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BACK TO BASICS: A CALL TO RE-EVALUATE THE UNEMPLOYMENT INSURANCE DISQUALIFICATION FOR MISCONDUCT

BY LISA LAWLER GRADITOR*

Over the past five years, the unemployment insurance (hereinafter “UI”) system has attracted increasing attention among American policy makers and worker advocates—and for good reason. In 1999, the national unemployment recipiency rate (the number of insured unemployed workers, or those claiming unemployment benefits, compared to the total population of unemployed workers seeking employment) slumped to 37%.¹ Recipiency rates for low-wage workers were even lower, standing at only 18% during the mid-1990’s.² Such low rates of recipiency trigger alarm because the UI system is supposed to function as an insurance policy for both the nation and individual workers, insuring workers against the loss of employment and protecting

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¹. See U.S. GEN’L ACCT. OFF., GAO-01-181, UNEMPLOYMENT INSURANCE: ROLE AS SAFETY NET FOR LOW-WAGE WORKERS IS LIMITED 10 (2000) [hereinafter SAFETY NET] (noting that in the last fifty years the overall percentage of unemployed people who apply for benefits under the UI program has declined due to reduction in manufacturing, union membership and tighter state eligibility criteria). For discussion of recipiency trends from 1980 to 1990, see generally U.S. GEN’L ACCT. OFF., GAO/HRD-93-107, UNEMPLOYMENT INSURANCE, PROGRAM’S ABILITY TO MEET OBJECTIVES JEOPARDIZED (1993) [hereinafter OBJECTIVES JEOPARDIZED] (finding a 20% decline in the UI recipiency rates since the late 1970’s); See also Stephen A. Wandner & Thomas Stengle, Unemployment Insurance: Measuring Who Receives It, 120 MONTHLY LAB. REV. 15 (1997) (describing several competing methods to measure UI recipiency).

². See SAFETY NET, supra note 1, at 5 (noting that in March 1995, only 18% of unemployed low-wage workers collected unemployment benefits, compared to 40% of higher wage workers).
the nation during economic recessions by boosting consumer spending. Although the factors contributing to falling recipiency rates are myriad, worker advocates point out that a primary failing of the UI system is that UI "policy" carries too many antiquated exclusions.

The American UI system was created in 1935, in large part to aid workers laid off as a result of the Great Depression. Despite large-scale changes in the American economy and historic demographic shifts in the composition of the labor force, the legal framework of the UI system has not undergone substantial revision since its inception. Therefore, it is hardly surprising that UI rules, designed to reflect the experience of the average worker in 1935, are no longer meeting the needs of the twenty-first century labor force. Recent programmatic reviews of the UI system have allowed worker advocates and policy makers to gather support for a reform agenda to modernize the system. The first item on this agenda is to reform eligibility guidelines, or the rules that govern what kind of work is covered under the UI program.

State eligibility rules often exclude large numbers of women

3. See generally DAVID C. WITTENBURG ET AL., LITERATURE REVIEW AND EMPIRICAL ANALYSIS OF UNEMPLOYMENT INSURANCE RECIPIENCY RATIOS (The Lewin Group, U.S. Dept. of Labor, Final Report, 1999) (examining the effects of several factors on the UI system: decline in unionization, federal taxing of UI benefits and cost-shifting from state UI programs to other federally funded programs) available at http://wdr.doleta.gov/owsdr99/99-7/99-7.pdf. For the influence of race on recipiency, see JEFFREY B. WENGER, DIVIDED WE FALL (Economic Policy Institute Briefing Papers, 2001), available at http://www/epinet.org/briefingpapers/divided.html (finding that a 1% decline in white labor participants and a 1% increase in the share of women workers resulted in a 1% decline in overall UI recipiency).

4. See WITTENBURG, supra note 3.

5. Id. at 3-4. See Edwin E. Witte, Development of Unemployment Compensation, 55 YALE L.J. 21, 29-34 (1945).

6. See generally OBJECTIVES JEOPARDIZED, supra note 1; SAFETY NET, supra note 1; See MARC BALDWIN & RICHARD MCHUGH, UNPREPARED FOR RECESSION: THE EROSION OF STATE UNEMPLOYMENT INSURANCE COVERAGE FOSTERED BY PUBLIC POLICY IN THE 1980S (Economic Policy Institute, Briefing Paper No. 29, 1993) (finding that restoring the power of UI to pre-1980 levels will require increasing workers' access to benefits and increasing the level of these benefits) at http://www.lights.com/epi/virlib/BriefingPapers/1992/unpreparedf.PDF (last visited Oct. 9, 2003).


and low-wage workers because they require a person to work full-time hours in order to be covered. Even where part-time workers are not excluded from coverage, they commonly run afoul of state rules requiring a UI claimant to be available and searching for full-time work. Since two-thirds of working mothers are employed part-time, women are disproportionately harmed by these eligibility rules. Additionally, the earnings thresholds that a worker must meet to qualify for unemployment benefits also disadvantage part-time workers because states base these amounts on the reasonable expected earnings of a full-time worker. High-wage earners, who work less than full-time, may nonetheless qualify for benefits because their above-average compensation will make up for fewer working hours. However, low-wage workers have to work more hours to qualify when these earning thresholds are stated in dollar amounts; part-time low-wage workers often fail to qualify. To the further disadvantage of low-wage workers, the relevant time period for calculating qualifying wages—the base period—typically disregards workers’ most recent three to six months of earnings; many low-wage workers, who have unstable job histories, need their most recent


10. See generally id. (noting that twenty-nine states require a claimant to search for full-time work in order to collect unemployment benefits). For the relevant Illinois provisions, see 820 ILL. COMP. STAT. 405/500 (2000) (setting forth eligibility requirements for UI benefits); Ill. Reg. 2865.115 (defining the phrase “actively seeking work”). See also Ill. Reg. 2865.125 (stating that the UI full-time work requirement is not applicable to claimants who can prove that only part-time work is available to them).

11. See generally NATIONAL EMPLOYMENT LAW PROJECT, WOMEN, LOW WAGE WORKERS AND THE UNEMPLOYMENT COMPENSATION SYSTEM: STATE LEGISLATIVE MODELS FOR CHANGE (1997) [hereinafter WOMEN, LOW WAGE WORKERS & UNEMPLOYMENT COMPENSATION] (providing a “comprehensive checklist of state unemployment compensation laws benefiting women and low-wage workers” to show that “increased state efforts to expand access to unemployment compensation” is “consistent with the fundamental changes in the labor market”) Id. at 2-3, available at http://www.nelp.org/docUploads/pub19%2Epdf (last visited Oct. 9, 2003).

12. Illinois has a low earning threshold that is not difficult even for low-wage part-timers to meet. See 820 ILL. COMP. STAT. 405/437 (2000).

earnings to qualify.\textsuperscript{14}

Advocates point out that these eligibility exclusions rely on antiquated notions of which workers "deserve" benefits. In the 1930's, the UI system favored full-time work because the average worker was a male head of household with a non-working spouse who assumed primary responsibility for household necessities. Policy makers felt that workers who worked only part-time did not demonstrate a genuine attachment to the workforce and should not be eligible for UI. For this same reason, states calculated earnings levels so that only full-time workers would qualify.\textsuperscript{15}

These rules are becoming increasingly unworkable in the modern workforce that now includes a growing number of women, part-time workers, and low-wage service workers in high turnover positions. In response, worker advocates have designed model legislation to address these problems. Twenty states have reformed their UI codes to accommodate the part-time workforce.\textsuperscript{16} With the wide-spread use of computers and internet technology, twelve states have adopted an alternate base period that computes qualifying wages using the last completed calendar quarter.\textsuperscript{17}

Even as states address outmoded eligibility requirements, however, another equally important feature of UI law is receiving far less attention than it deserves. Commentators are neglecting the whole array of disqualifications based upon the circumstances of separation from work. Every state's UI system utilizes standard disqualifications to ensure that only those who become unemployed "through no fault of their own" receive benefits.\textsuperscript{18} The two predominant disqualifications are for workers who commit "misconduct" at work and workers who "voluntarily terminate" or


\textsuperscript{15} The rules defining the base period for wages grew from administrative necessity, when in the days preceding computers, administrators of the UI system needed at least three months to process employer wage reports submitted in paper form on a quarterly basis in order to determine the claimant's wages.

\textsuperscript{16} See generally BALDWIN & MCHUGH, supra note 6 (noting that eight states offer benefits to part-time workers in most circumstances. Twelve additional states may allow workers receiving UI benefits to maintain eligibility by looking for part-time work, depending on the worker's prior work history and reason for wanting only part-time work).

\textsuperscript{17} See MAURICE ESMELLEM, ET AL., FAILING THE UNEMPLOYED: A STATE BY STATE EXAMINATION OF UNEMPLOYMENT INSURANCE SYSTEMS 5-7 (Econ. Policy Inst., Nat'l Employment Law Project, 2002) (noting that shortcomings in the UI system prevent many workers from ever qualifying for benefits).

