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Unemployment Compensation: Women and Children—The Denials

I. INTRODUCTION

Over the past few decades, women have left their jobs at home to seek market employment. Because of this mass movement, the composition of the United States labor force has changed considerably.[1] Today, 66.3% of all married mothers participate in the workforce.[2] As the structure of the labor market shifts from the traditional model of the male workforce, society must deal with changing family structures.[3] One of the most pressing concerns that has arisen, especially for working women, is the need to balance child-care responsibilities and work.[4]

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1. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, LABOR FORCE STATISTICS—DERIVED FROM THE CURRENT POPULATION SURVEY, 1948-1987 (Aug. 1988) [hereinafter BUREAU OF LABOR STATISTICS, LABOR FORCE STATISTICS]; Bureau of Labor Statistics, U.S. Dep't of Labor, Unpublished Data (Mar. 1990) [hereinafter Bureau of Labor Statistics, Unpublished Data].

2. Bureau of Labor Statistics, Unpublished Data, *supra* note 1.

3. Nancy E. Dowd, *Work and Family: Restructuring the Workplace*, 32 ARIZ. L. REV. 431, 439 (1990).

4. Many commentators have examined the social, political, and moral implications of the change in the composition of the working population and its impact on the family. *Id.*; Steven Mintz & Susan Kellogg, *Recent Trends in American Family History: A Commentary Describing Dimensions of Demographic and Cultural Change*, 21 HOUS. L. REV. 789 (1984); Nellie Pappas, Book Review, 86 MICH. L. REV. 1154 (1988) (reviewing MARIAN W. EDELMAN, FAMILIES IN PERIL (1987)). An examination of the legal responses to these issues

Unemployment compensation laws in this country offer a rich ground to examine varying legal responses to the labor force's pressing need for child care. It is within the context of individual state eligibility requirements that problems relating to this issue arise. All state statutes provide that a worker may not voluntarily leave her job or be unavailable for suitable work except for "good cause."[5] Therefore, the inquiry is whether child-care responsibilities are included in the definition of "good cause" under state unemployment compensation provisions.[6] A worker's eligibility for unemployment compensation turns upon the definition of "good cause." Today, a majority of jurisdictions in the United States exclude child care from the "good cause" provisions of their statutes.[7] The impact of this exclusion on working families is dramatic. It discriminates against working women by imposing inconsistent demands upon them: they must enter the workforce to meet the current economic need for dual incomes,[8] yet they are ineligible for unemployment compensation

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is even more important, however, because in part, it is through law that society changes its behavior and reconstructs its traditional images of our social relations. A poignant example of the effect law can have on society can be found in the court's decision in Brown v. Board of Education, 348 U.S. 886 (1954). Prior to *Brown*, equal protection doctrine was decontextualized and formal, as exemplified by decisions such as Plessy v. Ferguson, 163 U.S. 537 (1896), which reaffirmed the doctrine of "separate but equal". The law operated on abstract principles with no view to the real substance of the crisis. It was not until *Brown* that the Warren court approached the problem from a contextual standpoint. The court used empirical data to support its change in doctrine and examined the reality of discrimination and its lasting detrimental impact on black children in making a paradigmatic shift from separate but equal to desegregation. In retrospect, the changes made by the Warren court were critical. One wonders what the state of racial affairs would be today without *Brown*. Similarly, we are heading to that critical point in the law of unemployment compensation where the denial of benefits is harming children and, in part, is causing the breakdown of the institution of the family. Thus, the time is here for another contextual inquiry by the law.

5. Arthur M. Menard, *Refusal of Suitable Work*, 55 YALE L.J. 134, 135 (1945). A definition of good cause becomes determinative twice in these statutes. First, it factors into determinations made as to why a claimant initially left a job, and second, it determines whether a claimant rightly refused suitable work. Most states' unemployment compensation laws preclude an employee from leaving a job for any reasons besides those attributable to the employer. This excludes all personal reasons from the statutory ambit of "good cause" for voluntarily leaving a job. For example, in 1963, the Florida legislature amended the unemployment compensation statute by adding the words "attributable to the employer," which had not previously appeared in the statute. This drastically affected court decisions in this area because such an addition effectively excluded all previously allowed personal reasons for leaving employment from the definition of good cause. Thus, the wording of these good cause provisions clearly determines the benefits received under the statutes.

6. Kenneth M. Casebeer, *Teaching An Old Dog Old Tricks:* Coppage v. Kansas *and At-Will Employment Revisited,* 6 CARDOZO L. REV. 765, 790 n.83 (1985).

7. *Id.* at 765, 792 n.87.

8. Dowd, *supra* note 3, at 473-74; BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT AND EARNINGS (Jan. 1990) (citing statistics which show that of 34.1

when they must leave their jobs to care for their children.[9]

This double discrimination against working mothers stems in part from the differing sets of assumptions on which the law and a market society operate. The law assumes that choices about whether to work are voluntary and individualistic, whereas the current market requires dual-income families. This fundamental difference is arguably why the majority of decisions in unemployment compensation law neither reflect an awareness of, nor respond to, current market realities. The intersection of unemployment compensation law and child care illustrates the clash that occurs when the law does not reflect and reinforce the market. The collateral issue of child care not only exemplifies the discord between the law and the market, but also demonstrates a discord *within* the market itself. To a certain degree, market forces acting without consideration of subsequent effects create the problem of child care. That is, the unstated but nevertheless underlying goal of our market economy is to have both parents working, thereby increasing aggregate production.[10] Capital managers achieve this goal by pushing wages down to a minimum such that two incomes become imperative. The effect of this is to draw more women into the labor force than in previous years.[11] As a result of this market trend, however, even a dual income is often still too low and does not provide for child care, which has become increasingly necessary as women leave the home to work.[12]

The unemployment compensation doctrine disregards the significance of current child-care issues. There is a danger to legal doctrine of this kind, first because the motivation behind such doctrine and its resulting power affect actions within the market and within society in general. The decisions in this area reinforce the status quo, partly

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million two-person families in the United States in 1989, 57.1% are families where both the husband and wife work outside the home).

9. The focus of this Comment is the effects of the current unemployment compensation system on working mothers. Consequently, most of the language and the statistics used are directed towards women, with little mention of men. However, the author is aware that this crisis also affects working fathers and all family members. The absence of any explicit mention of men is in no way meant to demean men's role in child care.

10. *See* Casebeer, *supra* note 6, at 793-97 (outlining general assumptions of labor law leading to labor cost minimization).

11. ALICE K. HARRIS, OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES 300-19 (1982).

12. The market phenomenon of forcing dual incomes causes serious problems for single mothers. Their wages have been pushed down to a minimum on an assumption that there is another income in the family. Without a second income, however, single working mothers are those most drastically affected. The pressure on them to secure adequate, affordable child care is even greater than on two-income families, which can often themselves not afford child care.

because of a notion that the status quo is efficient.[13] Second, the decisions reflect ideological beliefs about the necessity for mobile capital and managerial prerogatives held by a majority of courts. Such beliefs also act as the foundation on which industry in this country operates. Moreover, notions of competitive advantage and high profit margins make employers reluctant to be innovative in solving child-care problems; employers do not want to lose their profit margins by initiating progressive child-care programs first and thus compromising their competitive advantage.

Changes in the law will likely result in changes in the market with respect to what employers are willing to do in the area of child care.[14] If the law sanctioned innovative programs such as on-site child-care facilities, rather than sanctioning managerial prerogative and high profit margins, more employers would implement child-care programs. A doctrine driven by laissez-faire beliefs and misplaced assumptions about the status quo is unlikely to place the correct value on issues such as child care.

With an eye towards the indifference in our nation's unemployment compensation system to the issue of child care, this Comment examines judicial interpretations of several state unemployment compensation statutes. It identifies doctrinal weaknesses and suggests policy changes to relieve the current prejudicial effects these laws have on working parents—especially mothers—and their children. Part II reviews the history of the labor force, the family, and the treatment of women in the courts. Part II also documents the entry of large numbers of women into the workforce, the effect of this dynamic on the traditional family structure, and some current concerns about child care. Part III examines how current unemployment compensation legislation and its judicial interpretation affect working women's ability to care and provide for their children. Part III also discusses the public/private dichotomy that enters the analysis when deciding who should be financially responsible for the costs of solving the current child-care problem. Part IV investigates our current images of

13. Courts mistakenly assume that child-care issues create so many economic obstacles that any systemic inroads would be inefficient. Courts fail to realize that employers can alleviate the problem by increasing consumer prices. Larger employers may internalize and spread costs across a broad base. As more women enter the work force, the child-care problem gets worse, and women cannot, themselves, efficiently internalize the cost of child care. The inefficiency to women manifests itself in working mothers' decreased production and continual absence from work. Thus, judicial assumptions that employers cannot overcome economic obstacles or that the status quo is efficient are mistaken.

14. Changes in law need not come exclusively from the courts. Legislatures could achieve much progress in this area if they investigated and implemented laws to guide both private and public child care.

women and the labor force, focusing on the gendered nature of law. Part IV attempts to link legal change with market change in light of our current societal structure regarding families. Part V discusses policy considerations that courts have largely ignored and suggests possible solutions to the current problems facing the courts with regard to unemployment compensation doctrine and child care. Part VI concludes that an awareness of the problem of child care in our legal discourse may foster such an awareness in our market economy, resulting in adjustments to better accommodate working families.

II. HISTORICAL PERSPECTIVES ON LABOR FORCE, FAMILIES AND WOMEN IN THE COURTS: RECENT CHANGES WITH WOMEN WORKERS AND FAMILY

A full understanding of the current legal response to the issue of child care is not possible without first examining the history of our labor force, our notions of family, and the legal treatment of women. Many perceptions of labor and family stem from traditional ideas dating back to the seventeenth century when the family was a self-sustaining economic unit with the male as the laborer and the female as the homemaker and nurturer of the children.[15] This family structure remained in place until the nineteenth century when America began its change from an agrarian to an industrialized nation. Change brought adjustments in our social structures. Families moved to urban areas, men got jobs in factories, and women stayed at home to care for children and guard the private refuge which the home and family had become.[16] Throughout these years and through the mid-twentieth century, males dominated the labor force.[17]

It was not until the early twentieth century and into the Depression era that women began to leave the home in large numbers to earn money to help the family survive.[18] Because of years of male domination in the workplace, lawmakers and employers considered only male needs when constructing rules affecting the workplace.[19] Not surprisingly, these rules often discriminated against women who tried to enter such workplaces[20] and perpetuated perceptions that only males belonged in the labor force. However, the mass entry of women into the labor force in the mid-twentieth century challenged these male-oriented norms.

15. Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1140.
16. *Id.* at 1141-42.
17. *Id.* at 1142.
18. Dowd, *supra* note 3, at 436.
19. *Id.* at 435.
20. *Id.*; Bradwell v. State, 83 U.S. 130 (1872).

The struggle of women to gain recognition in the workplace is mirrored by their related struggle in our legal system. The law's indifferent treatment of women is well documented.[21] In the eighteenth and nineteenth centuries, women had little independence and almost no recognition as individuals in the courts.[22] Most of the laws—founded on the perceived inferiority and delicacy of women—tied the woman to her father or spouse.[23] Justice Bradley, sitting on the Supreme Court in 1872, captured the prevailing sentiment about women in his concurring opinion in *Bradwell v. State*:

> The natural and proper timidity which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say the identity, of interests and views which belong or should belong to the family institution, is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband . . . . The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.[24]

It was not until the turn of the century that women, led by Susan B. Anthony and Elizabeth Cady Stanton and their supporters, gained any significant legal rights. The Nineteenth Amendment, which gave women the right to vote,[25] was the first formal step in a long battle in the legislatures and courts to overcome such chauvanistic ideas about women as those stated by Justice Bradley. Over the years, the legal system has responded to the changing roles of women in society; we have seen the passage of such Acts as the Equal Pay Act,[26] the Pregnancy Discrimination Act,[27] and Title VII.[28] Courts have recognized

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21. Wimberly v. Labor & Indus. Relations Comm'n of Mo., 479 U.S. 511 (1987); *Bradwell*, 83 U.S. at 130. *See generally* Barbara Flagg & Ruth B. Ginsberg, *Some Reflections on the Feminist Legal Thought of the 1970s*, 1989 U. CHI. LEGAL F. 9 (describing the history of women in the courts).

22. Teitelbaum, *supra* note 15, at 1140, 1154 (discussing married women's inability to separate property and the presumption for paternal custody of children upon separation throughout the early to mid-1800's).

23. JESSE DUKEMINIER & JAMES KRIER, PROPERTY 325 (2d ed. 1988).

24. *Bradwell*, 83 U.S. at 141.

25. U.S. CONST. amend. XIX.

26. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d) (1988)).

27. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (1988)).

28. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. § 1981 (1988)).

women's fundamental rights in decisions such as *Roe v. Wade*[29] and *Reed v. Reed*.[30] To a certain degree, then, the legal system has responded to societal changes from the seventeenth century to the present in areas of labor,[31] family,[32] and women.[33] Yet, the legal system has failed to respond to the problems created when labor, family and women converge. Legislators and courts must address the problems created by this combination and the challenge it presents to our historical, social, and legal frameworks. The special needs of women and underlying policy considerations must be factored into this analysis. In particular, the legal system has failed to respond adequately to child-care needs of working women.

Unemployment compensation law illustrates the courts' failure to accommodate the inevitable union of women, labor, and family. Participation of mothers in the labor force with children under eighteen has risen 24% since 1970.[34] Approximately 53.2% of children under age six have working mothers.[35] As a result, most children no longer come home from school to their mothers, or have mothers as their primary caretaker.[36] Society has shifted child care from the home to day-care and other child-care centers which attempt to replace the presence of the mother in the home.[37] This shift has contributed to the erosion of traditional family structures.[38] Because women are a large and necessary part of our work force,[39] and because women are also a necessary part of the family structure, the question of child-care rights must be confronted.[40]

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29. 410 U.S. 113 (1973).

30. 404 U.S. 71 (1971) (recognizing that sex classifications may violate the Equal Protection Clause).

31. *See supra* notes 26-28.

