase must be expected. The question is how much.

Though no exact figure is available, an outside limit may be estimated. Since 1979, California has treated pregnancy as a disability under its state-sponsored Disability Insurance Program.\(^{187}\) Since 1982, pregnancy claims under the Disability Insurance Program\(^{188}\) have accounted for between 19% to 22% of total claims paid.\(^{189}\) During this same period, the actual cost of pregnancy claims ranged from 16% to 20% of the total amount paid.\(^{190}\) In 1994, for example, pregnancy claims made up 22.3% of the claims filed and accounted for 17.5% of the benefits actually paid out.\(^{191}\) Put another way, the inclusion of pregnancy increased the number of claims by 29% and the amount of benefits by 21%.

A more careful analysis of this data, however, indicates that the actual increase should be much smaller. The pool of unemployment claims extends well beyond disability. That pregnancy claims constitute one in five disability claims does not necessarily mean that pregnancy claims will constitute one in five unemployment claims. Unemployment claims in California last year were made at approximately five times the rate of disability claims and at almost twenty-four times the rate of pregnancy-related disability claims.\(^{192}\) Cast as a percentage of unemployment, medically necessary maternity leaves were only 4% the number of the unemployment insurance claims and cost less than 10% of the amount paid.\(^{193}\)


\(^{188}\) Pregnancy leave must be medically necessary to be compensable under this program. See id. § 2626(a), (b).

\(^{189}\) See Memorandum from Jeanne Hughes to Professor Mark R. Brown, supra note 185, at 2.

\(^{190}\) Id.

\(^{191}\) Id. at 3.


\(^{193}\) See supra note 192. In 1994, the total amount paid for unemployment insurance was $3,406,542,370. CALIFORNIA EMPLOYMENT DEV. DEP'T, supra note 192, at 1. The same year, California paid a total of $329,045,913 for pregnancy-related disability claims. Memorandum from Jeanne Hughes to Professor Mark R. Brown, supra note 185, at 3.
Granted, California insures only medically necessary, as opposed to all, maternity leaves, and the correlation between its disability and unemployment schemes is not perfect. Because disability benefits in California are generous, however, the percentage of the total amount paid likely errs on the high side. That California compensates only medically necessary leaves, moreover, should not greatly affect the rate of pregnancy-based separations; a pregnant claimant will at some time find it medically necessary to take a leave of absence. The average length of separation might be longer in a system that does not require medical necessity, which means increased costs. But the increase is easily overstated. Because claimants are not likely to take a leave of absence at a substantially reduced salary unless it is truly necessary, the average length of leave should not differ markedly from the length of separation due to medical necessity.

The California model suggests that the number of unemployment claims arising out of pregnancy should increase claims by roughly 4%. The financial cost of including pregnancy, though more speculative, should not be appreciably greater. Instead, the California experience indicates that insuring pregnancy is a lot less expensive than one might think.

3. Stereotyping and Encouraging Discrimination—A larger problem than financial costs is the potential for stereotyping and encouraging discrimination against women. A sticking point in the passage of the Family and Medical Leave Act was the fear that employers would view women as the primary beneficiaries of unpaid leave and thereby engage in discrim-

194. Disability benefits in California are unlimited in duration, although on average they did not exceed 13 weeks in 1994. See Memorandum from Jeanne Hughes to Professor Mark R. Brown, supra note 185, at 4. Weekly benefit amounts are set at 55% of the claimant's average weekly salary up to a maximum of $336 per week. CAL. UNEMP. INS. CODE § 2655 (West Supp. 1996).

195. See supra notes 182-85 and accompanying text.

196. A practical observation reinforces this point. Because of the potential for tort liability, physicians are more likely to err on the side of stating that pregnancy renders the claimant unable to work. Thus, obtaining a medical opinion that one should cease working, which is normally all that is required, should not be too difficult. The medical necessity requirement, then, does not prove very different from my proposal.