\textsuperscript{18} For the historical origin of this requirement, see Gladys Harrison, Eligibility and Disqualification For Benefits—Statutory Purpose and "Involuntary Unemployment," 55 YALE L.J. 117, 118 (1945).
quit their employment. These disqualifications potentially affect all unemployment claimants except workers separated due to a traditional pink-slip layoff. For this reason, advocates have not ignored the issue of disqualifications altogether. They have included liberalization of voluntary leave laws in campaigns to modernize state UI systems, noting that the disqualification for voluntarily terminating a position disproportionately affects women. Approximately thirty states now permit victims of domestic violence to voluntarily terminate their employment because of the abuse they have suffered and still collect UI benefits. Fifteen other states will not disqualify a person who quits work due to “compelling and necessitous [personal or family] circumstances.” Few advocates have undertaken a comparable public re-evaluation of the second major disqualification, affecting workers who have been fired for “misconduct.”

The word “misconduct” carries a stigma that connotes fault. Often misconduct involves affirmative acts such as chronic absenteeism, insubordination, or rule violations that do not compel sympathy. However, like the initial eligibility rules, the “misconduct” disqualification is a product of the economy, workplace, and culture of the 1930’s. Thus, many states have interpreted their misconduct disqualification provisions to require total obedience to workplace rules and near perfect attendance,

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21. Many state UI statutes require that an employee’s reason for quitting be “attributable to the employer” in order to collect benefits. WOMEN, LOW WAGE WORKERS & UNEMPLOYMENT COMPENSATION, supra note 11, at 13. This rule disadvantages women because they are over five times more likely than men to leave a job because of family conflicts. Id. Illinois retains the “attributable to the employer” language with only limited exceptions, not including domestic violence. See 820 ILL. COMP. STAT. 405/601 (2000).


23. Id. at 4.
and have assumed that employers have no duty to accommodate workers who face compelling problems. Like eligibility restrictions, these biases disproportionately affect women, low-wage workers, and individuals trying to transition from welfare to work.

This article explores the disjunctions between the expectations built into the disqualification for misconduct and the experience of the modern workforce. To illustrate these disjunctions, the article adopts a case-study approach, using Illinois "misconduct" cases. The paper then makes the case for including a fundamental reexamination of disqualifications for misconduct as part of the national debate over ways to improve the UI system.

Part I describes the various rules and procedures that make up the UI system, and explains the history and role of disqualifications as a component of that system. Part II focuses on disqualification for misconduct, first by tracing the development of that term within the common law, and then by examining Illinois misconduct jurisprudence from the period 1935-1988, a time when Illinois utilized a common law definition of misconduct. This section of the article chronicles the types of employee behavior that typically resulted in disqualification and evaluates the fairness of the common-law standard as applied to prevailing labor market conditions.

Part III examines the standard of "statutory misconduct," which was adopted in Illinois in 1988 as a result of efforts by unions and advocates for low-wage workers. Subsections within part III use examples drawn from case law to show how, for each of the elements of the statutory definition, the Illinois Department of Employment Security (IDES) and Illinois courts have failed to interpret the statute as written; how they have imbued statutory misconduct with outdated cultural assumptions, and thereby have transformed the disqualification into a standard that does not make sense for today's labor force.

Part IV addresses the policy implications that result from IDES' and the courts' refusal to read the language of statutory misconduct in light of modern workplace realities. This section also demonstrates that current jurisprudence is both economically and socially unsound, and that it is unduly prejudicial to low-wage workers. Part V concludes with policy recommendations drawn from the experiences of several states that use a more nuanced approach to worker "misconduct."

I. FOUNDATIONS OF THE AMERICAN UNEMPLOYMENT INSURANCE SYSTEM

Before 1935, the federal government did not recognize unemployed workers as a special class of citizens in need of federal
financial assistance. Unemployed workers, like all other impoverished citizens, depended on state welfare programs for aid. In operating these social welfare programs, many states assumed that able-bodied unemployed persons were especially undeserving of public support. These states viewed their joblessness as a direct result of personal failings—inferior moral character and poor work ethic. Such attitudes can be traced back to fourteenth-century England, where authorities scrutinized able-bodied men who could not secure work, withholding economic aid, and even doling out physical punishment for their apparent “refusal” to work.

In the early twentieth century, American attitudes regarding unemployment still reflected the English legacy. Legal historian Philip Harvey explains that, except during brief periods of economic recession, Americans viewed joblessness as a “voluntary phenomenon.”

Society considered unemployed people to be of “suspect moral character who chose to live lives of idleness rather than accept presumptively available employment.” For this reason, the public’s attitude toward joblessness “emphasized the denial of assistance to able-bodied persons except in conjunction with disciplinary work requirements designed to weed out the work-shy, punish the lazy, and mold character.”

Even after England created a national UI system in 1911, Americans openly criticized the English for fostering “doles from the public treasury.” No American state was able to garner enough legislative support for UI legislation.

24. See Philip Harvey, Joblessness and the Law Before the New Deal, 6 GEO. J. ON POVERTY L. & POLY 1, 3-8 (1999) (tracing the development of aid to the able-bodied unemployed in England and the United States prior to the New Deal). See also Witte, supra note 5, at 21-25 (discussing the historical aspects of unemployment insurance).

25. See Harvey, supra note 24, at 4-11 (providing an overview of the development of legal and social treatment of the unemployed through the sixteenth century). As Harvey explains, this “refusal” to work was frequently due to the unavailability of jobs. Id. at 13-15. See also Philip Harvey, An Analysis of the Principal Strategies that Have Influenced the Development of American Employment and Social Welfare Law During the 20th Century, 21 BERKELEY J. EMP. & LAB. L., 677, 681 (2000) [hereinafter Principal Strategies] (arguing that the “key to understanding the strengths and limitations of competing strategies for combating joblessness lies in a careful assessment of differing explanations of what causes joblessness”).

26. Harvey, supra note 24, at 41.

27. Id.

28. Id.

29. Witte, supra note 5, at 22.

30. See id. at 22-24 (citing REPORT OF THE PRESIDENT’S CONFERENCE ON UNEMPLOYMENT 25, 28 (1921)).

31. One major obstacle that prevented states from enacting UI legislation before 1935 was the fear that adding to an employer’s costs of doing business
The Wisconsin legislature rejected unemployment legislation in ten consecutive legislative sessions before becoming the first state to enact such legislation in 1932. This victory was hollow, however, because of the compromises the legislative sponsors accepted to secure passage of the bill. Under the statute employers who created independent UI reserves could opt out of the state system, and the legislation would not take effect unless an insufficient number of employers created independent programs. Thus, the enactment of the federal legislation was preceded by fervent debate at the state level over the prudence of government-sponsored aid to the unemployed.

This hostile American political climate did not improve until President Franklin Delano Roosevelt garnered broad public support, and people came to recognize, based on their shared experience of the Great Depression, that market fluctuations contribute to unemployment. During the depression of the 1930's, the growing population of able-bodied unemployed consisted not of malingering social outcasts, but rather of working men laid off from factory jobs. As these men and their families suffered the devastating emotional and financial effects of unemployment, their plight proved to the collective American consciousness that not all unemployment results from inferior temperament or insincere desire to work. Thus, the United States would place the enacting state at a comparative disadvantage in interstate commerce. See Witte, supra note 5, at 28.

32. Id. at 23-26.
33. Id.
34. Id. at 21-25.
35. Id. at 25-29.
36. Harvey attributes this shift in support for the unemployed to a larger shift in views on the cause of joblessness, from a "behaviorist approach" that viewed unemployment as being attributable to and remediable by the worker's own conduct, to a "job shortage approach" that attributed unemployment to the market's failure to provide jobs for all job seekers. Principal Strategies, supra note 25, at 686-94. Harvey asserts that current social welfare policy marks a return to behaviorist perspectives. Id. For an explanation of the role President Roosevelt played in the passage of the Act see Witte, supra note 5, at 29-34.
37. The physical and emotional ramifications of unemployment include: "severe mental and physical health problems, increased rates of suicide and attempted suicide, serious family and relationship problems and increased criminal activity." Principal Strategies, supra note 25, at 679-80 (internal footnotes omitted).
38. Economics, and more particularly the theories of John Maynard Keynes, added legitimacy to the UI system by positing that providing financial assistance to America's large population of unemployed people would increase consumer spending, thereby counteracting depressive market forces. See Thomas Earl Geu & Martha S. Davis, Work: A Legal Analysis In the Context of the Changing Transnational Political Economy, 63 U. CIN. L. REV. 1679, 1692 (1995) (citing JOHN M. KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY (1936)).
States created a national program to aid unemployed workers as part of the Social Security Act of 1935. The Act created a federal-state partnership in which the federal government pays for the administration of state UI trust funds that accumulate during periods of economic prosperity and are expended in economic downturns to stabilize the economy and aid the unemployed.