32. Teitelbaum, *supra* note 15, at 1154 (discussing courts' intervention into child custody and family-rights matters).

33. *See* DUKEMINIER & KRIER, *supra* note 23, at 325 (discussing legal advances with respect to married women's property and family rights).

34. BUREAU OF LABOR STATISTICS, LABOR FORCE STATISTICS, *supra* note 1.

35. Bureau of Labor Statistics, Unpublished Data, *supra* note 1.

36. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, CURRENT POPULATION REPORTS-HOUSEHOLD ECONOMIC STUDIES: WHO'S MINDING THE KIDS? CHILD CARE ARRANGEMENTS, WINTER 1986-87, SERIES P-70, No. 20, at 3 (1990).

37. *Id.* at 2. A shift in mother's duties of housework and general family responsibility has not accompanied the shift from mother as primary caretaker to mother as full-time worker with children in day care. Somehow, working mothers have taken on new careers without the luxury of relinquishing their home responsibilities.

38. Dowd, *supra* note 3, at 437.

39. NATIONAL GOVERNORS' ASSOCIATION, CENTER FOR POLICY RESEARCH, TAKING CARE: STATE DEVELOPMENTS IN CHILD CARE 2 (1990) (projecting that by the year 2000, 75% of all two-person families will have both parents working).

40. This Comment is not advocating a return to the traditional family model. However, there are certain values that are associated with traditional norms, most notably, structure and

Many working women today experience conflict between their desire to advance their careers and their desire to start or care for a family. Although some employers have implemented progressive maternity and child-care programs,[41] for the vast majority of women today, such options are either unavailable, insufficient, or too costly.[42] The insufficiency or nonavailability of programs that aid working mothers[43] exascerbates the conflict for women who both want or need to work and have children. In light of the current problems associated with child care, the importance of unemployment compensation benefits for families faced with these concerns is evident.

III. UNEMPLOYMENT COMPENSATION

Our unemployment compensation system began in 1935 with the passage of the Social Security Act, which established a dual system of federal and state unemployment compensation laws.[44] Initially, the system was created as a response to the great number of workers, male and female, who were unemployed due to the depression of the 1930s. It was also a response to the many workers who had entered the workforce during the early years of World War II because of a need for increased production, but who would face unemployment at the end of the war.[45]

Unemployment compensation is a system of cash payments to temporarily unemployed workers who have previously worked in the labor market.[46] Eligibility provisions vary from state to state but most states require the employee to have worked minimum number of weeks before becoming eligible for benefits.[47] A tax on employers, kept separate from a state's general budget, funds the current system.[48]

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nurturing for children, which should not be lost in the wake of women entering the workforce. In order to continue our current system of both men and women in the workplace and yet not sacrifice traditional values, the issue of adequate affordable child care must be addressed so that there is a *viable* alternative to the traditional family for parents who work.

41. *Id.* at 22-23 (mentioning Cumberland Hardwoods in Tennessee as an example of a successful employer on-cite child-care program to accommodate an after-hours employee training program and explaining some current parental leave policies).

42. *Id.* at 14.

43. *Id.*; Bureau of Labor Statistics, Unpublished Data, *supra* note 1.

44. Social Security Act, ch. 531, 49 Stat. 636 (1935) (codified as amended at 42 U.S.C. §§ 1101-1109 (1988)). *See generally* Eveline M. Burns, *Unemployment Compensation and Socio-Economic Objectives*, 55 YALE L.J. 1, 7-8 (1945) (describing the historical underpinnings of unemployment compensation).

45. *Id.*

46. *Id.* at 2.

47. *Id.* at 3; Lee G. Williams, *Eligibility for Benefits*, 8 VAND. L. REV. 286 (1955).

48. Burns, *supra* note 44, at 4. The United States system of unemployment compensation

The goal of the unemployment compensation system has been a debated topic.[49] Some viewed the system as a restrictive, employer-based one while others see it as a liberal, expansive, worker-based system.[50] The restrictive theory held that the major purpose of the system was the stabilization of the economy[51] and the liberal theory saw the payment of benefits to unemployed workers as the primary goal.[52] The two theories had different focuses, the former on employer prerogatives and the latter on the general welfare of the worker. However, theorists from both camps agreed on the need for a system to provide economic relief for workers unemployed through no fault of their own.[53] The policy behind the system announced by President Roosevelt in 1935 was a rough combination of these two ideas.[54] After 1935, there was a move toward emphasizing the benefits aspect of the system, yet even then, there existed two views on the precise role the system should play in securing income for the unemployed.[55] One view dictated that only a select group of workers should receive payments based on past earnings, and even then, only for a very limited duration.[56] The second view advocated massive income protection for all unemployed workers for a specified period of time.[57]

Eveline Burns, commenting on the socio-economic objectives of the unemployment compensation system, suggests three reasons why the former, more restrictive view has slowly eroded and why we are now left with a rather expansive income security program.[58] She contends that implementing the former theory would require strict, uniform eligibility requirements which provide a sufficient payment of income for unemployed workers.[59] Second, a restrictive view would need a "socially acceptable justification for the favored treatment of those accepted to the unemployment compensation program."[60]

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varies greatly from other countries, most notably Canada, which has a tripartite system of funding provided by the employer, the worker, and a contribution by the Canadian government from general revenues. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, SOCIAL SECURITY PROGRAMS THROUGHOUT THE WORLD 44 (1989). For a discussion of the Canadian system, see *infra* notes 325-26 and accompanying text.

49. Burns, *supra* note 44, at 7.
50. *Id.*
51. *Id.* at 8.
52. *Id.*
53. *Id.* at 8-9.
54. *Id.* at 8.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 8-9.
59. *Id.* at 9.
60. *Id.*

Lastly, such a system would require other means of assistance provided by the government for those excluded from the program.[61] Burns believes that the flaws in each of these three prerequisites have caused the breakdown of the restrictive viewpoint.[62] First, she explains, overly strict eligibility requirements would make the system too difficult to administer and would jeopardize the popularity of the entire system.[63] Second, without any worker contribution in the United States system, it would be difficult to justify favored treatment of certain workers.[64] Finally, the increasing need to provide alternative means of assistance, coupled with the small likelihood that alternative means are forthcoming, cause such a restrictive view to be unattractive.[65] Therefore, she argues, there has been a de facto expansion of the theoretical formulations of the system and a move toward the more liberal conception of the program.[66]

Without close scrutiny, Burns seems correct that all unemployed workers should receive benefits unless a socially justified reason, such as misconduct, warrants their exclusion. In practice however, such theoretical conceptions do not hold true. Unfortunately, a restrictive system which the law has perpetuated over the last fifty-five years is still in place. Workers often face arbitrary eligibility requirements for which, more often than not, no socially acceptable justification exists, and often certain groups of workers have inadequate secondary sources of child-care assistance.[67]

A. *Child-Care Availability*

This Part samples cases presenting problems facing working mothers when courts deny them unemployment compensation when they refuse to take a job or continue working because of child care. The United States has a "jigsaw puzzle" of child care and preschool education services.[68] Unfortunately this puzzle is missing several very

61. *Id.*

62. *Id.* at 8-10.

63. *Id.* at 10.

64. *Id.* at 9-10.

65. *Id.* at 10.

66. *Id.* at 11. Burns' view, however, presupposes that women are on equal footing with men in attaining available jobs in the work force and that the de facto expansion she refers to encompasses income security for female as well as male workers. In reality, women are not yet on equal terms with men. Thus, the question arises whether there is a genuine dichotomy in coverage between male and female workers, expansive coverage for the former and restrictive coverage for the latter).

67. *Id.* at 10; *see* NATIONAL GOVERNORS' ASS'N, *supra* note 39, at 14.

68. *See* NATIONAL GOVERNORS' ASS'N, *supra* note 39, at 2.

important pieces.[69] There are two major sources, and one emerging source, of child care in this country. Public programs, both federal and state, and private care programs are currently the two major providers of child care, with private employer facilities representing an emerging source of such care.[70] The availability of private care facilities, however, does not warrant as much focus as the other two sources, because private facilities tend to be used by middle- to upper-class families who can afford to pay for such care, whereas most of the cases studied here involve middle- to low- income factory and shift workers who cannot afford private care for their children.[71]

In the present public systems there is an inconsistency between the quality of the care provided and the cost.[72] Strides have been made in recent years as a result of an awareness of the problem of child care, but these laws and support networks are still not enough to relieve the burden of working parents who have children.[73] The Family Support Act, which provides child care to welfare recipients, has been a first step toward a comprehensive system of federal and state child care in this country.[74] However, there is still a lack of available facilities for many families. Often, when a facility becomes available, it is too expensive or the quality of care is very low.[75] For example, only nineteen states require training for family day-care providers.[76] Less than half the states require the child/staff ratio for two-year-olds or four-year-olds recommended by the National Association for the Education of Young Children.[77] One of the weaknesses in state-

69. *Id.*

70. *Id.*; *see also* U.S. DEPARTMENT OF LABOR STATISTICS, BUREAU OF LABOR STATISTICS, MONTHLY LABOR REVIEW 41-56 (Jan. 1991). The Department of Labor notes trends in state legislation to adopt laws facilitating employer child-care programs. Recent changes include a Colorado law permitting the Department of Social Services to assist employers applying for licenses for on-site child-care centers, a Louisiana law creating a 12-member "Child Care Challenge Committee" to make recommendations for a program to encourage employers to participate in child-care options for their employees, and a Minnesota law amended to allow employees to use personal sick leave benefits to care for a sick child. The Louisiana amendment also requires employers to provide up to 16 hours of unpaid leave a year for a parent to attend school conferences and meetings which cannot be scheduled after working hours. This encouraging new legislation illustrates states' recognition of the severity of the child-care problem and their responses.

71. Sanchez v. Unemployment Ins. Appeals Bd., 569 P.2d 740 (Cal. 1977); Shufelt v. Department of Employment & Training, 531 A.2d 894 (Vt. 1987). For the most part, the cases discussed in this Comment involve women in shift jobs who work in factories and plants and receive minimum wage.

72. *See* NATIONAL GOVERNORS' ASS'N, *supra* note 39, at 2.

73. *Id.* at 2-3.

74. *Id.*

75. *Id.* at 4, 7.

76. *Id.* at 6.

77. *Id.* at 4.

funded child-care programs today is that state policies terminate subsidies to parents at a level below the actual cost of the child-care program. Forced beyond their financial means,[78] parents must seek other forms of child care or, as many of the cases illustrate, leave their jobs to provide care themselves.[79] Although many of the states appear to have child-care subsidy programs for low-income families, many of these programs fall short of providing adequate care.

The demand for subsidized child care in this country cannot be underestimated. Forty four states claim that the demand for such care is greater than the slots available.[80] Notably, there was a significant decline in the amount of federal funding for child care in the 1980s.[81] This is ironic given the increasing number of women who entered the workforce in the last decade and the resulting crisis of child care facing the nation. Interestingly, only twenty-one states currently have an established parental leave policy in place,[82] and even so, most of those only allow employees to take the maximum amount of their accrued annual or sick leave.[83] Only four of those states pay the employee's salary while she is on leave.[84] The problem of child-care availability becomes ominous when these statistics are considered. In a study done by the Census Department on Child Care Arrangements for the winter of 1986-1987, the following results were tabulated.[85] Of all the grade-school-age children with working mothers in the United States during that year, 71% used kindergarten and grade school as their primary day care source.[86] For the remaining 29%, secondary sources of care were necessary because the average workday extended beyond school-day care hours.[87] The survey also indicated that approximately 800,000 children were left unsupervised for most of the hours that their mothers worked.[88]

The unavailability of child care affects low-income families dramatically. In the fall of 1987, about 8% of employed women with children under fifteen were living in poverty,[89] and of all the families living in poverty, over half were maintained by female heads of house-

78. *Id.* at 7.
79. *Id.*
80. *Id.* at 14.
81. *Id.*
82. *Id.* at 23.
83. *Id.*
84. *Id.*
85. *See* BUREAU OF THE CENSUS, *supra* note 36, at 3.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at 11.

holds.[90] This statistic takes on importance when coupled with the fact that women in poverty spent approximately 25% of their monthly income on child care, compared with 6% by women in non-poverty line families.[91] The lack of adequate subsidized facilities in this country and the prohibitive cost of available care exacerbates the problem of working mothers having to quit their jobs or refuse suitable work because they have no viable child-care options. The policy implications of such conclusions are staggering in light of the importance of family as a place of solace and strength to all people, irrespective of class. It is estimated that forty-four states appropriated a total of one billion dollars in 1989 to public child care,[92] whereas estimated private expenditures were about fifteen billion dollars.[93] The disparity between the two figures is astonishing given the statistics on the number of families in poverty,[94] and of those, the number headed by females.[95]

Another reason for the increase in the child-care problem is that families can no longer depend on relatives to keep children while both parents work.[96] Female relatives, who before may not have worked, are now working.[97] Economic realities require that all members of a household, especially both parents, work. In light of the problems revealed by the statistics, we must make quality child care accessible and affordable.[98]

B. *The Mechanics of the System*

The current unemployment compensation system allocates funds to workers on the basis of individual state eligibility requirements.[99] The eligibility criteria are described in terms of disqualification and are two-tiered: disqualification for voluntarily leaving employment without showing "good cause," and disqualification for refusing suita-

90. U.S. DEP'T OF LABOR, WOMEN'S BUREAU, FACTS ON WORKING WOMEN 2 (Aug. 1989).

91. *See* BUREAU OF THE CENSUS, *supra* note 36, at 11.

92. *See* NATIONAL GOVERNORS' ASS'N, *supra* note 39, at 17.

93. *See* BUREAU OF THE CENSUS, *supra* note 36, at 10.

94. *See id.*

95. *See* Bureau of Labor Statistics, Unpublished Data, *supra* note 1.

96. *See* BUREAU OF THE CENSUS, *supra* note 36, at 5.

97. *Id.*

98. Although this part focuses on problems associated with child care, many of these same arguments can be made with respect to workers who may be forced to care for an elderly or sickly parent or relative. Therefore, urging inclusion of child care as good cause in the statutes should lead to an adoption of these personal reasons as good cause for voluntarily leaving a job or refusing suitable work.