197. See supra note 193 and accompanying text.

198. I recognize that further study of the financial costs is necessary. However, the California example is useful because it suggests that the cost might be much less than expected.
inatory hiring practices. The same argument may be made with regard to pregnancy-related unemployment benefits. Even if the employer is not penalized by a higher experience rating, it might avoid female employees because of perceived "dislocation costs," that is, the cost of replacing an employee who takes a leave of absence.

To avoid this incentive, Issacharoff and Rosenblum propose that "between fifteen and forty percent of the pregnancy benefits be paid to the firm to underwrite the costs of continuing benefits and securing temporary replacements." Notwithstanding Issacharoff's and Rosenblum's misgivings, as well as a large amount of scholarship protesting special treatment for pregnant workers, the fear of additional discrimination is exaggerated. Pregnancy insurance is not likely to inflate existing discriminatory practices by any appreciable margin, because—unlike mandatory private insurance—employers will bear the same tax regardless of whether or not they hire women. Moreover, the rate of dislocation should not increase because of the availability of pregnancy benefits.

Time away from work might increase because of pregnancy insurance, which could in turn cause a reciprocal increase in dislocation costs. But even if women risk discrimination because of increased dislocation costs, the lack of realistic alternatives suggests that pregnancy insurance is worth the risk. Doing nothing, expanding unpaid leave, or providing greater unemployment insurance coverage on a gender-neutral

199. Cf. Remmers, supra note 159, at 409 ("[E]mployers will tend to view women as the beneficiaries of a parental leave policy. This view could result in discriminatory hiring practices.").
200. See supra notes 164–72 and accompanying text.
201. Issacharoff & Rosenblum, supra note 9, at 2219.
202. Id.
203. See, e.g., Lally-Green, supra note 122, at 245 ("Critics ... argue that laws that appear to give pregnant women preferential treatment are likely to jeopardize the hiring of women due to the potential increase in costs to the employer."); Brown et al., supra note 98, at 579 ("[A]dvocates of the 'similar treatment' approach ... argue that the best or even the only way to end discrimination against women is to require similar treatment to that afforded men.").
204. Any tax increase caused by pregnancy insurance should be socialized and not experience-rated. See supra notes 164–72 and accompanying text.
205. See supra notes 194–96 and accompanying text.
206. See supra notes 175–78 and accompanying text.
207. Issacharoff and Rosenblum observe that "more than half the work force" does not qualify for benefits under the Family and Medical Leave Act, and the system disproportionately favors males, who tend to work more often for the larger, covered employers. Issacharoff & Rosenblum, supra note 9, at 2190 & n.164.
basis appear to be the only potential alternatives. For the reasons already discussed, maintaining the status quo is unacceptable. Furthermore, unpaid leave trades gender bias for class-based discrimination. Professor Hylton has observed that “the expected discrimination (avoidance by employers of female workers) is likely to affect only the low-wage segment of the female labor market, rather than women employees generally.” Lastly, the financial cost of a gender-neutral expansion of unemployment insurance coverage would be greater, and hence even more difficult to sell politically in these times of fiscal austerity.

The argument that special treatment for pregnancy perpetuates stereotypes is dubious for at least two reasons. First, the assumption that pregnancy insurance is special or preferential treatment is itself based on a male norm. Different treatment consistent with the male norm, however, is not viewed as special, but is considered objectively justified. Military leave, for example, which benefits primarily men, is not deemed special treatment. The Supreme Court’s decision in

208. See supra Part III.B.

209. See Dowd, supra note 89, at 127 (“Pay is both a gender and a class issue. Without pay, parental leave is likely to be used primarily by women because of their position in the workforce as compared to that of men. The result is that low-income parents, and certainly single parents, will find it virtually impossible to take the leave.”).

210. Hylton, supra note 143, at 484. Professor Hylton concludes that “[t]he class bias is simply easy to see in the case of parental leave, where the concerns of relatively skilled working women are at odds with those of lower-skill female employees.” Id. at 485.