To build these UI reserves, states levy a UI tax on employers based on a portion of each employee's salary; workers do not contribute directly to the UI system. Employer UI taxes are experience-rated and increase to reflect the number of employees who collect unemployment benefits. Thus, by charging employers with a history of layoffs a higher tax, state UI systems operate as a financial disincentive for employers considering reductions in force.

The federal Act contains few programmatic provisions and reflects a national policy decision to delegate to the states almost exclusive control over design of UI programs. Following the passage of the Act, states created nearly identical legal

40. Id. § 502.
41. Sachin S. Pandya, Retrofitting Unemployment Insurance to Cover Temporary Workers, 17 YALE L. & POL’Y REV. 907, 924-29 (1999). Although workers do not contribute directly, the cost to employers resulting from the experience-rated funding mechanism is often passed on to the workers through lower wages and decreased employment benefits. Id. at 926.
42. Id. at 924-29. As a result of this funding system, employers often feel as if they pay for an unemployment claimant's benefits dollar for dollar. In fact, employers pay unemployment taxes regardless of whether the claimant later collects UI benefits. Id. See Earle V. Simrell, Employer Fault vs. General Welfare as the Basis of Unemployment Compensation, 55 YALE L.J. 181, 185-96 (1945) (noting that when experience rating was first introduced, employers and some courts sought to limit it to instances where the employer was at fault for the separation). Mr. Simrell provides an interesting discussion of the historical effect of experience rating on disqualifications. Id. See OBJECTIVES JEOPARDIZED, supra note 1, at 50 (describing state methods for taxing employers). See also CHIRAG MEHTA & NIK THEODORE, THE TEMPORARY STAFFING INDUSTRY AND U.S. LABOR MARKETS: IMPLICATIONS FOR THE UNEMPLOYMENT INSURANCE SYSTEM 1, 4 (America's Workforce Network Research Conference, Research Paper, 2001) at http://wdr.doleta.gov/conference/pdf/mehta.pdf (last visited Oct. 9, 2003).
43. One of the stated purposes behind the Illinois UI statute is to "encourage stabilization of employment." 820 ILL. COMP. STAT. 405/100 (2000). For a discussion of how experience-rating stabilizes employment see Pandya, supra note 41, at 925 (noting that "without experience-rating, employers could shift those costs onto UI by temporarily laying off workers during slumps in consumer demand rather than keep those workers on the payroll").
44. Witte, supra note 5, at 21-25. See also OBJECTIVES JEOPARDIZED, supra note 1, at 14 (stating that "[w]ithin certain limits, states have full autonomy in carrying out their basic program operations. They decide the requirements that unemployed workers must meet for eligibility, the amount of benefits, and the length of time they will pay benefits").
frameworks, consisting of complex eligibility and disqualification provisions, to determine which unemployed workers would receive benefits. In contrast to social welfare programs based on entitlement, the unemployment compensation system is rooted in insurance principles, distinguishing between those who deserve benefits and those who do not. An individual establishes initial eligibility, or a compensable loss, by proving that she or he has a significant attachment to the workforce, is actively seeking full-time work, and is able and available to return to the labor force.

Claimants who satisfy these eligibility requirements then face disqualification if they are deemed to be at fault for being unemployed. Although the economic and social phenomena of the Great Depression tipped the scale in favor of government support for the unemployed, states did not abandon their historic

45. For a discussion of the interaction between UI and other federal welfare programs, see SAFETY NET supra note 1, at 7-9.


47. The whole notion that certain separated employees are undeserving is one that should be considered critically. Many of the individuals labeled as work-shy suffer other maladies such as mental illness, inadequate housing, or domestic violence—social ills not discussed publicly in the early decades of the 20th century. A recent study of barriers that welfare recipients encounter when looking for regular employment found that 25.4% reported a major depressive disorder, 14.6% had post traumatic stress disorder, 7.3% had generalized anxiety disorder, and another 14.9% identified themselves as victims of domestic violence. SANDRA DANZIGER ET AL., BARRIERS TO THE EMPLOYMENT OF WELFARE RECIPIENTS 32 (Poverty Research & Training Ctr., Univ. of Mich., Research Paper, 2000) at http://www.jcpr.org/wpfiles/Danziger.barriers.update2-21-2000.PDF (last visited Oct. 9, 2003).

48. To prove work force attachment, states require that a claimant earn a specified amount in his/her base period. Illinois requires earnings of $1600 within the first four of the last five completed calendar quarters. In addition, a claimant must earn $440 in the quarter other than the quarter in which her earnings are highest. 820 ILL. COMP. STAT. 405/237 (2000). Illinois does not have an alternate base period for individuals who fail to qualify under this provision.

49. The Illinois UI statute does not require a claimant to search for full-time work. However, IDES added this requirement by regulation. 820 ILL. COMP. STAT. 405/407 (2000); 56 ILL. ADM. CODE 2865.125 (2003).

50. The unemployment insurance system was not designed to aid those unable to work due to physical infirmity, conflicting family responsibilities or other extenuating circumstances. 820 ILL. COMP. STAT. 405/500 (2000); Ill. Reg. 2720.115, 2720.120. At the inception of the UI system, the founders envisioned that such individuals would be aided by the traditional social welfare programs. SAFETY NET, supra note 1, at 7-9.

51. Harrison, supra note 18, at 118.
reservations about providing aid to the able-bodied unemployed. Every state UI statute enacted following the creation of the federal program included disqualifications aimed at restricting benefits to those unemployed “through no fault of their own.”

Disqualifications strike an uneasy compromise between 1930’s notions of wanting to support honest working men during layoffs and earlier convictions that public funds should not be squandered on workers prepared to connive to avoid working. Disqualifications also perform a function in keeping with the insurance model of benefit distribution—like suicide exclusions in life insurance policies and in home insurance policies for arson by the owner, disqualifications act like gate-keepers against persons who lack a sincere desire to work and who seek to create situations where they can rely on government financial support.

By using disqualifications to limit benefits to workers involuntarily unemployed through no fault of their own, states can scrutinize workers applying for benefits and ensure that they “deserve” government financial assistance. Nearly all states thus closely examine the reason for claimants’ separation from employment. Straight layoffs arouse almost no suspicion, whereas employees who quit a job or who are fired trigger close scrutiny. If an investigation by state administrators reveals that a person claiming unemployment benefits was terminated for “misconduct,” voluntarily quit a job without good cause, or refused a suitable job offer, then she or he is disqualified from receiving unemployment compensation benefits. With these limitations,

52. Katherine Kempfer, Disqualifications for Voluntary Leaving and Misconduct, 55 Yale L.J. 147, 149 (1945).
53. See id. (providing a discussion of the several theories behind disqualifications).
54. See id. at 150-51 (noting that “unemployment compensation is limited to ‘involuntary’ unemployment because public opinion would not support the payment of benefits as a matter of right to persons ‘voluntarily’ unemployed.... One of the factors which influences, consciously or unconsciously, the popular judgment as to whether a claimant should be entitled to unemployment benefits is whether his conduct is consistent with a genuine desire to work and to be self-supporting or whether it indicates that the claimant is seeking to take advantage of his benefit rights in order to have a ‘vacation’ from work”). Id.
55. See Expanding Unemployment Insurance, supra note 22 (noting significant variation among state disqualifications for quitting a job).
56. Determining whether a particular individual committed misconduct at work involves a detailed factual analysis of the circumstances leading up to the termination of employment. In Illinois, an UI claimant facing disqualification for misconduct has the right to participate in an administrative hearing where an administrative law judge, called a hearings referee, considers testimony by both the employer and the employee as to the circumstances surrounding the discharge. The hearings referee will then make a determination as to whether the employee’s conduct constitutes misconduct under the laws of Illinois. 820 Ill. Comp. Stat. 405/800 (2000);
unemployment compensation functions as both a social welfare program, providing a basic level of income support to unemployed workers, and a national insurance policy against economic downturns. UI is a ready resource for laid-off workers but disqualifications ensure that the benefits cannot be easily obtained through deceit.

II. THE DISQUALIFICATION FOR MISCONDUCT: LEGAL STANDARDS

Of the three basic disqualifications listed above, the disqualification for misconduct is the forfeit provision for workers who are terminated or discharged from their last place of employment. Determining whether a worker's act will be disqualifying has never been clear-cut, because the majority of state unemployment legislation left the term "misconduct" undefined. Courts relied on the common law to impart specific meaning to the disqualification. In 1941, Wisconsin issued the first published definition of the term misconduct in Boynton Cab v. Neubeck and Industrial Commission. In Boynton, a taxi driver was terminated after eight weeks of employment for overcharging a customer and pocketing the surcharge, for being partly responsible for three minor traffic accidents, and for allegedly failing to report the full extent of the damage incurred in two of these accidents. His employer terminated him following the third accident for "his entire bad record of violations of company rules, [after he] had been given many warnings for these violations ...." In considering whether the Wisconsin disqualification for misconduct precluded him from receiving benefits, the Court first had to address what scope the legislature intended for the term "misconduct." The Court consulted ordinary usage of the term "misconduct" as well as English common law. Based on these
sources and on the stated intent of the legislation to ameliorate the harsh effects of unemployment, the Court set forth the following definition:

[T]he intended meaning of the term "misconduct,"... is limited to conduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion are not to be deemed "misconduct."