99. Williams, *supra* note 47, at 286-87.

ble work without showing "good cause."[100] The "good cause" provision plays a dual role in the determination of benefits; therefore, characterization of child care as "good cause" for leaving employment or refusing work becomes indispensable if working women are to have a fair chance at receiving unemployment benefits.[101]

Courts have considered challenges to the state eligibility requirements on several grounds. First, claimants argue that refusing a working mother benefits on the basis that child care is voluntary ignores history,[102] public policy, and the biological difference between women and men.[103] Second, claimants argue that child-care responsibilities are "good cause" for refusing work.[104] Lastly, claimants assert that the stringent requirement that they be "willing, able and ready" to work to meet the statutory availability criteria often excludes mothers who are not immediately ready because of delays in securing alterate sources of child care.[105]

When a claimant applies for unemployment compensation, the state agency in charge first examines why the claimant left her employment.[106] If she left voluntarily for personal reasons, almost universally the inquiry ends and benefits are denied.[107] If she left involuntarily (discharged without cause), or in some states voluntarily but for reasons attributable to the employer, then she passes the first stage and the inquiry continues.[108] The second step of the eligibility test asks if the worker was offered any suitable employment since her last job and, if she refused it, for what reason.[109] If she refused other-

100. Louise F. Freeman, *Able to Work and Available for Work*, 55 YALE L.J. 123 (1945); Menard, *supra* note 5; Casebeer, *supra* note 6, at 790 n.83.

101. Most jurisdictions define "good cause" under each of these two provisions separately. The doctrine, for the most part, does not automatically assume that what qualifies as good cause for voluntarily leaving a job also qualifies as good reason for refusing suitable work. However, such a linkage seems logical, because the need to care for children is just as compelling and should be equally as justifiable as good cause whether the parent leaves work or refuses work.

102. Mintz & Kellogg, *supra* note 4; Pappas, *supra* note 4.

103. Sanchez v. Unemployment Ins. Appeals Bd., 569 P.2d 740, 750 (Cal. 1977); Dowd, *supra* note 3, at 437.

104. Claimants arguments vary from state to state, as the cases in this Comment illustrate. *See infra* notes 119-25, 141 and accompanying text.

105. Nurmi v. Vermont Employment Sec. Bd., 197 A.2d 483 (Vt. 1964), *overruled by* Shufelt v. Department of Employment & Training, 531 A.2d 894 (Vt. 1987). These cases implicate pregnancy issues. The notions of "able" and "available" deny recognition of the physiological conditions of pregnancy.

106. *See generally* Casebeer, *supra* note 6.

107. Katherine Kempfer, *Disqualification for Voluntary Leaving and Misconduct*, 55 YALE L.J. 147 (1945).

108. *Id.*

109. *See generally* Menard, *supra* note 5 (explaining the process by which states decide what work is suitable and whether an employee's refusal of a job was permissible).

wise suitable work for personal reasons, again the majority of states will deny her benefits, because she has not shown the good cause necessary for eligibility under applicable statutes and has made herself unavailable for work.[110] If however, she shows good cause for refusing offers of suitable work, in many states she still must pass an availability test to qualify for benefits.[111] Thus, even if she had good cause for refusing suitable work, she may have so heavily restricted her possible hours or location of work that she has detached herself from the labor market, and she is classified as unavailable for work and denied benefits.[112]

Determinations of good cause and availability for work, themselves stringent, are made even more so by ambiguities in state eligibility statutes and by intricacies in the definitions of the terms themselves. One of the main problems is that "good cause" has not been defined clearly. Some states interpret good cause to mean only those causes attributable to the employer, while other states such as California leave the possibility open for good cause to include personal reasons by equating good cause with adequate cause.[113]

As society changes, so too should perceptions of the factors that are important in an employee's life; therefore, definitions such as "good cause" should not remain constant. Courts nonetheless operate today on the basis of what good cause encompassed thirty and forty years ago when the original cases arose, rather than recognizing other causes that have emerged with the dramatic change in the labor force.

Another obstacle for unemployment compensation claimants is meeting the three-prong definition of "availability"—the claimant must be "willing, able, and ready" to accept suitable employment.[114] "Willing" means that an employee must exercise due diligence to find a job.[115] Often, in an attempt to curb benefit payments, states disqualify claimants either because their search did not meet the diligence standard or because the agency determined that the restrictions an employee imposed on herself indicated an unwillingness to work.[116] Therefore, many claimants fail the eligibility test at this stage of the

110. *Id.*

111. *See, e.g.*, Sanchez v. Unemployment Ins. Appeals Bd., 569 P.2d 740, 751 (Cal. 1977); Shufelt v. Department of Employment & Training, 531 A.2d 894, 898 (Vt. 1987).

112. *Sanchez*, 569 P.2d at 751; *Shufelt*, 531 A.2d at 898.

113. *See infra* part III.D.

114. Aladdin Indus. Inc. v. Scott, 407 S.W.2d 161, 164 (Tenn. 1966); Freeman, *supra* note 100, at 123.

115. *See* Freeman, *supra* note 100, at 125-29.

116. *Id.*

process. "Able" generally means physically capable of handling the work.[117] "Ready" means willing at once.[118] Of the three prongs, the "readiness" requirement poses the greatest obstacle to working mothers. This is because many working mothers with child-care responsibilities are not immediately ready to accept a job opportunity. Many cases interpreting the readiness requirement disqualify working mothers because they have restricted their hours and locations.[119]

Unemployment compensation cases often involve a determination of whether a claimant refused suitable work. Yet defining the term "suitable" is problematic. The first cases interpretating state unemployment compensation statutes treated suitable as meaning "fitted . . . [in terms of] training [and] experience."[120] Unfortunately, after more than fifty years of jurisprudence in this area, courts still interpret suitablility as fitting in skill, experience, and salary, rather than taking into account other circumstances of the employee that may render previously suitable employment unsuitable.[121] The lack of recognition of child-care responsibilities shows how a restrictive view of suitability hinders women seeking unemployment. Under this rigid definition of suitability, a woman who had previously held a factory job, was laid off, and then was offered new factory employment at the same pay and time is classified as being offered suitable work,[122] irrespective of whether her babysitter left or her husband died or abandoned her in the interim, leaving her with new and pressing child-care problems. Under most state systems, such a woman would be denied benefits if she refuses to accept the job offered to her. As long as the suitability, availability, and voluntarism requirements remain formal and unyielding, the seriousness of domestic responsibility situations poses great barriers to women receiving benefits. The inherent limitations of these terms is evident in the caselaw from the six states examined in this Comment.

C. *Voluntary Quits*

"Voluntary quit" is a term used to describe when a mother ceases work for personal reasons. It is important to examine this area of unemployement compensaiton because almost all jurisdictions refuse to recognize child care as good cause for voluntarily leaving a

117. *Id.*
118. *Id.* at 129-34.
119. Aladdin Indus. Inc. v. Scott, 407 S.W.2d 161, 164 (Tenn. 1966).
120. Freeman, *supra* note 100, at 125.
121. Nurmi v. Vermont Employment Sec. Bd., 197 A.2d 483, 486 (Vt. 1964), *overruled by* Shufelt v. Department of Employment & Training, 531 A.2d 894 (Vt. 1987).
122. *Id.*

job.[123] Certain exceptions do exist; California as a matter of course, and certain other states in specific instances, recognize child care as good cause.[124] The majority of states exclude child care from the rubric of good cause by inserting the words "attributable to the employer" after the voluntary good-cause provisions.[125] Florida's statute, for example, states: "An individual shall be disqualified for benefits . . . in which [she] has voluntarily left [her] employment *without good cause attributable to the employer*" and states: "good cause as used in this subsection shall include only such cause as is attributable to the employer . . . ."[126] The Florida statute and others like it have successfully excluded any reasons outside the employment context, including all domestic responsibilities, from the definition of good cause. In states like Florida, employer fault becomes the decisive factor in determining eligibility for unemployment compensation.[127] The fixation on employer conduct is incongruous with one of the supposed objectives of the unemployment system: the promotion of employee general welfare.[128]

Most jurisdictions follow the Florida model in their statutory language and case law in denying benefits to working women with families who voluntarily leave their jobs.[129] By contrast, California has left the door open in its statutory language for recognition of child-care issues. Section 1256 of the California Unemployment Insurance Code reads: "An individual is disqualified for unemployment compensation benefits if the director finds that he or she left his or her most recent work voluntarily without good cause . . . ."[130] The absence of the words "attributable to the employer" frees the Califor-

123. Casebeer, *supra* note 6, at 792 n.87; Kempfer, *supra* note 107, at 156-57.

124. Sanchez v. Unemployment Ins. Appeals Bd., 569 P.2d 740, 750 (Cal. 1977); Shufelt v. Department of Employment & Training, 531 A.2d 894, 899 (Vt. 1987).

125. Beard v. State Dep't of Commerce, Div. of Employment Sec., 369 So. 2d 382, 385 (Fla. Dist. Ct. App. 1979).

126. FLA. STAT. § 443.101 (1989) (emphasis added). Although the statute indicates that the claimant is only disqualified for the week in which she left her job, such disqualification continues under subsection (1)(a) until she is reemployed and has worked the number of weeks necessary for benefits). *See id.*

127. Earle V. Simrell, *Employer Fault vs. General Welfare as the Basis of Unemployment Compensation*, 55 YALE L.J. 181, 182 (1945).

128. *Id.* at 184-85. Such restrictive language suggests that the purpose was never in fact general welfare, as it excludes all those workers whose unemployment results from their personal fault. There still exists the notion that a mother who gets pregnant or leaves a job to take care of her children is at fault, and thus, she does not qualify for benefits under a system which only provides insurance for workers unemployed through no personal fault.

129. Aladdin Indus. Inc. v. Scott, 407 S.W.2d 161 (Tenn. 1966); Nurmi v. Vermont Employment Sec. Bd., 197 A.2d 483 (Vt. 1964), *overruled by* Shufelt v. Department of Employment & Training, 531 A.2d 894 (Vt. 1987).

130. CAL. UNEMP. INS. CODE § 1256 (Deering 1985).

nia courts to construe good cause to encompass child-care responsibilities. Therefore, the first part of the eligibility test referred to previously turns on whether child-care responsibilities are included in the definition of good cause.

D. *State Requirements: Voluntary Quits and Refusal of Suitable Work*

1. FLORIDA

In *Beard v. State Department of Commerce, Division of Employment Security*,[131] the Florida Second District Court of Appeal interpreted the good cause provision of the voluntary quit section of the statute literally.[132] The case dealt with a woman who quit her job when her employer required her to work the night shift (11:45 p.m. to 7:45 a.m.), a time when she usually stayed home with her two teenage children.[133] She first requested her accrued annual leave to make arrangements for child care before starting her new shift, but she was denied this leave.[134] Thereupon, she voluntarily left her employment.[135] The court, in affirming the decision of the unemployment compensation commission appeals referee, stated that according to section 443.06(1) of the Florida Statutes,[136] if an employee voluntarily leaves her employment it must be for good cause attributable to the employer.[137] The court reasoned that because the claimant left for child-care reasons and not due to any fault of the employer, she was ineligible for benefits.[138] The court rejected the argument that the employer's denial of vacation time to search for appropriate child care forced the woman to leave her job.[139] In a narrow interpretation of the statutory language, the court stated that she quit her job before having made any efforts to secure child care; thus, the employer's denial of leave did not directly cause her to quit her job.[140] Through a technical reading of the statute, the court effectively delivered a message about unemployment compensation: no personal reasons, however compelling, constitute good cause for voluntarily leaving a job.

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131. 369 So. 2d 382 (Fla. Dist. Ct. App. 1979).
132. *Id.*
133. *Id.* at 383.
134. *Id.*
135. *Id.*
136. FLA. STAT. § 443.06(1) (1979), *replaced by* FLA. STAT. § 443.10 (1989).
137. *Id.* at 384-85.
138. *Id.*
139. *Id.* at 383-84.
140. *Id.*

The *Beard* court justified its decision in part by distinguishing it from *Yordamlis v. Florida Industrial Commission*,[141] a 1963 decision by the Florida Third District Court of Appeal. In *Yordamlis*, the court granted benefits to a *male* claimant who had both voluntarily left his job and refused suitable employment because of his child-care responsibilities.[142] At the time of that decision, section 443.06(1) of the Florida Statutes[143] merely stated that a claimant could not voluntarily leave employment without good cause.[144] The *Yordamlis* court, stating that "[the] petitioner had valid personal reasons to terminate the employment which required him to work until 9:00 [p.m.] and to refuse to accept a job which would require a substantial amount of night work," included child care in the good cause provision.[145] The court in *Beard* distinguished *Yordamlis* by pointing out that the 1963 amendment to section 443.06(1) adding the words "attributable to the employer" meant that the legislature "must have intended to remove domestic obligations as good cause for voluntary termination."[146] The amendment, the court said, accounted for the difference in result between the two cases.[147] Although the court's analysis in *Beard* referencing the amendment may be technically correct, other policy reasons may have affected the court's decision. First, the legislature's amendment to the statute narrowed considerably the definition of good cause for leaving employment in Florida.[148] Second, *Yordamlis* involved a male staying home with his children, whereas *Beard*—the first opportunity the court had to consider the interpretation of the amended legislation—involved a woman attempting to assert this same right. The policy change resulting from the amendment lowers the concerns of working families on Florida's list of legislative priorities. The implications of this are not complimentary to either the judicial or legislative system in Florida.

Another interesting aspect of the court's analysis in *Beard* is its treatment of the connection between the good cause provision for vol-

141. 158 So. 2d 791 (Fla. Dist. Ct. App. 1963).

142. *Id.* at 792.

143. FLA. STAT. § 443.06(1) (1961).

144. *Id.* at 791; *see also Beard*, 369 So. 2d at 384.

145. *Yordamlis*, 158 So. 2d at 792.

146. *Beard*, 369 So. 2d at 385.

147. *Id.* at 384.