211. See Dowd, supra note 134, at 717 & n.78 (“[T]he problem with a differences approach is that the concept of sex differences reflects a stereotyped view of the sexes and could be used just as easily to deny equality as it could be used to promote equal opportunity.”) (footnote omitted).

212. See, e.g., Wendy W. Williams, Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 345–46 (1985) (“Pregnancy, for [Justice] Rehnquist, is an ‘extra,’ an add-on to the basic male model for humanity. Equality does not contemplate handing out benefits for extras—indeed, to do so would be to grant special benefits to women, possibly discriminating against men.”).

213. Brown et al., supra note 98, at 596.

Indeed, often ostensibly gender neutral rules serve to benefit men. But the gender bias of our culture is so deeply entrenched that these practices are viewed as either benefiting the entire society or simply reflecting the natural order. For example, military leave—which primarily benefits men—is defined as critical to the public interest, but pregnancy leave is characterized as special treatment for women.

Id.
Sherbert v. Verner,214 moreover, which held that workers separated from employment for religious reasons could not be disqualified from receiving unemployment benefits,215 is seen as accommodating religion rather than preferring it.216

Second, as noted by Professor Dowd:

[W]here the statutes are intended to compensate for actual disability associated with pregnancy and childbirth which operates to disadvantage women, and therefore are based on the existence of a real condition, they are not based on presumed or stereotypical assumptions about the disabling effects of pregnancy or the appropriate social roles of women.217

Simple biological reality avoids any need for stereotypical assumptions and distinguishes pregnancy insurance from gender-based parental leave. Although the charge of stereotyping can be made in the latter, it cannot in the former.

CONCLUSION

Unemployment compensation should be provided to all eligible218 claimants who separate from their employment because of pregnancy. Insurance should be provided regardless of whether the claimant is fired or has quit. Both pre- and postpartum claimants should qualify. Toward this end, legislation should be enacted that modifies or eliminates the need for medical necessity, involuntariness, employer-based fault, and availability. A claimant who has worked for her employer for at least ten weeks prior to becoming pregnant should qualify for

215. Id. at 410; see also supra note 98 (discussing Sherbert in more detail).
216. See, e.g., Brown et al., supra note 98, at 635 ("The Sherbert Court did not hold that the plaintiff was entitled to special treatment, which could arguably be viewed as a violation of the establishment clause. Rather, the Court held that the government could not penalize the plaintiff.") (footnote omitted).
217. Dowd, supra note 134, at 717 n.80.
218. By "eligible," I mean that the claimant must satisfy all other customary eligibility requirements not discussed in this Article. For example, a claimant must work a sufficient number of weeks to qualify for benefits. See, e.g., 26 U.S.C. § 3304(a)(7) (1994) (stating that "an individual who has received compensation during his benefit year is required to have had work since the beginning of such year in order to qualify for compensation in this next benefit year").
unemployment benefits until she either accepts suitable employment or exhausts her benefits. Benefits should continue post-partum for at least twelve weeks, when the claimant should be required to renew her search for suitable employment.

I offer the following model as one mechanism for insuring pregnant workers. It is designed as state legislation, but may be tailored to suit federal law.

MODEL PRE- AND POST-PARTUM UNEMPLOYMENT INSURANCE ACT

§ 1. PREGNANCY AND CHILDBIRTH SATISFY GOOD CAUSE REQUIREMENT. Pregnancy or childbirth shall provide an otherwise eligible claimant good cause for terminating her employment within the meaning of [insert cite to good cause requirement], provided, the claimant must have worked for her last employer for ten consecutive weeks prior to becoming pregnant.

§ 2. PREGNANCY AND CHILDBIRTH NEED NOT BE ATTRIBUTABLE TO EMPLOYMENT. An otherwise eligible claimant who separates from her employment because of pregnancy or childbirth need not establish that the reason for the separation is attributable to [or connected with] her employment within the meaning of [insert cite to attribution requirement].

219. Benefits currently expire after 26 weeks in 48 states. Massachusetts and Washington grant benefits up to 30 weeks. ACUC REPORT, supra note 6, at 33, 39 n.5. My proposed Model Act does not purport to enlarge these limitations.