Under this definition, the Court found the taxi driver eligible for unemployment benefits, despite his violation of several workplace rules and his failure to report two accidents, because his conduct did not manifest an unreasonable and improper course of conduct.

The analysis in Boynton provided a definition of misconduct that dominated case law in Illinois, and across the nation, for nearly fifty years. Because the majority of states still define misconduct according to the common law, Boynton continues to be cited with approval today. The earliest published misconduct
cases in Illinois delineate four potential grounds for misconduct: 1) a wilful disregard of the employer's interests; 2) a deliberate violation of the employer's rules; 3) a disregard of the standards of behavior rightfully expected by the employer; and 4) negligence to such a degree or with such recurrence that the employee's actions manifest an intent to disregard his/her responsibilities. In cases where the employee's actions endangered coworkers or public safety, Illinois courts disqualified claimants regardless of whether they had wrongful intentions, or scienter.

In 1985, the Illinois Supreme Court, considering the meaning of misconduct for the first time, further clarified the circumstances under which an employee's violation of a work rule would constitute misconduct. In *Jackson v. Board of Review*, the Court considered whether a claimant could be denied benefits for repeatedly violating an employer rule prohibiting workers from drinking alcohol on the job. The Court found the claimant ineligible using the *Boynton* definition of misconduct and made the following additional points: 1) if a disqualification rests on employee violation of an employer rule, the rule must be reasonable; 2) there must be some nexus between the rule and the employment; and 3) a claimant's actions need not harm or potentially harm the employer to be disqualifying. Because the claimant in *Jackson* deliberately violated a known rule, the Court did not consider the alternative ground for finding misconduct—that a claimant's act, though it violates no rule, disregards an employer's interests or expectations.

By the mid 1980's *Boynton*'s murky reference to employer expectations had produced a broad spectrum of disqualifying

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71. 475 N.E.2d 879 (Ill. 1985).
72. The claimant argued that despite violating a work rule, her conduct was not disqualifying unless the employer could show “substantial actual harm to its interests.” *Jackson*, 475 N.E.2d at 884. The *Jackson* court rejected this argument outright, finding that neither harm nor potential harm was necessary to prove misconduct. *Id.*
73. *Id.* at 886. The *Boynton* Court stated that there are “standards of behavior which the employer has a right to expect.” *Boynton*, 296 N.W. at 639. That statement proved challenging to apply to specific facts, leading the dissenting Justice in *Jackson* to describe the definition as “amorphous to the point of being meaningless.” *Jackson*, 475 N.E.2d at 886.
behavior. At one extreme, acts of open insubordination, deliberate falsification of job records, and drinking on the job almost ensured disqualification. In the middle, acts such as tardiness or being argumentative became disqualifying when they were excessive or were repeated after employer warnings. At the other extreme, negligence, inability to meet employer expectations, or poor judgment did not constitute disqualifying misconduct. Underlying common law misconduct jurisprudence is the implicit assumption that workers who deliberately violate a known employer rule or who commit acts in the moderate to extreme range of the spectrum do so knowing that unemployment will likely result.

Applying this premise to a wide range of discharge scenarios was workable in the early decades of the 20th century, when workplace norms, rules, and expectations were widely known and substantially uniform. During much of the twentieth century, the American economy was highly dependent on manufacturing, an industry in which the economic demand for labor was derived from


76. Jackson, 475 N.E.2d at 884.


81. SAFETY NET, supra note 1. See generally Wandner & Stengle, supra note 1.
a need for physical manpower to carry out the manufacturing process and employees are valued for strength, stamina, and sufficient mental capacity to perform manual tasks without a hitch. Even the workplace itself was relatively uniform, being largely comprised of male heads of household, working in full-time, long-term employment arrangements. Workplace mores in the early twentieth century reflected this need for efficient production and emotionless execution of tasks. In 1911, Frederick Winslow Taylor's popular management theory directed employers to: 1) reduce all knowledge to specific workplace rules; 2) remove all possible mental work from the place of employment; and 3) assign workers specific tasks to complete in a predetermined amount of time. Authoritarian managerial styles born out of this philosophy exacted hard, repetitive labor from employees. Throughout this period, strong union activity put limitations on at-will employment, which otherwise allowed employers broad latitude in exercising their prerogative to hire and fire. Union representation kept workers informed of workplace rules and policies and aware of established consequences for breach of these rules. In the event of termination, union grievance procedures

82. The industrial revolution and the introduction of machines operated by low-skilled workers impersonalized the workplace and made workers more fungible than they had been in earlier periods of American history, when local economies were based more on farming and apprenticeships were common. Geu & Davis, supra note 38, at 1686-87.

83. While several unemployment rules, like the rule requiring a claimant to be available for full-time work on any shift, assume that workers have an at-home counterpart responsible for household responsibilities, these norms reflect the experience of middle-class and upper-class white families during the 1950's. See Martin H. Malin, Unemployment Compensation and Eligibility: Unemployment Compensation in a Time of Increasing Work/Family Conflicts, 29 U. MICH. J.L. REF. 131, 158-59 (Fall 1995/Winter 1996) (noting also that these norms fail to reflect the experience of minority workers and low-income families).

84. See Geu & Davis, supra note 38, at 1690 (quoting FREDERICK W. TAYLOR, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT (1967)).

85. Many landmark legal protections of the union-represented workforce were also established during this time period. See Geu & Davis, supra note 38, at 1691 (citing the establishment of landmark legal protection for organized labor, such as the National Labor Relations Act, ch. 372, 49 Stat. 449, 449-57 (1935) and the Fair Labor Standards Act, ch. 676, 52 Stat. 1060, 1060-69 (1938)).

86. The results of union representation are summed up in the “traditional workplace contract” which consisted of: (1) annual real wage increases and cost-of-living adjustments, (2) extensive collectively bargained job-related benefits, (3) the seniority system for layoffs and promotions, (4) negotiated conditions of work and narrow job classifications, (5) grievance and arbitration provisions, (6) on-site union representation, and (7) retention of management prerogatives over many workplace issues and virtually all strategic enterprise decisions.
protected employees from arbitrary decisions.87

In this cultural environment, an intentional violation of an employment rule served as a predictable indicator of an insincere desire to work because following rules was part and parcel of the work, central to efficient business operation. Likewise, the "standards of behavior" expected by an employer were widely known and bargained for by unions that gained employment benefits by sacrificing worker autonomy. Thus, the assumption implicit in the common law disqualification spectrum is defensible, namely that employees who commit acts in the extreme to moderate range of the spectrum should know that unemployment may result and thus are at fault for being jobless. Given these norms, the common law could effectively root out "undeserving" workers without jeopardizing the remedial objectives of the program. However, by 1987 Illinois advocates for the unemployed began seriously questioning the common law’s continued ability to perform this function.

III. STATUTORY DEFINITION OF MISCONDUCT

In Jackson, attorneys for the unemployed worker argued that rule violations that cause no actual harm to the employer should not constitute misconduct.88 These advocates reasoned that such a limitation was necessary to ensure that disqualification did not arise out of minor rule violations that had no real impact on the employer.89 When the Illinois Supreme Court rejected this argument in Jackson, and held that an act that causes no harm to the employer can be disqualifying, advocates for the unemployed responded by mounting a legislative advocacy campaign to liberalize the misconduct definition altogether.90 Instead of settling for making harm a prerequisite for misconduct, advocates sought to limit the disqualification to acts of gross misconduct or

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87. See Baldwin & McHugh, supra note 6, at 13 (stating that unions provided information and representation to individuals claiming unemployment benefits, thereby increasing recipiency rates).
88. Jackson, 475 N.E.2d at 884.
89. The following description of the circumstances surrounding the enactment of the statutory definition of misconduct is based on interviews with attorneys who worked at the Legal Assistance Foundation of Metropolitan Chicago during 1986-1988 drafting the statute and working to secure its passage: telephone interview with Jeffrey Gilbert, Managing Partner of Johnson Jones Snelling Gilbert & Davis, in Chicago, Illinois (telephone interview held on June 13, 2002); Bill Martinez, Partner at McNamara & Martinez, LLP, in Denver, Colorado (telephone interview held on June 21, 2002).
90. Id.
at least to intentional acts of misconduct.\textsuperscript{91} After negotiations and compromises with representatives of labor, business, and IDES, advocates for the unemployed succeeded in getting the Illinois General Assembly to enact a statutory definition of misconduct in 1987.\textsuperscript{92}