148. It is interesting to contemplate the mindset of the Florida legislators who created this amendment and to wonder if they ere aware that it would result in excluding domestic responsibility from the ambit of permissible good causes for voluntarily leaving a job. Perhaps they were, since Florida has always been a pro-employer state, as evident from the continuous support that the at-will doctrine receives in its courts. *See, e.g.*, DeMarco v. Publix Supermarkets Inc., 384 So. 2d 1253 (1980) (holding that employees may be fired at the will of their employers, regardless of cause).

untarily leaving a job and the good cause provision for refusing suitable work.[149] Although the primary issue before the *Beard* court was not refusal of suitable work, but voluntary leaving, the court nonetheless analyzed the relationship of the good cause clause of both provisions in other jurisdictions.[150] *Beard* does not actually resolve the good cause issue, but it suggests that it would follow the Vermont Supreme Court's decision in *Nurmi v. Vermont Employment Security Board,*[151] where the court, interpreting a statute similar to Florida's, decided that because the good cause provision of the "voluntary quit" section of the statute permitted only reasons attributable to the employer, the good cause provision of the "refusing suitable work" section also required reasons attributable to the employer.[152] The interpretation effectively eliminates domestic responsibilities as good cause in Vermont. The *Beard* court stopped short of accepting that analysis, but the language of the opinion suggests that should a similar case arise the court would not be unwilling to make such a connection.[153] This will be extremely detrimental to unemployment compensation claimants in Florida.[154]

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149. *Beard*, 369 So. 2d at 384.

150. *Id.*

151. Nurmi v. Vermont Employment Sec. Bd., 197 A.2d 483 (Vt. 1964), *overruled by* Shufelt v. Department of Employment & Training, 531 A.2d 894 (Vt. 1987).

152. *Id.* at 384-85.

153. *Id.*

154. The controversial issue is whether the two good cause provisions should be treated the same or differently. Those who advocate treating them differently argue that to add the words "attributable to the employer" onto the voluntary quit disqualification section of the statute (and not the suitable work section) makes more sense because the inquiry is focusing on a worker who independently and willfully left her job. Advocates of this position justify their vision with notions of employer prerogative and the need for continuous production. Such a position examines and restricts good cause from the viewpoint of the employer only; therefore, requiring causes solely attributable to the employer would appear quite sound. On the other hand, advocates suggest that good cause for refusing suitable work should be treated differently because we are no longer dealing with an employed individual, but rather one who is on the outside of the existing, thriving labor force. In this scenario the possibility that other, non-employer forces could be at work in causing the claimant to refuse suitable work is greater, and thus, theoretically, more room exists for a broader good cause provision. Also, the claimant refusing suitable work does not pose the threat of interrupting production and the flow of capital by walking off a job. These two factors, the reasoning goes, serve as legitimate enough reasons why the two good cause provisions should be treated differently in the statutes.

The disagreement with that view, however, is twofold: first, and important, the justification for including the words "attributable to the employer" are not at all convincing. Why should the possibility of production stoppage or a slowing in the movement of capital translate into more restrictive categories into which reasons for leaving a job should fall? The concerns of a parent will be the same when confronted with a sick child or another child-care crisis, whether that parent is faced with leaving a job or refusing suitable work. The only difference is timing. A parent who needs to be home with a child, who already has a job and must leave faces the restrictive good cause provisions embodied in the "attributable to the employer" clauses; yet a parent who is already out of work and needs to stay home technically

The requirement that availability encompasses "willing, able, and ready" serves to limit the benefits granted to claimants.[155] Although the majority of cases examined in reference to the denial of unemployment compensation benefits deal with child-care responsibility, rigid eligibility requirements similarly affect pregnant women and force them to make difficult decisions about work and family. In *School Board of Volusia County v. Florida Department of Labor and Employment Security*,[156] the court dismissed the claim of a pregnant teacher who left her job under an unpaid maternity leave program and subsequently applied for unemployment compensation.[157] The case involved the second of the three parts of the availability test.[158] The court found that because of her pregnancy, the teacher was not able to work and not actively seeking a job; thus, she was unavailable for work and ineligible for benefits.[159] *School Board of Volusia County* is an example of how the seemingly neutral unemployment compensation laws adversely affect pregnant women, who are often incapable of working as they had before. Neither this court nor a majority of other courts in the United States[160] have made allowances for the impact

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faces a less restrictive good cause provision. The distinction, however, is groundless. The concerns are just as serious and justified at both stages. These parents have no choice, because they must manage responsibilities of both family and work without allowing either to suffer. Secondly, if the courts' doctrine truly followed the "difference" analysis to its logical conclusion, it would allow many more personal reasons to qualify as good cause under the suitable work provisions of the statutes than under the voluntary quit provision. But the reality is that such broad allowances do not currently exist in the doctrine of the courts; rather, in most jurisdictions, the good cause provision for suitable work is treated just as restrictively as that for voluntarily leaving a job. Furthermore, treatment of good cause in both types of cases is the same. If Florida were to adopt the thesis of this Comment, by not only treating the two good cause provisions alike, but by dropping the employer causation language from the statute, it would require a complete overhaul of the present courts' thinking. Such an adoption would affect decisions in many others areas, making inconsistent a substantial part of the employment doctrine of the state. This is so because adherence to the view of similar treatment for the two provisions would mean a relinquishing the idealogy of employer prerogative. Florida, a leading proponent of the at-will doctrine and a general pro-employer state, would then have an unemployment doctrine at odds with itself—making allowances for a worker's right of self-determination while supporting the objectives of a pro-management state. Arguably, a recognition of this potential inconsistency continually drives the court in its decisions to reject an interpretation of the statutory provisions which would treat the two good cause provisions similarly, even though it may recognize the pressing problem of child-care issues in the workforce.

155. Williams, *supra* note 47.

156. School Bd. of Volusia County v. Florida Dep't of Labor & Employment Sec., 393 So. 2d 70 (Fla. Dist. Ct. App. 1981).

157. *Id.* at 72.

158. *Id.*

159. *Id.*

160. Wimberly v. Labor & Indus. Relations Comm'n of Mo., 479 U.S. 511 (1987) (denying a pregnant woman unemployment compensation benefits).

that such an eligibility requirement has on pregnant women with reduced physical capacity. Thus, the underlying assumptions about choice which still exist in our judicial system greatly influence court decisions, particularly in unemployment compensation doctrine.

The soundness of the current doctrine which burdens these women is subject to question. At the base of the doctrine is the belief of the courts that pregnancy and child care are matters of real choice to working women in our society today. Yet, as child-bearers, women do not have a meaningful choice in these matters. Even though working women literally can choose not to become pregnant, to assume or require that all working women would or should make that choice is unrealistic. If the judicial system continues to view these as matters of pure choice, the system and society will not readily change. For so many women today who work as part of dual-income families,[161] the notion of choice or placing pregnancy or family on hold until they no longer have to work is an unrealistic viewpoint because, most likely, these women will always have to work. The question goes even deeper than that. Why should women even have to think in such terms? Most men have never had to make such choices. For generations the workplace has been accommodating men with children.[162] Yet when women are faced with these issues, our laws and those who interpret them conjure up the idea of free choice, and thus, refuse to accommodate such situations equally. Today, working women have no true choice in the economic order. Decisions that perpetuate such outdated assumptions about women and their choice to work or have families do nothing to refocus our legal system on some of the most pressing issues facing society at this time.

2. TENNESSEE

Aladdin Industries, Inc. v. Scott,[163] a landmark case, involved a female employee who left her job when her employer changed her from a day to a night shift.[164] The employee left her job voluntarily rather than accept a change in shift because she had three children and her husband worked nights.[165] She was never informed when she was hired that she might have to work other shifts, yet her employer

161. BUREAU OF LABOR STATISTICS, EMPLOYMENT AND EARNINGS (Jan. 1990).

162. Yordamlis v. Florida Indus. Comm'n, 158 So. 2d 791 (Fla. 3d DCA 1963); *see generally* Teitelbaum, *supra* note 15 (explaining the traditional workforce comprised of men who did not have to worry about child-care because their wives took care of the children while they worked).

163. 407 S.W.2d 161 (Tenn. 1966).

164. *Id.* at 162.

165. *Id.*

claimed that it informed all employees of that possibility, as standard company procedure.[166]

Aladdin incorporated the ideas of good cause for both voluntarily quitting a job and for refusing suitable work.[167] It is unlike most of the Florida cases which separate these issues and treat the good-cause provisions differently. The *Aladdin* court found the employee ineligible for unemployment compensation benefits because she both voluntarily left her job and refused suitable work without good cause.[168] By restricting her hours and refusing such employment, she made herself unavailable for work and thus unemployable.[169] The court found that child care did not constitute good cause for either of the above criteria of the eligibility test.[170] In deciding the issue, the court aptly captured the underlying fear of many courts deciding these issues when it stated: "To uphold the decision of the Board of Review would be placing in the hands of the employee the right to determine when and under what conditions she would work. Such a holding would unduly restrict the employer and could conceivably, under certain circumstances, make it almost impossible to carry on a business during certain hours."[171] Thus, the unstated impetus behind the courts' doctrinal formulation appears to be managerial prerogatives.[172] The court in *Aladdin* disregarded the employee's contention that she was never directly informed about the possibility of changing shifts and focused instead upon her unavailability, not on the reasons for her unavailability.[173] *Aladdin* reflects a pattern of cases in Tennessee in which employees are denied unemployment compensation benefits based on their unavailability for work rather than any examination as to the reasons for such unavailability.

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166. *Id.*
167. *Id.*
168. *Id.* at 164.
169. *Id.*
170. *Id.*
171. *Id.*
172. The term "managerial prerogatives" refers to the assumption, present in the common law, that certain rights and freedoms are necessarily exclusively vested in the employer. This is coupled with the economic principle that power in the workplace should be centralized. *See generally* JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983). These notions of managerial prerogatives and concern for the ultimate flexibility of capital within the market are not unique to the doctrinal developments in this body of law. Rather, it is present in the continuing doctrinal stronghold of the at-will regime in the United States today. It is also present in the area of labor law as evidenced by the courts' and legislatures' denial of protection to workers engaged in partial strikes because employee slowdowns are seen as efforts to usurp management control and to interrupt the free flow of commerce. *See* Audubon Health Care Center, 268 NLRB 135, 137 (1983) (prohibiting partial strikes because they usurp the employer's managerial prerogative).
173. *Aladdin*, 407 S.W.2d at 162-64.

Katherine Kempfer, in her discussion of the voluntary quit provisions of state statutes, says that such strict requirements reflect bad policy choices with respect to the overall system of unemployment compensation.[174] She states that the provisions often penalize women who must leave their job for family concerns.[175] She notes that the definition of good cause is arbitrary and unsupported.[176] She also claims that although the original reasons behind the voluntary quit limitations may have been sound, as society and the work force change, those limitations can no longer be justified.[177]

Kempfer's points are well-taken because the voluntary quit disqualification provision does, in fact, serve as an overall discrimination against working mothers, as the caselaw illustrates. Kempfer asserts that our laws will not change until society as a whole signals its approval of child-care responsibilities as a socially justifiable reason for voluntarily leaving employment.[178] Arguably however, until the law first recognizes and legitimizes these reasons for leaving, society will not become aware of the problems to the extent that it should and consequently will not give its approval to these issues.

If courts were to view decisions to stop work based on of child-care responsibilities as *involuntary*, rather than a true reflection of workers' volition to stop working, perhaps the court would be more likely to include such responsibilities as good cause for voluntarily leaving employment.[179] However, if we continue to view parents who leave work to care for their children as attempting to take advantage of the unemployment system, or if we continue to believe that families have any true choice when they face these problems, the law will never change. Perhaps the inherent problem is that the decisionmakers in this country are so far removed from such problems that they do not realize the limitations that such strict unemployment eligibility requirements impose on the average worker. Viewing decisions about domestic responsibilities as a matter of choice perpetuates the current prejudicial impact of voluntary clause provisions.

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174. Kempfer, *supra* note 107, at 148.

175. *Id.*

176. *Id.*

177. *Id.* at 149.

178. *See* Kempfer, *supra* note 107.

179. Paul H. Sanders, *Disqualification for Unemployment Insurance*, 8 VAND. L. REV. 307, 320-23 (1955). Sanders suggests that if the notion of choice is not a factor in the court's analysis, circumstances which preclude working due to child-care responsibilities will be seen as involuntary. Once it is involuntary, the idea that there is a will or desire not to work will evaporate.

3. VERMONT

Prior to 1987, the leading case on unemployment compensation in Vermont was *Nurmi v. Vermont Employment Security Board.*[180] The *Nurmi* decision, although now overruled,[181] is a significant examination of the legal treatment of unemployment compensation child-care cases in Vermont. It represents a conservative legal analysis used by the courts throughout the state from the initial years of unemployment compensation to 1987. In *Nurmi*, the Supreme Court of Vermont denied unemployment compensation benefits to a group of women who had previously worked the night shift, were laid off, were offered positions on the day shift, and refused to accept those jobs because of their child-care responsibilities during the day.[182] The court treated the issue as whether the women had made themselves unavailable for work by limiting the shifts they would work.[183] At the time, the Vermont eligibility statute stated that an individual was disqualified for benefits if the commission found that she "has failed, without good cause, either to apply for available, suitable work . . . or to accept suitable work when offered to [her] . . . ."[184] The court reasoned that because the women's refusal to work was not attributable to the employer in any way and because their child-care responsibilities were not "compelling reason[s] beyond [their] control," the women were not entitled to benefits.[185]

There are two problems with the court's analysis in *Nurmi*. First, the court made an illogical leap in its interpretation of the good cause provision of the statute. The court stated that because an employee cannot voluntarily quit her employment "except for good cause attributable to such employing unit," it implies that she also cannot refuse suitable employment offered to her except for good cause attributable to the same employing unit. However, nowhere in the suitability provision of the statute is such limiting language found. Therefore, according to the rules of strict statutory construction, the court made an unjustifed leap. Second, the court stated that because the women restricted their working hours to the night shift, they automatically made themselves unavailable for work.[186] In making

180. 197 A.2d 483 (Vt. 1964), *overruled by* Shufelt v. Department of Employment & Training, 531 A.2d 894 (Vt. 1987).

181. Shufelt v. Department of Employment & Training, 531 A.2d 894 (Vt. 1987) (overruling Nurmi v. Vermont Employment Sec. Bd., 197 A.2d 483 (Vt. 1964).