220. A refusal of suitable employment is a disqualifying event in most states. E.g., KY. REV. STAT. ANN. § 341.370(1)(a) (Michie 1994). Under my proposal, a pregnant claimant would not be disqualified for refusing employment, and a post-partum claimant would not be disqualified for refusing employment during the 12-week period immediately following childbirth.

221. This section eliminates the need for a pregnant claimant to establish good cause for leaving her employment. It also dispenses with the requirement that pregnancy-related separations be medically necessary.

222. This provision tempers the risk that a claimant will use unemployment insurance to subsidize her pregnancy. Of course, the claimant must meet all other durational eligibility requirements. See supra note 218.

223. This provision eliminates the attribution requirement for pregnancy-related separations.
§ 3. **Availabilty Established by Intent to Return to Work.**

(a) An otherwise eligible pregnant claimant shall not be deemed unavailable for employment within the meaning of [insert cite to availability requirement], so long as she intends to seek full-time employment beginning twelve weeks after childbirth.\(^{224}\)

(b) An otherwise eligible claimant shall not be deemed unavailable within the meaning of [insert cite to availability requirement] during the twelve-week period immediately following childbirth.\(^{225}\)

§ 4. **Refusal of Employment Not Disqualifying.** Refusal of suitable employment shall not disqualify an otherwise eligible pregnant claimant within the meaning of [insert cite to disqualification provision],\(^{226}\) nor shall refusal of suitable employment disqualify an otherwise eligible claimant if the refusal occurs during the twelve-week period immediately following childbirth.\(^{227}\)

§ 5. **Definitions.**

(a) **Childbirth.** "Childbirth" shall include the twelve-week period immediately following the day of delivery.\(^{228}\)

---

\(^{224}\) This provision insures that pregnancy does not automatically lead to disqualification under the guise of unavailability. That the claimant intends to return to work following childbirth should be enough of a continuing connection to the labor force to satisfy existing federal mandates, if any. Of course, the claimant need not actually return to work following childbirth.

\(^{225}\) This provision insures that a post-partum claimant will not be disqualified for at least 12 weeks following childbirth. It draws from Issacharoff's and Rosenblum's conclusion that workers unemployed because of pregnancy should be compensated for 12 weeks post-partum. See supra note 154 and accompanying text.

\(^{226}\) This provision is designed to eliminate disqualification for refusing suitable employment. It is necessary because most states require that eligible claimants seek and accept reemployment. See, e.g., Ky. Rev. Stat. Ann. § 341.370(1)(a) (Michie 1994) ("A worker shall be disqualified from receiving benefits for . . . [failure] without good cause either to apply for . . . or to accept suitable work . . . .").

\(^{227}\) This clause dovetails with § 3(b) of the Model Act; it insures that a claimant will receive benefits for 12 weeks post-partum.

\(^{228}\) This broader definition of childbirth allows a claimant to quit after childbirth and still receive benefits. It is designed to address the situation where a working mother finds it necessary only after pregnancy and childbirth to quit work and tend to her family.
(b) PREGNANCY. "Pregnancy" shall include the period immediately following conception until childbirth.\textsuperscript{229}

American culture celebrates family, abhors discrimination, and promises an equal opportunity for all. However, unlike most of the industrialized world,\textsuperscript{230} our society has yet to reconcile the tension between these three competing values. Providing unemployment insurance for pregnancy is not a panacea, but it should bring greater equality to the labor market and help to forestall the increasing feminization of poverty. More study, of course, is needed on the financial cost of such a system. The percentages suggested in this Article are extrapolated and based on the experience of a single state. Still, the relative cost of pregnancy insurance should prove to be small when compared to the expected benefits.

\textsuperscript{229} This section clarifies the obvious; pregnancy includes the period between conception and childbirth.

\textsuperscript{230} See O'Brien & Madek, supra note 102, at 314; see also Issacharoff & Rosenblum, supra note 9, at 2200–14 (discussing the accommodation policies of European countries).