Advocates did not succeed in obtaining the more liberal redefinition of the misconduct disqualification that they originally envisioned. However, advocates for the unemployed thought the definition of statutory misconduct enacted by the Illinois General Assembly was a marked improvement.\textsuperscript{93} New section 602A of the Illinois Unemployment Insurance Act (the IUIA), specifically defined misconduct as:

the deliberate and willful violation of a reasonable rule or policy of the employing unit, governing the individual's behavior in performance of his work, provided such a violation has harmed the employing unit or other employees or has been repeated by the individual despite a warning or other explicit instruction from the employing unit.\textsuperscript{94}

Section 602A is well-constructed, setting forth four discrete statutory elements: 1) deliberate and wilful violation; 2) of a reasonable employer rule that either 3) occurred despite the employer's warning or explicit instruction or 4) harmed the employer.\textsuperscript{95} Thus, Section 602A follows Jackson's paradigm of linking disqualification to violations of reasonable rules or policies. However, Section 602A explicitly overrules the Jackson Court's holding that the claimant's violation of a reasonable rule need not have harmed the employer to constitute misconduct.\textsuperscript{96} The statute allows benefits when an employee is terminated for a single deliberate violation of a reasonable rule unless the employer demonstrates that the violation has "harmed" the employer or another employee. The statutory definition also departs from the common law in several other important respects. First, it eliminates disqualifications for breaching "standards of behavior

\textsuperscript{91.} \textit{Id.}
\textsuperscript{92.} \textit{Id.}
\textsuperscript{93.} \textit{Id.}
\textsuperscript{94.} 820 ILL. COMP. STAT. 405/602A (2000).
\textsuperscript{96.} Courts have also held that in a misconduct case, it is the employer that bears the burden of proving each element of the misconduct statute. \textit{See} Adams v. Ward, 565 N.E.2d 53, 57 (Ill. App. Ct. 1990) (discussing how an employer has the burden to demonstrate the employee's violation).
which the employer has the right to expect,"97 since neither that language used in Boynton nor any similar language appears in the statute. Second, where Boynton clearly disqualified claimants for certain degrees of negligence, Section 602A requires an element of intent—a deliberate and wilful rule violation.98

The legislature amended Section 602A without generating any legislative history to clarify the policy reasons behind the legislature's word choices. However, in the absence of legislative history, well-established rules of statutory construction direct judges to refer to the plain language of the Act for indicia of legislative intent.99 Nonetheless, neither the verbal clarity of Section 602A nor well-established canons of statutory construction have protected the statutory definition of misconduct from being eroded by Illinois courts working under the guise of judicial construction.100

A. Element I: Deliberate & Wilful Violation

The terms "deliberate and wilful" refer to the worker's state of mind during the commission of the alleged act of misconduct, and both require some degree of intent to violate an employer rule. Since the legislature did not limit the disqualification to an "intentional violation of a reasonable rule," the requisite state of mind covers more than the specific intent to violate an employer policy. In other contexts, Illinois courts have interpreted wilfulness to mean "consciousness that an injury may probably result from an act done and a reckless disregard of the consequences."101 However, in the unemployment context, Illinois courts have taken an expansive view of wilfulness, disqualifying claimants who disregard rules that they were "aware of," without

97. Boynton, 296 N.W. at 640.
98. 820 ILL. COMP. STAT. 405/602A (2000).
99. Courts are only to consult other canons of statutory construction when the plain language of the statute is ambiguous or vague. See Paris v. Feder, 688 N.E.2d 137, 139 (Ill. 1997) (discussing the "cardinal" rule of statutory construction); Maloney v. Bower, 498 N.E.2d 1102, 1104 (Ill. 1986).
100. Courts reviewing an IDES determination of eligibility or disqualification will not disturb the agency's findings unless: 1) IDES' factual determination is "against the manifest weight of the evidence" or 2) IDES' legal determination is contrary to law. See Nichols v. Dep't of Employment Sec., 578 N.E.2d 1121, 1126 (Ill. App. Ct. 1st Dist. 1991); see also Collier v. Ill. Dep't of Employment Sec., 510 N.E.2d 623, 626 (Ill. App. Ct. 1st Dist. 1987). However, courts are also supposed to construe the Act liberally in favor of unemployed workers. Davis v. Bd. of Review, 465 N.E.2d 576, 580 (Ill. App. Ct. 1st Dist. 1984); Popoff v. Ill. Dep't of Labor, 494 N.E.2d 1266, 1267 (Ill. App. Ct. 2d Dist. 1986).
regard to whether the claimant acted wilfully. 102

In Harvey v. Illinois Department of Employment Security, 103 a security guard was aware of two conflicting rules: she had to perform a head count of ex-offenders in a rehabilitation program by 4:00 a.m., but she was also never supposed to leave her control room work station unattended. 104 Harvey’s co-worker, who should have covered the control room while Harvey performed the head count, had gone on break and not returned. 105 Harvey testified that, as the 4:00 a.m. deadline approached, she decided to lock the control room and perform the head count. 106 Despite Harvey’s attempts to comply with both employer rules and her careful consideration of the irreconcilable conflict in her duties, the Illinois Appellate Court disqualified her under Section 602A, reasoning that:

Plaintiff was aware of the company rule that the control room was not to be left unattended. At 3:20 a.m., plaintiff still had approximately 40 minutes to find her coworker, or contact Harris to find someone for assistance. These options, which plaintiff failed to take advantage of, clearly demonstrate that her conduct was not unavoidable. 107

The court does not even purport to analyze Harvey’s state of mind, but instead disqualifies her for misconduct after summarily disagreeing with her judgment call. Noting that the claimant was aware of a company rule does not substitute for an analysis of whether the claimant’s decision to reconcile her duties by locking the control room was reckless. Likewise, by focusing on the

102. Several Illinois cases have adopted the corollary of this rule, that if the claimant were unaware of the rule or policy then she did not act deliberately and wilfully. See Hoffman v. Lyon Metal Prods., 577 N.E.2d 514, 519 (Ill. App. Ct. 2d Dist. 1991) (stating that the claimant met eligibility requirements because he was not aware of a rule requiring him to obtain a pass before taking scrap metal); see also Farmers State Bank of McNabb v. IDES, 576 N.E.2d 532, 536 (Ill. App. Ct. 3d Dist.1991). While the corollary is right, the premise may not be. Thus, a claimant who is not aware of a rule cannot have acted deliberately in violating the rule. But a claimant who is aware of a rule has not necessarily acted deliberately. Additional analysis of the claimant’s state of mind is necessary to show that the conduct is deliberate.
104. Id. at 2.
105. Id. at 4.
106. Id. at 6-7.
107. Id. at 7. Harvey illustrates the Illinois Appellate Court’s treatment of the “deliberate and wilful” element of Section 602A. The facts summarized herein only relay Harvey’s testimony about her dilemma. IDES and the Circuit Court of Cook County held that the claimant resolved this dilemma by “penciling in” a head count without having actually performed one. The Illinois Appellate Court did not resolve this factual dispute, but rather rendered the quoted passage as an alternative holding. Id.
“avoidability” of Harvey's rule violation, the court sidesteps any serious consideration of Harvey's state of mind, instead asking itself whether the claimant committed a voluntary act, and whether this voluntary act violated a rule of which the claimant "was aware." This redefinition of the state of mind required for disqualification essentially eliminates any need to find either a deliberate or wilful violation. Finding wilful violation on a record where the claimant tried to comply with conflicting work demands but was unsuccessful, amounts to disqualification for a good-faith error in judgment.

In Scanlon v. Illinois Department of Employment Security, the Illinois Appellate Court extended this expansive interpretation of “deliberate and wilful” to include classic acts of negligence. John Scanlon was terminated after performing 26 years of manual labor for Ecolab, Inc. On the day of his termination, he loaded what he thought was 60,000 pounds of dense ash into a silo. Based on his calculation of the silo's holding capacity, Scanlon thought the silo could accommodate his load and the 210,000 pounds already inside. Two successive loading belts burned after he loaded the ash, so Scanlon alerted a supervisor and replaced the belts. At the end of his shift, Scanlon left without completing a log sheet. Ecolab discovered that Scanlon's load actually weighed 66,000 pounds, an amount too large for the silo. A built-in protective probe failed to shut down the system properly after Scanlon overfilled the silo, and thus the two belts burned. The employer stated that once before in his twenty-six years as an Ecolab employee, Scanlon had been warned about failing to complete a log sheet. Ecolab terminated Scanlon based on his overfilling the Silo, failing to troubleshoot successfully, and failing to complete a log sheet.