182. *Nurmi*, 197 A.2d at 485.

183. *Id.*

184. *See id.* (quoting VT. STAT. ANN., tit. 21, § 1344(3) (1961)).

185. *Id.* at 487 (quoting LeClerc v. Administrator, 78 A.2d 550, 551 (Conn. 1951)).

186. *Id.*

this determination the court failed to distinguish between women who remove themselves completely from the labor market and those who maintain a limited attachment to the market. Since one of the goals of unemployment compensation being to maintain some level of security for unemployed workers seeking jobs, it seems incongruous to be so quick to deny benefits for a mere narrowing of availability in the labor market, especially when the reasons for doing so are so important. The *Nurmi* court apparently did not think that family and child-care responsibilities were so important, because it refused to recognize them as good (enough) cause to turn down suitable employment.[187]

In re Prouty,[188] another Vermont case, used a similar analysis. In that case the court denied benefits to a claimant who limited her availability to the first shift because of child-care and family responsibilities.[189] The court stated that restricting herself to one shift when suitable work was available on two shifts was tantamount to refusing suitable work.[190] Having established the refusal of suitable work, the court then added that the only way such a refusal is justified is for good cause, which the claimant has the burden of showing.[191] Once again the court did not recognize domestic responsibilities as sufficient good cause to refuse work and denied the claimant benefits.[192]

These Vermont cases and those in other states dealing with these issues illustrate the fundamental lack of awareness of the conflict, especially for low-income families, between job and home responsibilities. This lack of awareness, coupled with state statutes that do not uniformly define what constitutes good cause, leads to decisions that burden women with families and that do nothing to change the currently male-biased nature of the law.[193]

In the 1982 case of *Hunt v. Department of Employment Security*,[194] the Supreme Court of Vermont, once again denying benefits to a worker who refused suitable work due to lack of transportation, outrightly stated a belief which no doubt had been underlying decisions of the court for many years. The court stated that in a system operated by assessments against employers which are pooled into

187. *Id.*

188. 310 A.2d 12 (Vt. 1973).

189. *Id.* at 13.

190. *Id.* at 14.

191. *Id.* at 15.

192. *Id.*

193. Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemmas of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 86 (1989).

194. 453 A.2d 391 (Vt. 1982).

state funds to pay benefits, it would be against the objectives of the policy behind unemployment compensation to increase an employer's assessments when the employee is refusing suitable work due to no direct fault of the employer, and moreover, where the same employer is the one offering the claimant another job.[195] Can we afford to continue this employer protection, especially in the face of ineffective social programs like unemployment compensation and with knowledge that the family unit is breaking down? Until the courts recognize an employee's interest in her job,[196] employers will continue to be favored. Moreover, decisions of courts rooted in the principle that "lesser harm to employers" is beneficial will perpetuate.

Thus, in Vermont, the prevailing view until 1987 on child-care issues was based on an unarticulated set of assumptions about the labor force as seen from a male perspective.[197] The cases refused to recognize domestic responsibilities as either good cause for voluntarily leaving employment or for refusing suitable work. Fortunately, in 1987 the Vermont Supreme Court changed its direction (perhaps finally in recognition of a changing society) and overruled the long standing *Nurmi* case.[198]

In *Shufelt v. Department of Employment and Training*, the court began a new trend in Vermont toward a recognition of child care as good cause under the availability provisions of state unemployment compensation statutes.[199] The claimant in *Shufelt* was laid off from her regular day shift. A month later her employer offered her a job on the night shift, which she refused, stating that she was uncomfortable leaving her three daughters at home alone.[200] The court presented the issue in terms of whether child care was good cause for refusing suitable work. It articulated a standard of reasonableness that focused on what a reasonable person in the same circumstances would do.[201] The court cited *Grenafege v. Department of Employment Security*[202] for the proposition that our system of unemployment compensation is

195. *Id.* at 393. *Hunt* is a glaring example of how courts weigh families and employers on the scales of justice. Even moderate costs to the employer appear to preclude all consideration of the adverse impact these decisions have on families.

196. R. Michael Fischl, *Some Realism About Critical Legal Studies*, 41 U. MIAMI L. REV. 505, 526-28 (1987).

197. *See, e.g.*, *Hunt*, 453 A.2d at 391; *In re* Prouty, 310 A.2d 12 (Vt. 1973); Nurmi v. Vermont Employment Sec. Bd., 197 A.2d 483 (Vt. 1964), *overruled by* Shufelt v. Department of Employment & Training, 531 A.2d 894 (Vt. 1987).

198. Shufelt v. Department of Employment & Training, 531 A.2d 894, 896 (Vt. 1987).

199. *Id.* at 898.

200. *Id.* at 895.

201. *Id.* at 898.

202. 357 A.2d 118 (1976).

remedial in nature and must be liberally construed in favor of claimants.[203]

In *Nurmi*, the court assumed that the requirement of good cause attributable to the employer for voluntarily quitting a job also applied to the refusal to accept suitable work, even in the absense of any statutory language to support such a proposition.[204] The court in *Shufelt*, however, followed a much stricter statutory construction and stated that good cause to refuse work need not necessarily be tied to the employer.[205] The *Shufelt* court instead considered domestic responsibilities as good cause under the availability portion of the statute. In doing so, the court followed the ruling of the Rhode Island Supreme Court in *Huntly v. Department of Employment Security*,[206] which stated that "parental responsibility may constitute good cause for limiting availability, so long as such limitation does not substantially impair a claimant's attachment to the labor market."[207] Thus both *Huntley* and *Shufelt* went one step further than *Nurmi*. First, the *Shufelt* court recognized child care as good cause.[208] It then stated that the determination must be made as to whether, even with good cause, the claimants own restrictions "substantially impaired [her] attachment to the labor market."[209] Unlike the court in *Nurmi*, the *Shufelt* court did not assume that the claimant automatically made herself unavailable by restricting her attachment to the labor market.[210] The *Shufelt* court, although recognizing parental responsibility as good cause, did limit the reasonableness standard which it set forth. It stated that in each case the reasonableness of the child care must be judged according to the age and number of children and to what the actions of similarly situated parents would be.[211] By doing so, the court stopped short of declaring all parental responsibilities as constituting good cause.

Given the long tradition in Vermont of denying all benefits for any personal and voluntary refusals of work, this is not surprising. Yet the *Shufelt* court did not go far enough in erradicating all doubts about whether child-care responsibilities constitute good cause. It did not do so because the court still held "the burden rests with the claim-

203. *Id.* at 120.
204. *Nurmi*, 197 A.2d at 486-87.
205. *Shufelt*, 531 A.2d at 897.
206. 397 A.2d 902 (R.I. 1979).
207. *Shufelt*, 531 A.2d at 898 (quoting *Huntley*, 397 A.2d at 906).
208. *Id.* at 898.
209. *Id.*
210. *Id.*
211. *Id.* at 899.

ant to show that the refusal was for good cause,"[212] and in so doing the claimant also has the burden of establishing the reasonableness of her actions.[213] In light of the precedent in Vermont, the chances that a claimant may be able to sustain the burden that child care is good cause are quite low. Prior to *Shufelt*, which attempted to change the course of unemployment jurisprudence as it affects parents, Vermont gave no recognition to parental needs. In Vermont today, claimants may still encounter resistance in the courts on unemployment compensation claims, especially if the facts vary even slightly from those in *Shufelt*. It is uncertain whether one case is sufficient to truly change the course of the law given the limitations of a reasonableness standard rather than a presumption that child care is good cause with no burden of proof on the claimant.

4. CALIFORNIA

A germinal case in unemployment compensation law is *Sanchez v. Unemployment Insurance Appeals Board*,[214] decided by the Supreme Court of California in 1977. *Sanchez* represents a minority but progressive viewpoint on the issue of child care and unemployment compensation benefits. Maria Sanchez was an unemployed waitress who applied for unemployment compensation benefits. She informed the Department of Employment Development that she could not accept work on Saturdays and Sundays because she had to stay at home with her four-year-old son.[215] Before Maria became unemployed, her sister had looked after the child, but her sister had returned to Mexico.[216] Maria also informed the Department that she was available for waitressing jobs and factory work.[217] She was available to work at either of these jobs during the week and on any shift.[218] The Department concluded that her self-imposed exclusion from weekend work made her unavailable for work under the California unemployment compensation statute, and thus she was ineligible for benefits.[219] A hearing referee, the Unemployment Compensation Review Board, and a California Superior Court affirmed the Department's rejection of benefits.[220] The superior court noted that her

212. *Id.* at 896.
213. *Id.*
214. 569 P.2d 740 (Cal. 1977).
215. *Id.* at 743.
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*

exclusion from weekend work had "materially reduced her opportunities for employment" and thus she was unavailable for work under the statute.[221] The Supreme Court of California reversed, stating that the lower court had applied an incorrect standard of availability which had adversely affected the outcome.[222]

It is important to note, as did the California Supreme Court,[223] that *Sanchez* is not about the voluntary quit provision of the statute. Rather it implicates the availability requirement of section 1253 and the definitions of the terms within that section. According to section 1253 a claimant must be "able to work and available for work"[224] to qualify for benefits. A claimant is disqualified from benefits if she "without good cause, refuse[s] to accept suitable employment when offered to [her], or fail[s] to apply for suitable work when notified by a public employment office."[225] The Board offered three justifications for its interpretation of the availability standard.[226] First, it concluded that any restriction by the employee which would "materially reduce" her possibilities for work would render her unavailable under the statute.[227] Second, the Board interpreted the provision to require that a claimant be available for work "as is customarily or ordinarily required by work in his usual occupation."[228] Finally, the Board concluded that the claimant had virtually always worked on weekends.[229]

The Supreme Court of California pointed out that the Board did not explore the concepts of suitable work or good cause in the three justifications for the standard.[230] The court, reading section 1253 literally, stated that the threshold questions in these cases are (a) whether the work was suitable, and (b) whether the claimant had good cause for refusing such suitable work.[231] The court determined that allowing the standard adopted by the Board to stand would nullify the suitable work provision of the statute.[232] This is so because if a court takes a refusal to work at specified times as evidence of general unavailability for work, as the Board did, and does not inquire into the suitability of the work or the reasons for refusals, then possibly all

221. *Id.* at 744.
222. *Id.* at 749.
223. *Id.* at 743 n.3.
224. *Id.* at 743 n.4.
225. *Id.* at 744.
226. *Id.*
227. *Id.*
228. *Id.* at 745.
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.*

refusals of unsuitable work and all good reasons for refusing work would render workers unavailable under the statute. The Supreme Court of California stated that both suitability and good cause must be considered.[233] The court used these two definitions to limit the scope of the availability requirement. Availability in itself concerns certain economic needs, whereas the suitability and good cause provisions refer to the particular employee's needs.[234] Thus, the court set up a two-step test of availability. First, there must be an inquiry into the suitability of the job and the causes for refusals. Second, once a claimant has restricted her market to suitable work for which she has no good cause to refuse, the court must determine whether the claimant's market is so small that she has effectively made herself unavailable for work for which there is a substantial field of potential employment.[235] In other words, "the initial test of willingness to accept suitable employment will be followed by an inquiry into the size of the market for suitable labor."[236]

The establishment of this two-step test by the court is significant in that it goes one step deeper than most courts do in determining eligibility requirements. In rejecting the notion that one's unavailability to accept a particular job offer is itself immediate cause for disqualification, the court first requires an examination of the work offered to see if it is suitable and whether there was good cause for rejecting it. Once those determinations are made, then the court examines availability in terms of attachment to the labor force. This is important with respect to child care because it opens the door for an argument that child care should fall under both of those two inquiries in being classified as good cause for refusing work and as a consideration in determining whether work is suitable.

The court in *Sanchez* takes this extra step by following *Garcia v. California Employment Stabilization Committee*.[237] *Garcia* held that a claimant cannot be required to be available for unsuitable work or work for which she has good cause to refuse, so long as she remains available to a substantial employment field.[238] The claimant in *Garcia* lacked transportation to get to a job, and the court declared that to be good cause for refusing such suitable work.[239] *Garcia* was thus an important precedent not merely because it initiated this two-step

233. *Id.* at 748-49.
234. *Id.* at 746.
235. *Id.* at 746-47.
236. *Id.* at 747.
237. 161 P.2d 972 (Cal. Dist. Ct. App. 1945).
238. *Id.*
239. *Id.* at 974.

methodology, but also because it demonstrated a willingness on the part of the California courts to expand the definition of good cause to include various nonemployment related reasons such as personal problems.

The *Sanchez* court alluded to the necessity of having a "more realistic and flexible test of suitability, good cause and actual labor market exposure."[240] Having established a broader test than that used by the lower court, the California Supreme Court then looked at the lower court's decision in light of its newly articulated test. First, it pointed out that at no time in the lower court proceedings was there a determination as to whether weekend work was suitable work for Maria Sanchez.[241] The court did not explore this omission except to state that an inquiry into the suitability of the actual work offered is always necessary under its newly established test.[242]

However, it is quite possible (and even likely) that had the court further explored the suitability question, it would have held that weekend work was not suitable for Maria Sanchez. Such a conclusion is reasonable because the court's reasoning linked the ideas of suitability and good cause.[243] It inquired into both of these issues before it determined availability. Also, the court declared in its opinion that child care is indeed a good reason for refusing suitable employment, based on concrete references to the policy behind the system.[244] Thus, the assumption that the court would not be hard pressed to conclude that child care should also factor into a determination of suitability is not far-fetched.