Despite the employer's consistent testimony that Scanlon was terminated for poor work performance, not for deliberately violating a rule or policy, the Court found Scanlon ineligible for benefits. The Court focused entirely on Scanlon's failure to complete a log sheet and offered virtually no analysis beyond the following:

the record includes Scanlon's admission that it was part of his job to log any problems he encountered and he did not log the problems. Furthermore, Scanlon admitted that he previously had been warned

109. Id. at 1-2.
110. Id. at 4.
111. Id.
112. Id. at 2-3.
113. Id. at 3.
114. Id. at 2.
about the failure to document any problems. Scanlon's admissions clearly fall within the parameters of wilful conduct.\textsuperscript{115}

The Court disregarded the absence of any allegation that Scanlon had acted with a wrongful purpose and based its disqualification decision solely on Scanlon's admission. This analysis makes clear that the Court's "parameters of wilful conduct" define a far broader area than the plain language of Section 602A, which requires a deliberate and wilful violation of a rule.\textsuperscript{116} Acknowledging a general awareness of employment obligations and admitting to a failure to perform one of them is not tantamount to an admission of a deliberate and wilful rule violation. Cases like Scanlon and Harvey, which hold that an act is deliberate and wilful if it is committed voluntarily despite awareness of a contrary employer rule, ignore an entire body of law that draws strong distinctions between acts that are voluntary and acts that are committed with general or specific intent.

Treating Harvey's error in judgment and Scanlon's poor work performance as misconduct, absent any wrongful intent, radically departs from the statutory language and renders Section 602A more stringent than the common-law misconduct disqualification it replaced.\textsuperscript{117} Common-law courts gave serious consideration to a claimant's state of mind, to prevent disqualifying claimants whose conduct was attributable to errors in judgment, mistakes, or the inability to meet employer expectations. In 1941, the Boynton court prophetically warned:

If mere mistakes, errors in judgment or in the exercise of discretion, minor and but casual or unintentional carelessness or negligence, and similar minor peccadilloes must be considered to be within the term "misconduct," and no such element as wantonness, culpability or wilfulness with wrongful intent or evil design is to be included as an essential element in order to constitute misconduct within the intended meaning of the term as used in the statute, then there will be defeated as to many of the great mass of less capable industrial workers, who are in the lower income brackets and for whose benefit the act was largely designed, the principal purpose and object under the act of alleviating the evils of unemployment by cushioning the shock of a layoff, which is apt to be most serious to such workers.\textsuperscript{118}

Thus, the claimant in Boynton received benefits, even though he violated several important rules and policies, because his state of mind did not reflect an improper motive or purpose.\textsuperscript{119} Illinois

\begin{itemize}
\item \textsuperscript{115} Id. at 8.
\item \textsuperscript{116} 820 ILL. COMP. STAT. 405/602A (2000).
\item \textsuperscript{117} These conclusions also run contrary to published Illinois case law. See Siler, 549 N.E.2d at 763 (holding that inadvertence, negligence, incapacity, or inability do not satisfy the "deliberate and wilful" standard).
\item \textsuperscript{118} Boynton, 296 N.W. at 640.
\item \textsuperscript{119} Id. at 640-42.
\end{itemize}
courts interpreting the common law came to a similar result. In *Pesce v. IDES*, the court held that a claimant who admitted responsibility for multiple accidents involving a company van remained eligible for benefits precisely because there was no evidence that he deliberately or wilfully caused the accidents.  

In these cases, whether the employer had warned the worker not to have another accident or to “drive more carefully” would have been irrelevant—if a second accident was not “deliberate” and “wilful,” it remained an accident, not misconduct. The first element of Section 602A should offer the same protection—a claimant who violates a rule due to mistake, poor judgment, inadvertence, or negligence does not do so deliberately and wilfully. If Harvey made an error of judgment when faced with conflicting rules, or Scanlon miscalculated what a silo could hold, then their errors should not have been deemed deliberate and wilful attempts to disregard the employer’s rules. The common law would have extended them both benefits.

**B. Element II: Reasonable Rule or Policy**

The outer limits of what constitutes a “reasonable rule or policy” of the employer are well-established. An employee must be aware of a rule or policy and understand how to comply with it before violating the rule or policy constitutes a disqualification. Thus, an employer must prove that the rule was clear and that the employee understood compliance to be mandatory, but need not prove that the rule was written down or otherwise formalized. Confronted with fact patterns involving serious wrongful acts, Illinois courts have carved out a series of exceptions to the plain language of Section 602A under which the employer need not present any evidence proving that it had communicated a rule or policy to the worker at all.

120. *Pesce*, 515 N.E.2d at 852.

121. See *Adams*, 565 N.E.2d at 57-58 (noting that claimant was not aware of a rule requiring him to launder uniforms that had been placed in a pile of trash); see *Farmers State Bank of McNabb*, 576 N.E.2d at 535-37 (discussing that claimant was not aware of a rule regarding staff deposits procedure, and that the employer’s failure to enforce the rule resulted in claimant not understanding that compliance was necessary); see also *Lyon Metal*, 577 N.E.2d at 519-520 (finding claimant eligible for benefits when he was not aware of rule regarding scrap metal).


123. See *Ray v. Dep’t of Employment Sec.*, 614 N.E.2d 196, 198 (Ill. App. Ct. 1993) (holding that “there is no mandate in section 602(A) that such misconduct be in violation of a written rule. . . . [I]mplicit in the employment relationship is the understanding that employees do not steal from employers”).

124. See *Meeks v. IDES*, 567 N.E.2d 481, 486 (Ill. App. Ct. 1990) (holding “we believe plaintiff’s argument [that an employer must prove a reasonable rule by direct evidence] is belied by commonsense business practices. With the
Some of these exceptions are understandable. For example, courts can infer the existence of a reasonable rule or policy through the "commonsense realization that certain conduct intentionally and substantially disregards an employer's interest." Thus, courts have not forced employers to take on the burden of proving that they had express rules prohibiting sexual harassment of co-workers, physical attacks on co-workers, or employee theft. Increasingly, however, courts do not restrict the exception to inherently dangerous or violent acts. For example, courts tend to lump various actions under the catch-all term "insubordination" and place them into the same category as extreme acts of violence, making both grounds for disqualification without any evidence of a reasonable rule that informs the employee of the prohibited conduct.

In Greenlaw v. Department of Employment Security, the worker's insubordinate act consisted of telling her supervisor to "kiss my grits" and walking out of the office. The Illinois Appellate Court deemed proof of a reasonable insubordination rule or policy unnecessary for disqualification because it found "kiss my grits" abusive, although admittedly not profane. The Court concluded that, because the phrase was abusive, common sense should have alerted the claimant that her conduct was impermissible; the Court required no further proof from the employer.

Greenlaw's conduct arguably falls within the moderate to...
extreme range on the common law misconduct spectrum. However, courts also relax the employer's burden of proof in cases involving minor episodes of insubordination. Thus the Circuit Court of Cook County recently upheld the disqualification of an "insubordinate" claimant who was discharged for "yelling" at her supervisor. When the hearings referee asked about the yelling incident, the employer provided no details, but admitted that the worker did not use vulgarity or commit any threatening or abusive act. The employer also admitted that in nine years the claimant had never received a warning, and did not describe any insubordination rule or policy. Nevertheless, the Circuit Court upheld the disqualification.

IDES has interpreted these and similarly reasoned court decisions to mean that:

It is, or should be axiomatic, that insubordination in all its forms... denotes willful and deliberate conduct which undermines authority, needlessly engenders ill-will, disrupts the good order of the work place, and is inherently injurious to an employer for these reasons in the first instance such that proof of prior warnings for related acts is unnecessary.

Thus, IDES has redefined the statutory inquiry under Section 602A when the reason for discharge is "insubordination." Instead of analyzing whether the specific act violated any rule of the employer, IDES determines whether the employee was "insubordinate," according to its own definition. Disqualification flows inexorably from all findings of insubordination.