Early in its opinion, the *Sanchez* court restated the statutory provision on suitability.[245] It stated that when a determination of suitability is made, "risk to health, safety, and morals" must be taken into account.[246] Those words offer potential for those advocating child care as a factor in a suitability determination. The *Sanchez* court later pointed out that "parents of a child are under an obligation to give [her] support and education suitable to [her] circumstances. And they may be subject to criminal penalties if they neglect their duties."[247] The court may have meant that parents, and society as a whole, have a moral responsibility to care for children. This moral

240. *Sanchez*, 569 P.2d at 748.
241. *Id.* at 749.
242. *Id.*
243. *Id.*
244. *Id.* at 750.
245. *Id.* at 744 n.6.
246. *Id.*
247. *Id.* at 749.

imperative falls under the rubric of the "health, safety, and morals" provision of the statutory suitability requirements.[248] Such an interpretation of the "health, safety, and morals" provisions would allow universal reform in unemployment compensation law, since all statutes contain such a provision. Progressive courts from states such as California, Alaska, and Rhode Island could set the example for other courts through doctrine that considers a parent's right to make moral decisions about child care an important enough right of self-determination to classify as a factor in determining suitability. There would then be three, rather than two, theories under which claimants could challenge eligibility requirements based on child care: first, that child care should be good cause for voluntarily leaving a job; second, that child care is good cause to be unavailable for suitable work; and third, that a denial of benefits causes a risk of the "health, safety, and morals" of children because it forces their parents to neglect them. The *Sanchez* decision brought these last two theories to light.

Sanchez next focused on the idea of child care as good cause for being unavailable for suitable work.[249] This analysis sets this case apart and puts it in a minority. The court combined notions of morality, law, and legislative policy in deciding that parental responsibilities are good cause for refusing suitable employment. "Because of the crucial importance of parental responsibility and supervision, it would be anomalous if the Legislature intended that the obligation of the prospective claimant of unemployment benefits to accept work be irreconcilable with the duties of parenthood."[250] *Sanchez*'s discussion of the balance between parental duties and work as a concern of the unemployment compensation system is absent from the doctrine of virtually all of the case law in this area. *Sanchez* held the good cause provision out as a scale onto which it weighed conflicting responsibilities.[251]

This recognition of the conflict between work and home also distinguishes the California court from most others in that a gendered perspective seems absent from its doctrine. The language of *Sanchez* appears to evolve from a broad perspective encompassing both a female and a male voice.[252] The language, which paints a picture of the true dilemma that parents — especially women — face, is sympa-

248. *See* CAL. UNEMP. INS. CODE § 1258 (West 1986) (describing the "health, safety, and morals" consideration in suitable employment determinations).

249. *Sanchez*, 569 P.2d at 750.

250. *Id.* at 749.

251. *Id.*

252. Frances Olsen, The Sex of Law (1985) (unpublished manuscript, on file with the *University of Miami Law Review*).

thetic, and takes into account the subjectivity and true lack of choice involved in child-care decisions by working parents.[253] The lack of gender bias is unusual and suggests that there is more driving the doctrine of the California courts than preconceived, rigid images of what the workplace, the unemployment compensation system, or child-care responsibilities should be.

Sanchez also differs in the meaning it attaches to "good cause." Under its definition, good cause means "adequate" cause.[254] If conservative courts like Florida and Tennessee defined good cause as the California court has done, the outcomes of their cases might be different. Changes in outcome in favor of claimants would be even more likely if other courts interpreted good cause to mean adequate cause not only for refusing suitable work, but also for voluntarily leaving a job. *Sanchez* did not limit its definition of good cause to the suitability provision. In fact, the court stated that

> the responsibilities our laws place on parents, and the importance to their children and society that those duties be discharged, mandate that the "good cause" concept not be defined so narrowly as to compel unemployed parents who remain available to a significant labor market to fulfill their parental responsibilities only upon pain of losing their unemployment benefits.[255]

The court concluded this section of the opinion by citing a 1968 North Carolina case[256] which, referring to child care, stated, "it is difficult to imagine a better cause for rejection of employment."[257] Therefore the *Sanchez* court's decision was a great step towards having the courts throughout the country recognize and legitimate the importance of child care in today's labor market.

The last important aspect of *Sanchez* was the court's ruling on the burden of proof.[258] *Sanchez* reduced the claimant's burden somewhat by stating that with respect to the second part of the test—that is, once a claimant has shown her availability for suitable work for which she has no good cause to refuse, the burden of proving whether she is available to a "substantial field of employment" is on the Department.[259] Although *Sanchez* does free the claimant from carrying the entire burden of proof, it still, like *Shufelt*, leaves upon the claimant the burden of proving good cause for refusal of suitable

253. *Sanchez*, 569 P.2d at 749.
254. *Id.* at 750.
255. *Id.*
256. *In re* Watson, 161 S.E.2d 1, 7 (N.C. 1968).
257. *Sanchez*, 569 P.2d at 750 (quoting *Watson*, 161 S.E. 2d at 7)).
258. *Sanchez*, 569 P.2d at 750.
259. *Id.*

work. Therefore, the burden of proof makes it extremely difficult for claimants to win.[260] Rather than making the burden of proof prohibitive, the courts should allocate the burden of proof so it reinforces their substantive decision. Having substantively recognized child care as good cause to refuse work, the courts should create a presumption in favor of claimants that child care is a valid reason for refusal.

If the courts want to maintain some kind of control on the matter, they can do what the *Shufelt* court attempted to do by imputing a "reasonableness" standard in the presumption. This would free most working parents who claim unemployment compensation from having to establish good cause so long as their actions were reasonable. The existence of a reasonableness provision, some may claim, still involves a value judgment on the part of the courts.[261] Though this is true, the way to change is through a slow process of rethinking burdens and restructuring doctrine. Perhaps the compromise of a reasonableness standard may not be as threatening to some courts throughout the country which have traditionally been hostile to this issue. Notwithstanding the burden of proof issue, the California court's decision in *Sanchez* is an excellent example of sound doctrinal analysis in its incorporation of both precedent and ideology resulting in a gender-neutral recognition of child care as good cause for refusing suitable work.

Sanchez set the stage for further expansion of the good cause provision. Two years later, in *Glick v. Unemployment Insurance Appeals Board*,[262] the California Supreme Court held that a student who restricted her working hours to nights and weekends to attend law school had good cause for refusing suitable employment under the statute.[263] The court stated that "given the indispensable role which education plays in the modern industrial state" the good cause provision should be read to encompass such reasons for refusing suitable work.[264] The court also pointed out that by attaining a law degree, the claimant would avoid future possibilities of being unemployed through no fault of her own, which was the purpose of the statute in the first place and thus should not be used to deny her benefits.[265] The court's extension of good cause to include education followed

260. Shufelt v. Department of Employment & Training, 531 A.2d 894, 896 (Vt. 1987).

261. To minimize disparate determinations of reasonableness, the legislatures or the courts should articulate guidelines as to the definition of reasonableness. This would facilitate consistency in the initial eligibility determinations.

262. 591 P.2d 24 (Cal. 1979).

263. *Id.* at 29.

264. *Id.*

265. *Id.*

from *Sanchez*, which defined good cause as adequate cause. Education was certainly an adequate reason to limit the claimant's availability.[266] The California court, as evident in decisions like *Sanchez* and *Glick*, has interpreted the good cause provisions of the unemployment compensation statutes liberally thereby affording higher protection and broader benefits to working mothers.

5. ALASKA

Alaska has followed California's lead. The Supreme Court of Alaska, in *Arndt v. State Department of Labor*,[267] followed the reasoning in *Sanchez* in holding that a claimant's parental responsibilities may be considered in a determination of good cause for refusing suitable employment.[268] The court adopted the claimant's argument that in determining what constituted good cause and suitable work it should consider factors that would tend to "influence a reasonably prudent person" in her decision whether to accept a job.[269] Instituting the two-part *Sanchez* test,[270] the court remanded the case for a determination of whether the claimant's decision to refuse work was reasonable in light of her parental responsibilities.[271]

There is a problem with cases like this that remand to lower courts. The remand in *Arndt* was called for because the determination of reasonableness is a question of fact for the lower court to assess. Yet, because the lower courts are faced with situations which vary factually from claimant to claimant, the result is an indeterminate doctrine. Without the higher courts announcing exact criteria, based on their interpretation of unemployment compensation statutes, for when refusal of work due to child care is reasonable and therefore permissible good cause, the lower courts have little guidance. This is arguably the reason why the majority of decisions that grant benefits to workers for child-care reasons seem to be reversals of lower court decisions. If child-care responsibilities were presumptively treated as good cause under the statutes, both in the voluntary quit provision and in the suitability provision, the problem of indetermination would not exist. This is not necessarily a radical proposition; in most cases

266. *Id.* at 28. Presumably, if education is viewed as adequate cause under the statutes, child care should likewise be considered adequate cause for voluntarily leaving a job or refusing suitable work.

267. Arndt v. State Dep't of Labor, 583 P.2d 799 (Alaska 1978).

268. *Id.* at 803.

269. *Id.* at 802.

270. *Sanchez*, 569 P.2d at 744.

271. *Arndt*, 583 P.2d at 802-03. The *Arndt* standard combines the *Sanchez* and *Shufelt* reasonability tests.

the parents have no alternative but to stay home with their children. Therefore, in a majority of these cases, a parent's decision to refuse or quit work is almost automatically reasonable and should result in unemployment benefits.[272] A presumption in favor of laws recognizing child care as good cause would make the job of the lower courts easier and eliminate many appeals. Also, it would lead to more consistent doctrine.

Some of the inconsistency in the doctrine at the lower court level may also be due to gendered images.[273] Only now are the courts slowly becoming aware of the changes in the workplace due to higher court decisions which address these labor issues. Thus, appellate court decisions like those in California and Alaska, though encouraging, are not enough unless the lower courts begin to recognize child care as good cause by rote and decide cases consistently.

6. MASSACHUSETTS

Two Massachusetts cases have developed progressive doctrine and pose interesting policy questions. The first case, *Conlon v. Director of Division of Employment Security*,[274] forges new ground in the determination of good cause under state unemployment statutes in considering the eligibility of an unemployed nurses' aide.[275] The claimant in *Conlon* had six children. Because her husband, a fireman, worked nights, she had the responsibility of caring for the children at night. The claimant worked for a nursing home until April 1979 when it terminated operations. She applied for and received unemployment compensation benefits, but her benefits were terminated when Conlon indicated that she was available for work only on the 7:00 a.m. to 3:00 p.m. shift due to her child-care responsibilities.[276] The court linked the two good cause provisions of the eligibility statute to develop, through deductive logic, a sound argument why child care should be good cause under the statute.[277] The court examined the legislative history of the statute and found that from 1958 to 1969, the statute denied benefits to one who left work "voluntarily without good cause." There was no attachment to the employer required.

272. *Sanchez*, 569 P.2d at 750.

273. Finley, *supra* note 193 (explaining that males have created most of our law and as a result, there is a male slant to much of our legal reasoning, which causes gendered images to dominate the courts' doctrine.) *See also* Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 64 (1988).

274. Conlon v. Director of Div. of Employment Sec., 413 N.E.2d 727 (Mass. 1980).

275. *Id.* at 730.

276. *Id.* at 728.

277. *Id.* at 730; *see also supra* note 145.

However, the legislature amended the clause in 1969 to read "has left work voluntarily without good cause attributable to the employing unit."[278] The court concluded from this language change that where the legislature had wanted to limit good cause solely to that caused by the employer, it had done so explicitly.[279] Thus, the court reasoned, because the legislature did not expressly limit the good cause provision of the suitability requirement, it intended no such limitation. Thus, good cause in that context could encompass personal reasons. The court, simply by incorporating the idea of good cause in the statute into one inquiry, recognized an exception for personal reasons.[280] The court then went on to adopt the two-step test of *Sanchez* and remanded the case with instructions to follow the new standard set by the court.[281]

A second noteworthy Massachusetts case, *Raytheon v. Director of Division of Employment Security*,[282] established that a claimant's departure from work for personal reasons could be so compelling as to render her departure involuntary according to state unemployment statutes.[283] By approaching the issue as a question of law, the court provided precedent for an unemployment eligibility determination encompassing child-care responsibilities. The claimant in *Raytheon* was a factory worker who worked on the night shift. When her coworker, who provided her with transportation, was fired, the claimant could not get to work. After her emplyoyer denied her request to change to the day shift, she quit her job.[284] In response to her attempt to collect unemployment benefits, the court stated,

> [The general purpose of the unemployment compensation law] is to afford benefits to persons who are out of work and unable to secure work through no fault of their own. . . . The broader purpose of the law is to provide temporary relief for those who are realistically compelled to leave work through no fault of their own, whatever the source of the compulsion, *personal or employer-initiated*.[285]

Concluding that the claimant had exhausted all the possibilities available to her to gain transportation to work, the court held that her reasons were sufficiently compelling to render her quitting involun-

278. *Conlon*, 410 N.E.2d at 730.
279. *Id.*
280. *Id.*
281. *Id.* at 729-31.
282. 307 N.E.2d 330 (Mass. 1974).
283. *Id.* at 332.
284. *Id.* at 331.
285. *Id.* at 332 (emphasis added) (citation omitted).

tary. Thus, she was eligible for benefits.[286]

Why was such a liberation in the doctrine of good cause initially enumerated in a transportation case? And if transportation is a compelling enough reason to receive benefits, should not child care be similarly classified? What society would honor the former and not the latter?

IV. GENDERED DOCTRINE

Gender bias explains much of unemployment compensation law. Although unarticulated, it is a powerful motivator in courts, legislatures, and society. Gender bias is an important area to explore because it is an example of how male dominance and perspectives define Anglo-American jurisprudence.

Lucinda Finley, in her article on the gendered nature of legal language, explains that throughout history the primary creators of the law have been male.[287] Men have defined the law, interpreted it, and given it meaning according to their own experience. Not surprisingly, the law that has emerged reflects a male image. Finley points out that because men have been the ones to hold power, their legal creations have gone virtually unchecked; thus their pronouncements of the law have been seen as natural, complete, and objective. Yet males have created a law that is gendered and patriarchal. It remains so today as evidenced by court decisions in various legal arenas. The law of unemployment compensation is no exception.

Many of the cases examined in this Comment discourage a societal solution to the problems of child care and restrictive unemployment compensation eligibility requirements, encouraging instead personal or market solutions, despite their burdensome effects. The courts deciding these cases generally refuse to modify the existing doctrine and have not used the law to produce social change. This is partly because the capitalist philosophy of American society, in most instances, leaves one to find private solutions to one's own problems. Therefore, when a lack of child-care facilities or prohibitive costs force a parent to leave work to attend to children, it is not unusual for the courts not to interfere. The gender bias that underlies this perception often determines the outcomes of particular cases and, in the aggregate, creates a body of law whose doctrine serves only to reinforce the problems in the market, rather than offering potential solutions.[288]

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286. *Id.* at 333.

287. Finley, *supra* note 193, at 892-95.

288. *Id.* This assumes that the law is a powerful instrument of social change. The law

Unemployment compensation cases illustrate the historically gendered nature of law.[289] For years, courts dominated by a male perspective have decided cases which address fundamental problems in the labor market affecting *both* males and females. In other areas of the law, gender discrimination may be less noticeable, but the problem remains acute for working women.[290] This wholly male perspective is ill-equipped to render effective decisions in the area of unemployment compensation. Far too often males interpret issues that affect women, using male-created precedent. The question is one of neutrality: can doctrines created in these cases be truly neutral, or do the male lenses through which the facts are viewed distort the doctrine and cause it to be gender biased? As with other areas of law, a male-oriented perspective and the historical privilege given to the male viewpoint dramatically affects the resulting doctrine.[291]

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propels our behavior into various directions; the law's influence on employers is no exception. Therefore, gender bias in the law translates into gender bias in the market as society takes its cue from the letter of the law. *See* CAROL GILLIGAN, IN A DIFFERENT VOICE 35, 79 (1982) (discussing how male bias is reflected in our capitalist society).

289. As Lucinda Finley notes, males have crafted the majority of our laws, and the effect has been that these laws favor men. Finley, *supra* note 193, at 892. Frances Olsen attributes this male slant to the basic structure of our law, coupled with courts' interpretions of this structure over time. Our legal system adopted an adversarial model to resolve disputes, first in private spheres, then in public spheres as society became more complex. Despite the onslaught of polycentric disputes, the adversarial philosophy which drives and polarizes the legal system has not changed. A polarized legal system forces dualisms into the definition of law: rational/irrational, thought/feeling, objective/subjective, abstract/contextualized. These dualisms, according to Olsen, are sexualized, with the first term in the pair representing the male and the second term representing the female. Interestingly, the terms and concepts that are basic to our law appear in the first term. For instance, legal doctrine extols the rational, the objective, and the abstract. By contrast, legal doctrine rejects the second terms in these dualisms. Women's voices—perceived to be irrational and subjective—are not heard or reflected in our laws. However, because more and more women's voices (not characterized as irrational and subjective, are being heard and reflected in society, especially since women have joined the workforce, there is an uneasy juxtaposition between current legal doctrine and society. *See* Olsen, *supra* note 252.

290. *See, e.g.*, Beard v. State Dep't of Commerce, Div. of Employment Sec., 369 So. 2d 382 (Fla. Dist. Ct. App. 1979); Yordamlis v. Florida Indus. Comm., 158 So. 2d 791 (Fla. Dist. Ct. App. 1963); Aladdin Indus. Inc. v. Scott, 407 S.W.2d 161 (Tenn. 1966); Nurmi v. Vermont Employment Sec. Bd., 197 A.2d 483 (Vt. 1964), *overruled by* Shufelt v. Department of Employment & Training, 531 A.2d 894 (Vt. 1987). All of these cases, save *Yordamlis*, deal with female parents.

291. *See, e.g.*, Finley, *supra* note 193, at 893 (citing examples of how a male perspective has affected tort law). If an analogy can be drawn from the treatment of terminology and comparisons in the general law with unemployment compensation, (concerning the influence that male legal discourse has on current doctrine), then it is likely that the unemployment doctrine is affected by gender bias. For example, the term rape has traditionally been taken to connote a sexual incident between two strangers, and much of the case law focuses on the question of the woman's consent. This view ignores the glaring reality that rape often occurs between people who know each other, and it is a violent crime from a woman's viewpoint—rather than a sexual crime. The legal meaning attached to the term rape is a clear example of a

Legal comparisons reveal a great deal about the gendered nature of the law.[292] In order to make a comparison, one must discover and use a norm; in the law, inevitably, that norm is male. Consider the concept of equality. Just as legal discussions of racism assume a white norm when making comparisons in determining equality,[293] so, too, the law assumes a male norm when discussing equal opportunity. For example, in the early days of the feminist movement, women attempted to attain equality with men with respect to job opportunities. Males and "male jobs" represented the norm to which courts and legislatures compared all jobs. This male reference point was part of the problem with the Equal Rights Amendment ("ERA").[294] Women were so busy trying to be *like* men that many failed to realize the more fundamental problem that the entire male norm was simply wrong and had to be changed. That, of course, is a harder task than being equal to men, because it involves a conceptual shift in societal thought. Given the difficulty of such a conceptual shift, women in the 1970s and 1980s continued to work from the male reference point in attempting to better their relative positions.[295]

The ERA movement, hailed in many circles as a revolution for women's rights, undeniably accomplished some gains for women. Ironically, however, women were so insistent upon gaining themselves jobs long occupied only by men that they did so in an almost asexual fashion. Their goal was to compete in the market for jobs and salaries. The goals of men became the goals of women. The movement resulted in a rapid increase in the number of women in the work force,[296] but this increase occurred with almost complete disregard for related issues of importance to women, primarily pregnancy and child care. Unfortunately, the new rights afforded women to enter the work force often ignored the rights of their children.[297]

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meaning formulated without female input. Incorporating a female perspective into the law would entail seeking new definitions for these terms based on alternative experiences. *Id.* at 895.

292. *Id.* at 892-95.

293. Many legal comparisons assume certain unarticulated norms. For example, decisions such as Plessy v. Ferguson, 163 U.S. 537 (1896), invoking the doctrine of separate but equal presume the white norm as the standard of equality. Similarly, the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1988) presumes the male norm.

294. H.R.J. Res. No. 208, 92d Cong., 2d Sess. (1972).

295. *See generally* Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989) (analyzing the intersection of the sameness/difference debate in the study of men and women).

296. Bureau of Labor Statistics, Unpublished Data, *supra* note 1 (comparing statistics on working women from 1970 to 1990).

297. This Comment does not mean to fault women in any way for having taken this path. Given the invidious nature of the male gender bias, women in the early days of the feminist movement had no choice but to compete against a male norm. However, with the benefit of

Working women began to realize that they were respected only on the basis of what they had in common with men, rather than for who they were and what they had to offer.[298] This phenomenon is a perfect example of gender bias in a market governed by a male norm. All traces of difference were ignored as the two sexes battled for positions at the top. Biological differences like pregnancy were denied, and as a result, maternity or parental policies were given low, if any, priority. In the mid-1980s, however, there was a re-emergence of family as an important concern and a realization that families were suffering from both parents working, because there was less time for the concerns of children.[299] Many women decided that denying their differences no longer achieved a desired result because the "desired" result derived from a male norm. Women began to desire recognition of their differences, a "celebration of differences."[300] Along with this decision undoubtedly came the sense that the male norm no longer fit a society with a workforce comprised of so many women.

Nowhere is the need for a gender paradigm shift as clear as in the area of unemployment compensation law. In matters of child care, the male reference point has no historical experience. That is, when courts rely on images of traditional families in constructing their doctrine, no conflict between work and home arises. An understanding of the conflict of work and family is alien to the male norm.[301] It is thus impossible to fashion effective solutions to the conflict; those deciding the law are handicapped by an inability to understand the problem. Consequently, solutions to the unemployment compensation dilemmas have been incomplete, lacking a female point of view.[302] The emerging unemployment doctrine also lacks a contextual basis. It lacks, as Carol Gilligan and other relational feminists contend,[303] an awareness of female "connectedness" which may drive

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hindsight and after a generation of children who witnessed the struggle of women to fight for equality in the workplace, people discovered that both parents working did in fact have some negative effects on children. These effects have become increasingly worse as the child-care crisis in America has grown.

298. *See* Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKLEY WOMEN'S L.J. 191, 199-204 (1990).

299. *See, e.g.*, ARLIE HOCHSCHILD & ANNE MACHUNG, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME (1989).

300. West, *supra* note 273, at 18.

301. Finley, *supra* note 193, at 898.

302. There is no *one* female point of view or voice; however, some of the language in this Comment tends to "essentialize" to make a point. That is, learning from Carol Gilligan and Francis Olsen about the contrasts between males and females, often "a female viewpoint" is adopted here to highlight certain perspectives in contrast to those of men.

303. *See generally* GILLIGAN, *supra* note 288 (offering alternatives to the male norm and critiquing the individualistic male as lacking a female voice).

some females to want to care for children, to consider community needs, and to accommodate emotive and less self-interested needs into law.[304]

If an infusion of feminist theory will cause the courts to face the problems posed by restrictive eligibility requirements, why not adopt these concepts and effectuate change? The challenge is that this would require a complete overhaul of unemployment compensation doctrine and the system which underlies it. This is so because the "new model"[305] envisioned would use the woman as the reference point, thereby facilitating recognition of work and family conflicts. Such a model would be more likely to remove the gender bias from the unemployment compensation system and would offer potential societal solutions. A criticism of this shift is that a female norm is no better than a male norm and may result in equally pervasive gender bias. However, given the ubiquitous male norm, a female norm is unlikely to completely surpass it. The goal, of course, is a neutral norm which represents both male and female perspectives, and a legal doctrine which reflects cares and concerns of families while accounting for the underlying perspectives of both male and female lawmakers. That goal may be idealistic, but change must begin somewhere. Introducing a female norm may eventually result in a doctrine made up of both value systems.[306]

Another example of gender bias in unemployment compensation cases is found in the imagery used in the opinions. As Karl Klare wrote, "powerful although customarily unarticulated images of the workplace guide the development of labor law," which is "founded on the assumption that employee status and self-determination in work are incompatible."[307] Such an assumption is not easily uprooted, and the imagery it creates is dramatic. One such image is Justice Bradley's portrayal of the timid, fragile woman unfit for work outside the

304. West, *supra* note 273, at 18-22 (discussing Carol Gilligan's theories). The analysis here assumes that the Olsen dualisms are correct and that the right side does represent females. However, this itself is a debatable point. It is not the intention of this Comment to accept the characterization within these dualisms and to thereby reinforce the status quo of legal doctrine. Rather, the characterizations are simply illustrative of the need for a conceptual change in the guiding assumptions of the law by a greater acceptance of a female viewpoint.

305. ELIZABETH WOLGAST, EQUALITY AND THE RIGHTS OF WOMEN 22-23 (1980).

306. Finley, *supra* note 193, at 906-10. The ultimate goal is a doctrine which reflects both male and female value systems. However, the doctrine in the courts has been male oriented so long that it will take a rush of female perspectives to counter this bias. This Comment may seem in the short term to advocate a completely female doctrine, but the limitations of any such doctrine are apparent. Rather, the goal is a "meeting of the minds," so to speak, in legal doctrine.

307. Karl Klare, *The Bitter and The Sweet: Reflections on the Supreme Court's Yeshiva Decision*, 13 SOCIALIST REV. 99, 103-04, 111-16 (1983).

home.[308] Later these images evolved into those of the homemaker who cared for her husband and children and who entered the workforce only if necessary. Neither of those two images accurately portray today's women. Yet these images of past generations of women still govern current legal doctrine.[309]

Stare decisis may explain, in part, why there is not a rush to correct the burdensome decisions of the unemployment compensation caselaw. However, these cases send a gender-biased message to and about women that certainly does not "celebrate female differences."[310] The majority of these decisions, denying unemployment benefits to mothers who either leave or who are unavailable for work due to child-care responsibilities, implicitly precludes women from any real choice between motherhood and their jobs or careers. Courts seem to ignore the raw conflict between holding down a steady job and being available to care for children when day care centers are unaffordable or closed, or the child is ill.[311] Many courts still implicitly believe that a women's lot is to make the home her first priority.[312] Nowhere is the sacrifice of working women reflected in the tone of court decisions.[313] There is little acknowledgement in the doctrine that women are just as eager for and capable of holding jobs and advancing in careers as men.[314] There is little, if any empathy in the legal language or exploration into claimants' individual circumstances. Rather, judges articulate the doctrine by rote, imposing outdated imagery of women to conclude that child care does not constitute good cause for leaving work or refusing work. This doctrine, empty of context, is biased by male values and assumptions about women. Often the result is a decision that harms female claimants and their children, simultaneously and invidiously reinforcing the status quo.[315]

Unemployment compensation case law also furthers the eco-

308. Bradwell v. State, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).

309. Finley, *supra* note 193, at 890-93 (discussing the male perspective represented in our legal language and reasoning, and the lack of competing female perspectives).

310. West, *supra* note 273, at 18.

311. Sanchez v. Unemployment Ins. Appeals Bd., 569 P.2d 740 (Cal. 1977) is arguably the only case in unemployment compensation law which truly recognizes the dilemma between child care and employment.

312. *See, e.g.*, Beard v. State Dep't of Commerce, Div. of Employment Sec., 369 So. 2d 382 (Fla. Dist. Ct. App. 1979); Aladdin Indus. Inc. v. Scott, 407 S.W.2d 161 (Tenn. 1966).

313. *Id.*

314. *But see Sanchez*, 569 P.2d at 740 (noting the conflict between the dual responsibilities working women face).

315. Intercepting imagery that reinforces the status quo creates a chicken and egg problem; if we do not change the law, society will not change its perceptions; however, without a societal sanction of certain reconstructed images, there will be no meaningful change in the law.

nomic marginalization of women.[316] The cases reinforce the imagery of the traditional, financially stable family. Yet the statistics show that this imagery no longer accurately reflects American society.[317] Many claimants are single mothers who must work to support their families.[318] One of the reasons for focusing on unemployment compensation cases involving low-income workers is to show that, in order for our unemployment compensation system to be effective, courts must realize that many women have no real choice—if she is single and has a child, she must work to support that child. However, if the child should become ill, she has a parental obligation to care for the child. More often than not, a mother will not have a facility available to care for her sick child.[319] Thus, her only "choice" is to stay home and leave or lose her job. If the woman claims unemployment compensation, under current doctrine in a majority of states, she will be denied benefits because she left work for personal reasons not attributable to the employer.[320] Nowhere in the doctrine are the financial consequences to that claimant accounted for or even mentioned. In a capitalist society, private solutions are the norm, but what happens when there is no private solution, or the cost of private solutions is prohibitive? Courts must begin to consider these vexing questions.