Such a legal framework not only contrasts sharply with the language of Section 602A, but also with analysis under the

134. See supra notes 64-70 and accompanying text.
135. Oleszczuk v. Ill. Dep't of Employment Sec., No. 00-L-50337 (Ill. App. Ct. May 20, 1995) (unpublished order is on file at LAFMC, the Circuit Court decision is found at p. 23 of the Record).
136. Id. The Illinois Appellate Court recently overturned this decision of the Circuit Court of Cook County, in part because the record did not contain evidence of what reasonable work rule the employee violated. However, the Court went on to state that, "We could safely infer that if an employee is directed to attend a training session, it would be a reasonable work rule to require that employee attend and show evidence of having learned something. It could be argued that such a rule is so obvious it need not be stated." Oleszczuk v. Dep't of Employment Sec., 782 N.E.2d 808, 812 (Ill. App. Ct. 2002). With this dictum, the Court leaves the boundaries of its ability to infer work rules on insubordination undefined.
137. Vazzana v.IDES, 01-L-51261 (Ill. Cir. Ct. September 19, 2002) (IDES' position is set forth in the decision of the Board of Review, which is on page 42 of the record) (on file at LAFMC).
138. Id. at 2. IDES comments that "insubordination is committed when a worker refuses unlawfully to comply promptly with reasonable, job-related instructions, and subordinate himself to the directives of higher authority." Id.
common law. Allegations of insubordination are inherently subjective. One person's "yelling" is another person's passionate self-expression. The term also encompasses a broad range of conduct from shouting or swearing at management to failing immediately to obey or questioning a particular order or direction. Employers do not uniformly punish all of these forms of employee noncompliance with immediate termination. Common law courts drew more pragmatic and objective distinctions, disqualifying only those employees who actually used abusive or threatening language, jeopardized their co-workers' safety, or defied their employers publicly in front of co-workers. These courts recognized that conversations between management and subordinates about work performance frequently get heated. As long as arguments occurred privately and did not threaten management's authority over co-workers, then the employee remained eligible for benefits.

For all but extreme cases of insubordination, Section 602A should require an employer to prove that it had a reasonable insubordination rule, which clearly sets forth the proscribed conduct, and that the claimant had been warned about insubordination in the past. Section 602A does not exempt insubordination or establish a separate set of rules for analyzing cases involving insubordination.

C. Element III: Harm

Several Illinois appellate decisions have effectively eliminated the third element of Section 602A, which requires that, in cases where the claimant is not a repeat offender, the claimant's rule violation must have harmed the employer. The plain language of Section 602A, requires an act that "has harmed" the employer, meaning that an act that has already caused some demonstrable, objective harm. The parties in Jackson had argued over whether

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140. Sheff, 470 N.E.2d at 352; Gee, 483 N.E.2d at 1029-30.

141. Although some acts of insubordination could "have harmed" the employer in the first instance, one would predict relatively few cases in which the employer could demonstrate some tangible harm suffered. Insubordination would more often become disqualifying when repeated after a warning.

142. 820 ILL. COMP. STAT. 405/602A (2000). Despite the legislature's use of the present perfect tense, IDES promulgated administrative rules defining harm to include "damage or injury that could be reasonably foreseen to occur but for the individual being prevented from either carrying out his act or continuing to work" (examples omitted). Ill. Reg. 2840.25.
potential harm was disqualifying. The legislature came down in favor of actual harm, requiring that the act has caused harm, not that it "could," "may," or "threatens to" to cause harm. Nonetheless, several Illinois decisions deem potential harm sufficient to satisfy the statutory requirement. These courts disqualify claimants based on threatened harm that is both de minimis and speculative. Perhaps even more disturbing, courts often hypothesize potential harm that could have resulted from the claimant's conduct without any recorded evidence at all.

Although employers have the burden to prove that a termination was for misconduct, Illinois appellate courts sometimes disqualify claimants absent any employer evidence of harm whatsoever. Thus, in Stavins v. IDES, the Circuit Court of Cook County upheld the denial of unemployment benefits to a delivery driver who decided to run his route out of order due to time pressures. The employer testified that it terminated the claimant for poor work performance and offered no evidence of harm, actual or potential. The employer also acknowledged that,

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143. Jackson, 475 N.E.2d at 884-85.
144. For a general discussion of the statutory requirement of harm, and how courts treat it, see J. Sebastian, To Harm or to Have Harmed: That is the Question, 27 ADMIN. L., A-16 (Ill. State Bar Ass'n) July-Aug. 1997.
145. A deep division in authority now exists between courts that require the employer to prove actual harm and courts that do not. See Kiefer v. Ill. Dep't of Employment Sec., 640 N.E.2d 1252, 1256 (Ill. App. Ct. 1994) (holding that the claimant is eligible for benefits when the harm from misconduct is speculative and the threat of harm is only a remote possibility); see Adams, 206 Ill. App. 3d at 728-29 (finding that Section 602A adds the requirement that an employer prove actual harm); Zuaznabar v. Bd. of Review, 628 N.E.2d 986, 989 (Ill. App. Ct. 1993) (holding mere potential for injury insufficient, and requiring concrete harm if no prior warnings). Some courts deem potential harm to be sufficient. See Bandemer, 562 N.E.2d at 8 (threat of financial loss constitutes harm); Brodde v. Didrickson, 645 N.E.2d 990 (Ill. App. Ct. 1994) (setting a bad example creates potential harm); Greenlaw, 701 N.E.2d 175 (Ill. App. Ct. 1998) (holding that potential harm to the employer was sufficient, but there was no discussion of what constitutes potential harm).
146. See Bandemer, 563 N.E.2d at 7-8 (holding claimant's failure to report to work due to illness delayed opening of a retail store; the "threat of future financial loss created by the potential for missed sales" was harmful to an employer).
147. See Brodde, 645 N.E.2d at 991 (disqualifying a supervisor who overrode a safety mechanism, finding that potential harm to the company arose from the poor example set for subordinate employees).
148. See Adams, 566 N.E.2d at 57 (Ill. App. Ct. 1990) (noting that "if first, an employer must show the former employee violated a reasonable company rule. Every violation of a company rule will not constitute misconduct").
150. Stavins involves another common misapplication of law by IDES. Referees and the Board of Review sometimes comb the record in search of allegations that meet the definition of misconduct even when, as a matter of fact, that conduct did not cause the discharge. In Stavins, IDES based the
The John Marshall Law Review

despite changing the route, the claimant delivered all the medical specimens to the laboratory at the customary time. In fact, the claimant testified that he averted potential harm by rearranging his route so that he could reach all of the sites within his remaining time. Without any employer testimony describing how it was or could have been harmed by the employee's conduct, the court upheld the administrative agency's disqualification. The Illinois Appellate Court gave the "harm" element similar treatment in Greenlaw. The Court did not seriously consider how the claimant's outburst "kiss my grits" harmed her employer and dismissed the harm element in a single line: "Even though plaintiff's misconduct occurred in the presence of two supervisors, it constituted a deliberate disregard for the employer and was potentially harmful to its interests." Courts that interpret Section 602A to include the "threat of future harm" further dilute the "harm" requirement, rendering it meaningless. A reviewing court can always point to some potential harm that might occur when an employee violates an employment rule that is not, on its face, unreasonable. Absence, tardiness, incompetence, and negligence of all degrees theoretically jeopardize employer profitability. However, when an employer fails to describe any harm it suffered or might have suffered as a result of the claimant's actions, that is strong circumstantial evidence that the employer has not been harmed. Courts that invent potentially harmful ramifications exceed their judicial mandate to interpret statutes based on plain language. These courts also undermine the declared policy of the Illinois UI statute, which is "to lighten [the] burden [of unemployment] which finding of misconduct on the claimant's use of a company phone for personal calls even though the employer clearly testified that the claimant was discharged for poor work performance after running his route out of order. Id. The Circuit Court upheld this finding despite published contradictory caselaw. See Zuaznabar, 628 N.E.2d at 989 (awarding benefits to claimant bus driver when he had received no specific prior warning regarding unauthorized stops and there was no proof of harm).

151. See Stavins, 01 L 50775 at 1 (finding, "1) implicit in the decision of the hearings referee, as adopted by the Board, is a finding of wilful and deliberate 2) there is a causation based on totality of conduct of the claimant/plaintiff 3) that there were warnings, but even without warnings, there was actual and/or potential harm to the employer").

152. Greenlaw, 701 N.E.2d at 177-78.

153. Id. at 178.

154. Carol Kleiman, Not All Benefits are Equal at the Bottom Line, CHI. TRIB., June 29, 2002 at Bus. 1 (noting that absenteeism costs employers, on average, $755 per employee per year). See Maggie Jackson, Companies Adding Benefits for Care of the Elderly, N.Y. TIMES, July 7, 2002, § 3, at 8 (noting a research study which found that American corporations lose $11 billion annually due solely to absence, lost productivity, and turnover among employees caring for elderly relatives).
now so often falls with crushing force upon the unemployed worker and his family. The purpose of the Act is easily evaded if it can be read to disqualify employees who are fired for a single incident of absence, tardiness, insubordination, or negligence, merely because the infraction has the potential to cause harm to the employer.

IV. POLICY IMPLICATIONS

Over the last fourteen years, Illinois courts have transformed what appeared to be a legislative victory for low-wage workers into a harsher disqualification standard than the common law misconduct standard that Section 602A replaced. Many courts now read Section 602A as if it provided that a person commits misconduct when: 1) she or he is aware, or should be aware, of 2) a reasonable rule or policy or "standard of behavior" expected by the employing unit, and 3) violates the rule or standard through a voluntary act. This working definition is strikingly more stringent than the actual language enacted by the Illinois legislature. At the administrative level, IDES hearings referees, who preside over administrative hearings to determine eligibility under the Act, regularly disqualify claimants for "violations or disregard of standards of behavior which the employer has the right to expect," without regard to whether the claimant has violated any actual rule or policy of the employer. For that matter, referee decisions routinely fail to make findings on the various statutory elements of misconduct and often ignore the harm element altogether.