Arguably, the false imagery of a traditional, dual-parent family which the courts often use as an analytic baseline is the direct cause of decisions that deny benefits to claimants. Thus, whether it be in the form of false images of women or false images of the financial stability of working families, gender bias filters into these decisions and causes discriminatory outcomes.

The new doctrine must be free from all gender-biased imagery.[321] It must give workers the right of self-determination without the

316. Williams, *supra* note 47, at 819.

317. *See supra* notes 1, 2, 161.

318. *See, e.g.*, *Sanchez*, 569 P.2d at 740.

319. The majority of the women whom this problem will affect are those in the low-income bracket. The primary source of child care for these women is subsidized facilities. Yet 1990 statistics from the National Governors' Association show a lack of available slots for low-income children of these women in 44 of the states. *See* NATIONAL GOVERNORS' ASSOCIATION, *supra* note 39, at 14.

320. Beard v. State Dep't of Commerce, Div. of Employment Sec., 369 So. 2d 382 (Fla. Dist. Ct. App. 1979); Aladdin Indus. Inc. v. Scott, 407 S.W.2d 161 (Tenn. 1966); Hunt v. Department of Employment Sec., 453 A.2d 391 (Vt. 1982).

321. This does not mean to suggest that what is needed is a degendered doctrine. Rather, a doctrine reflecting both value systems is desireable. *See* Williams, *supra* note 295 (analyzing ways to deconstruct gender and thereby referencing degendered doctrine); Isabel Marcus, *Reflections on the Significance of the Sex/Gender System: Divorce Law Reform in New York*, 42 U. MIAMI L. REV. 55, 72 (1987) (discussing degendered approaches to law reform).

attendant punishment of the denial of benefits. If this doctrine were accepted, actions such as changing shifts or leaving work because of child care would not cause a woman to be denied benefits. This new doctrine also would require a restructuring of the present unemployment eligibility requirements to encompass family responsibilities as good cause both for leaving work and for being unavailable for work. Granting benefits to working mothers would signal the welcoming of a female voice into the law.

This alternate model would encompass a new order of equality, a model which encompasses differences between men and women rather than bestowing equality upon only those women who deny their differences. This model of equality would likely protect a larger percentage of women in the labor force, because it would accommodate working mothers in many different fields. The importance of developing a new legal model is that law reflects and constructs cultural practices. Therefore, if the law relies on misplaced assumptions, it will reinforce those assumptions in our daily lives, which we conduct in the shadow of the law.

V. POLICY CONSIDERATIONS AND SOLUTIONS

Much of the doctrine of unemployment compensation is founded upon what the family should look like.[322] This is in part because of a holdover notion of what the family used to be. Unemployment compensation law fails to recognize the drastic changes in the family which have taken place over the last few decades. Today, 81.3% of divorced female heads of households with children and 55.2% of never-married female heads of households with children are also in the labor force.[323] No longer should courts assume that when a mother leaves work to care for her children there is a husband present to support her. This fundamental change in the dynamics of family makes the availability of unemployment compensation benefits to women critical.

The data, which reveals alarming statistics about the number of women in the workforce with children and the general lack of child-care facilities in the United States amounts to the same level of seriousness that the empirical data in *Brown v. Board of Education* did.[324]

322. *See generally* Dowd, *supra* note 3, at 436 (explaining the restructuring of the workplace as women enter it); Teitelbaum, *supra* note 17 (describing the development of the traditional family).

323. Bureau of Labor Statistics, Unpublished Data, *supra* note 1.

324. Brown v. Board of Education, 348 U.S. 886 (1954); Bureau of Labor Statistics, Unpublished Data, *supra* note 1.

If the courts chose to look at the statistics and the operation of the market today, they would see that the law needs significant changes.

A larger question is whether society as a whole, through the vehicle of law, should be concerned with this paradox between work and home. To acknowledge that society should respond to this concern challenges capitalistic notions of private ordering and implicates expending public funds for ostensibly private problems. Especially in light of the present inadequate number of child-care options available to working families, courts must take these policy considerations seriously in the search for solutions to the problems associated with our current unemployment compensation law.

Other unemployment compensation systems throughout the world provide possible legislative models. Canada funds its system of unemployment compensation from three sources: the employee contributes 2.2% of her earnings, the employer contributes 3.15% of its payroll, and the government covers the extra cost of benefits when the regional rate of unemployment is above 4%.[325] This tripartite approach feeds great amounts of money into the system, thereby providing more benefits to a greater number of claimants. This is in contrast to the United States system, in which the only source of funding is an employer tax.[326] If legislatures allocated more money to the United States system, courts might be more willing to interpret eligibility requirements more liberally and the statutes themselves might be changed to encompass a wider base of applicants.

The unemployment system in Japan, like the Canadian system, is tripartite, with an employee, employer, and government contribution, but the Japanese government absorbs 25% of the normal cost of the system and 33.33% in times of deficit.[327] This large government contribution stabilizes the system by injecting money to provide a large benefit base. Another interesting characteristic of the Japanese system is that their extended benefit plan includes maternity leave.[328]

The Swedish system is intriguing in that it is a voluntarily subsidized system.[329] It is operated by unemployment compensation funds collected by trade unions, which receive substantial subsidies from the government. The system operates with a union-related program to which employees contribute, employers contribute 2.16% of the payroll, and the government contributes 46% of the cost of the program.

325. U.S. DEP'T OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, SOCIAL SECURITY PROGRAMS THROUGHOUT THE WORLD 55 (1989).

326. *Id.* at 272.

327. *Id.* at 136.

328. *Id.*

329. *Id.* at 246.

The Swedish system also includes a labor market support program with no employee contribution, a 2.16% employer contribution and a 33.33% government contribution. Claimants receive benefits from both programs according to their fund and wage class.[330]

Finally, the German unemployment system is unique in its administration. It is a compulsory insurance system funded by both employee and employer contributions and a government financed, need-based supplement. The government funds this supplement entirely from general revenues. The United States unemployment system has no equivalent need-based program.[331] The German system, like the others mentioned above, allows for two sources of funding, which in turn increases the financial base of the system and offers benefits to a potentially larger applicant pool than is offered in the United States.

Achieving greater funding for the unemployment compensation system may prompt judicial awareness or legislative action on individual eligibility requirements. Of course, none of these foreign programs solve our system's problems completely because the economies of the countries mentioned are different from our own. Such programs may work in those economies, but not in the United States free market economy. However, the more we know of alternate systems, the greater the possibility of combining some of their features to arrive at a more comprehensive system of our own. Also, although these systems have more funding sources, including employee contribution, the tax rate is higher in those countries than in the United States. Generally, the consensus in the United States is against programs that encourage a higher tax rate. Yet, competing policies suggest a need to consider not only the financial variables to the equation but also the human variables. It is time to recognize that this conflict deserves not only a private solution, but a public one as well.[332]

Child-care alternatives may also help resolve the problems with the unemployment compensation system. According to Dr. Betty Caldwell at the University of Arkansas,

> [Y]ou can't just add the idea that the world is round to the idea that it is flat. You have to go back and rethink the whole enterprise. This is what society has to do with child care—rethink the

330. *Id.*

331. *Id.* at 94.

332. It is important to differentiate between a full coverage unemployment compensation system and a less intrusive coverage system, only providing coverage for working parents. With the public generally skeptical of welfare programs, perhaps limiting coverage, and working within the existing coverage structures is more practical, so long as, at a minimum, child care is included as good cause under the statutes.

whole enterprise and come up with a new understanding of it.[333]

One approach to helping society rethink this issue is for the courts to be aware of the problems that exist and for them to reflect an understanding of those problems in their doctrine. The market, with an impetus from employers, can offer help to working parents. Some of the options open to employers include: promoting employer-assisted child-care programs on- or off-site, supporting resource and referral agencies for parents with children, providing flex-time options to workers, instituting broad maternity leave and parental policies, or even implementing six-hour work days in certain industries.[334] Proponents of the law and economics theory might argue that such measures will cut production, slow the flow of capital, and compromise employer prerogatives.[335] In a capitalist society such criticism may impede efforts to implement changes.[336] Once again, however, the damage done by employers ignoring these issues is substantial in terms of its effect on working women and their children. Although the effects of this damage may not become apparent to employers in the short term, if the present system continues without reform, the long-term damage to employers will become apparent as employees will repeatedly interrupt their jobs or leave them permanently for family responsibilities and consequently, productivity will decrease.

Economic solutions and creative child-care programs are of course necessary, but, perhaps first, we must change our legal doctrine by interpreting unemployment compensation eligibility requirements liberally. Eligibility requirements which in application discriminate against working women pose questions about the gendered nature of our law. The failure of the majority of jurisdictions to make any headway into the "feminization" of our laws compounds the problem.

What is the best solution? Perhaps a determination of good

333. NATIONAL GOVERNORS' ASS'N, *supra* note 39.

334. *Id.* at 20; Williams, *supra* note 47, at 835. If employers do not implement changes to accommodate working parents, employees may continue to attempt private solutions to allow them to work and support their families. Two considerations urge employer involvement despite the cost. First, the number of women in the workforce is increasing, and the problem of child care will not go away. Employers, to remain productive, can no longer afford to ignore these issues. Second, normative values must guide employers to the recognition that parents, especially mothers, should not have to carry the burden of this uneasy juxtaposition of work and home privately. With the high incidence of familial breakdown and the adverse effect on children, employers should consider more than a short-term cost analysis in their choices to fund employee child-care programs.

335. Simons, *Some Reflections on Syndicalism*, *in* BERNARD D. MELTZER & STANLY D. HENDERSON: LABOR LAW CASES MATERIALS AND PROBLEMS, 39-48 (3d. ed. 1985).

336. *See generally*, ATLESON, *supra* note 172 (discussing labor law's resistance to change due to assumptions about managerial authority which should no longer be paramount).

cause should depend on the ages of the children at home—parents of young children receiving more benefits than parents of teenagers. However, there may be moral problems associated with courts deciding who needs more care and attention. Perhaps it should depend on the working hours required. But if so, we must be careful not to fall back into relegating women to only daytime jobs and thus denying them equal status with their male counterparts. None of these suggestions points to an adequate solution to the problem. Perhaps a combination of alternatives motivated by an awareness of the problem will lend itself to the creation of a more fair and efficient system.

Ignoring these unemployment and child-care issues will not take the problem away. Women are not going to be forced back to the home.[337] Misplaced assumptions about gender and choice created images about women and labor many years ago that persist today in spite of statistical realities.[338] We must recognize the roots of those assumptions in order to rid our courts of them so that a genuinely new doctrine can emerge with completely new and different foundations. The system must be reformed through a new body of law more like that of California and Alaska. We must, as a society, explicitly recognize the importance of protecting family and take steps to do so by initiating new eligibility requirements granting benefits to women who leave work or refuse work for reasons associated with child care.

VI. CONCLUSION

Child care and family responsibilities should be paramount concerns in our complex society which virtually requires both parents to work. Until limitations are removed from the eligibility requirement provisions of unemployment compensation statutes, we truly cannot make inroads into bridging the gap, both legally and socially, between family and work. Thus, a crucial starting point for our courts and legislators should be a focus on child-care responsibilities being recog-

337. *See* BUREAU OF THE CENSUS, *supra* note 36.

338. We must change the assumptions as we must change the law. The market will not change on its own, it has not up to this point. In order to change, we must exit ourselves, look from outside and recreate. In his book, Atleson expresses his disappointment with the fact that much of labor law in this country today is still founded upon antiquated common law notions which thus nullifies much of the revolutionary advances made in the law by the NLRA. *See generally* ATLESON, *supra* note 172. In much the same way, false assumptions prefigure our unemployment compensation law today. One wonders what Atleson expected, given the deep rooting of the common law tradition in this country.

Presumably, the same could be said of the disappointment expressed in this Comment about courts' narrow interpretation of unemployment compensation statutes. The difference here, however, is the recognition that old common law assumptions influence current doctrine.

nized as good cause, irrespective of whether such child care requires leaving a job or refusing to accept one.

The two good-cause provisions statutes should be linked so that neither provision requires good cause to be attributable to the employer. There is no logic in saying that certain reasons that qualify as good cause to leave a job are not also acceptable reasons for refusing suitable employment. Good cause to refuse suitable work should be open ended enough to include domestic responsibilities.[339] Awareness is critical because it makes us rethink and reconstruct our conceptions of the current nature of our laws and our social institutions.[340] Awareness that women are in fact boxed into discrimination with respect to child care. This is because the market discriminates against working mothers from one side and the law discriminates against them on the other. The only difference between the two kinds of discrimination is when they occur. The market discriminates by pressuring the working mother at the first stage of the process to "choose" either work or family. The law discriminates against these women in the second stage of the process, when they become unemployed by leaving work to care for their children.

Far too often women have to choose between jobs or career goals and family responsibility. Our present legal and societal structures do not accommodate simultaneous career advancement and motherhood. Similarly, the law ignores the difficult issues associated with working women and child care, including the gender bias inherent in the unemployment compensation system and the financial consequences of denying benefits to women when they "choose" to leave their jobs or refuse "suitable" work to care for their children. An awareness of this connection between the market and the law is essential for change. Recognizing the link between the two goes a long way to understanding that law can change the market. As the trends in the law change, so too do those in the market. Unemployment compensation is a good starting point from which to create new models. We need a new legal model with fresh perspectives not encrusted by years

339. The court in *In re* Watson, 161 S.E.2d 1 (N.C. 1968), ruled the opposite of the Vermont court, refusing to impute the limitation "attributable to the employer" onto the good cause provision for refusing suitable work simply because such a limitation existed in the previous paragraph of the statute having to do with voluntary quits. The court reasoned that it was not legislative oversight to include such a limitation in one section of statute and yet leave it out of another. Rather, it stated that "good cause for rejecting a proposed new employment need not be connected with the work itself. . . . The wisdom of such a distinction is for the legislature, our authority being merely to determine the meaning of the words." *Id.* at 10.

340. Finley, *supra* note 193, at 909.

of male jurisprudence, and a new model of the market which adequately accommodates the female who is both worker and mother.

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