What is shocking about Illinois misconduct jurisprudence is not the outcomes in particular cases (there are several states with misconduct jurisprudence more conservative than Illinois), but that the purpose of the 1988 amendment has been so thoroughly subverted. The amendment enacted in Section 602A had great potential for bringing misconduct doctrine into conformity with the experiences of the modern workforce. Thus, Section 602A disqualifies employees who are terminated for violating a "reasonable" rule of the employer. In the modern workforce, where

155. 820 ILL. COMP. STAT. 405/100 (2000).
156. Boynton, 296 N.W. at 640.
157. While misapplication of the law by referees can be corrected on appeal, claimants pay a large price for IDES errors. The statute assumes that the first six months after a job loss is the critical time during which unemployed workers most need assistance. However, appealing the decision of a referee takes up to 120 days, and subsequent appeals in the state court system extend beyond one year. Misapplication of the law often defeats the purpose the Act, which is to provide income during the period of unemployment. UI benefits do not serve their purpose when a claimant receives them a year after being fired, especially if the claimant has already managed to find replacement employment.
most workers have benefit packages including sick and vacation
days, courts might use that provision to find that employers who
refuse to offer any such benefits and then terminate employees for
tardiness or absence do so at their own peril. Looking at work-
family conflicts from a modern perspective, courts might find
employment rules that prevent men and women from balancing
such conflicts unreasonable. Studies point out that “the number
of women in the workforce increased almost 200% between 1950
and 1990.” The percentage of mothers working outside the home
reached 65% in 1993. Thus, while it may have been reasonable
in the 1930's to require male breadwinners with non-working
spouses to have perfect attendance records, to hold today's workers
to that same standard is Procrustean, outdated, and unreasonable.

Moreover, although several of the opinions cited within this
article disqualify claimants for failing to follow employer rules to
the letter (Harvey who left her control room, Stavins who ran his
delivery route out of order, and Scanlon who did not complete a log
sheet), evidence is mounting that these judicially imposed
standards are out of touch with the realities of the modern

158. Employee benefits now make up a significant portion of employees' overall compensation. In 1955, fringe benefits comprised 17% of employee compensation. Michael L. Smith, Mandatory Overtime and Quality of Life in the 1990s, 21 IOWA J. CORP. L. 599, 600 (1996). In 1991, non-cash benefits constituted 27.7% of overall compensation, and experts predict this number to continue to rise to 40% of compensation. Mary E. O'Connell, On The Fringe: Rethinking the Link Between Wages and Benefits, 67 TUL. L. REV. 1422, 1425 (1993).

159. Today it is almost axiomatic that employers should accommodate work-family conflicts. Data indicates that employers do not even sacrifice profitability when offering certain benefits aimed at harmonizing work and family responsibilities. Telecommuting, flextime, compressed workweeks, part-time work, adoption and family leave benefits, and overall flexibility to take needed time off and work at home, all positively affect the employer's bottom line. See Kleiman, supra note 154, at Bus. 1 (citing research from the J. OF MANAGERIAL ISSUES). Some arbitrators of union grievances now consider work-family conflicts when determining whether a discharge or discipline was for good cause. For a general discussion of this trend, as well as suggestion for how courts should take work-family conflicts into account, see Malin, supra note 83, at 164-74. The author concluded that:

[pluralic and private workplace values are evolving to recognize that employees' family obligations may curb employer autonomy in directing the workforce. These values are evident in the FMLA, state laws mandating time off for parents to attend school activities, and in arbitration awards interpreting and applying collective bargaining agreements to employees faced with work-family conflicts. Evolving public justice values recognize a growing belief that employers have a role in accommodating employees' family obligations. These values should be applied in evaluating UI claims.]

Id.

160. Malin, supra note 83, at 133.

161. Id.
workforce. Failure of an employee to follow an employer rule unquestioningly, especially for employees who are expected to exercise judgment in the performance of their duties, is not as reliable an indicator of an inferior work ethic today as it was during earlier decades of the twentieth century.

Furthermore, changes in working conditions and demographics have been accompanied by equally dramatic shifts in the types of jobs that Americans typically occupy. Sixty-seven years after passage of the federal unemployment legislation, American manufacturing is becoming a relic.\textsuperscript{162} The twenty-first-century American economy now depends heavily on the service industry.\textsuperscript{163} Low- and high-wage earners alike often work in paraprofessional environments in which authoritarian managerial styles are less conducive to efficiency because service work does not depend on rote repetition of tasks according to rigid rules. In contrast to formulaic management theories of the 1930's, academics now discuss the profitability of a workforce of creative, educated minds, easily and quickly retrainable.\textsuperscript{164} Industrial policy analysts predict America's future global competitive advantage will lie in the ability to be facile at creating and adapting products for the global marketplace.\textsuperscript{165} To move industry in this direction, they advise against demanding blind adherence to overinclusive work "rules," commenting that:

What will be needed in this kind of economy is competition based on quality, service, and innovation, stressing efficiency in terms of time – getting new products and services off the drawing board and into the economy quickly. No matter what the particular mechanism, every worker's ideas must be heard and valued, and every worker needs to be able to change tasks and functions; the worker must broaden skills and take personal responsibility for product quality and continued education and retraining. The business organization must provide time and money for such retraining. Merely speeding up the production line to increase worker productivity is not the answer in the global economy.\textsuperscript{166}

\textsuperscript{162} See Geu & Davis, supra note 38, at 1701 (noting that "as many as 30 million U.S. workers have been dislocated by restructuring in manufacturing since 1980"). General Motors alone downsized its US operations staff from 424,000 in 1984 to only 250,000 in 1994. Smith, supra note 158, at 601.

\textsuperscript{163} In 1997, 68\% of low-wage workers and 45\% of higher-wage workers, were employed in services or retail trade. SAFETY NET, supra note 1, at 23.

\textsuperscript{164} Geu & Davis, supra note 38, at 1713.

\textsuperscript{165} Id. at 1712-13.

\textsuperscript{166} Id. at 1713. Geu & Davis also predict that work settings will becoming markedly smaller:

The premise of this Article is that as the economy becomes globalized, the most commonly used workforce model will shift from the present large group in a factory (or other large working place) to small, mobile units with shifting memberships organized on an ad hoc basis to respond to short- or medium-term job projects. Such a shift seems to be
Certainly, these perspectives do not condone insubordination, absenteeism, or violence in the workplace. But no economic or social gain is achieved by disqualifying a driver because he ran a route out of order or a security guard because she made the wrong choice between staying at her station or conducting a head count.

Applying a modern interpretation to the language of Section 602A could propel employers in the direction that these market analysts predict will prove the most profitable in the twenty-first century global market—by requiring employers to demonstrate that they have suffered actual harm as a result of an employee’s rule transgression, and by granting unemployment benefits to people fired by inflexible employers who refuse to offer claimants personal, vacation, or sick time off from work. The courts’ current jurisprudence, which disqualifies workers for even minor rule violations, including absences, in the absence of any benefits, creates the opposite incentives. This reading of the Act gives an employer no incentive to adopt a long-term perspective on employee retention, create decent work-family policies, or tolerate mistakes. Illinois’ misconduct jurisprudence has made it all too easy for an employer to avoid the consequence of an increased UI tax rate and to save the additional cost of keeping employees on through slow times by getting the worker disqualified from UI benefits for “yelling” at a supervisor, or by issuing one “warning” for minor tardiness and then firing the employee the second time she is late. In the face of significant social changes in the nature of work, Illinois courts have adopted a virtual strict liability theory that denies unemployment benefits to claimants who do anything wrong. Judicial analysis that focuses almost exclusively on the actions and transgressions of the employee without regard to the reasonableness of the employer's actions is misguided given recent changes in the workforce.

This disproportionate focus on the worker is also bad economics. Employees today have no incentive to cause their own unemployment in order to collect unemployment benefits. In thirty-two states, the average unemployment check leaves a single mother living below the poverty line. In most states, claimants still only receive one-third to one-half of their prior earnings. The inevitable result of the social and technological changes presently under way.

*Id.* at 1681.

167. See 820 ILL. COMP. STAT. 405/100 (2000) (stating that “to encourage stabilization of employment, compulsory unemployment insurance upon a statewide scale providing for the setting aside of reserves during periods of employment to be used to pay benefits during periods of unemployment, is necessary”).

168. See Wenger, supra note 3, at 16.

169. Higher benefit levels correlate with increased recipiency rates, implying that the more money claimants stand to collect the more often they apply for
Furthermore, the program is temporary, lasting only six months.\textsuperscript{170} The economic disincentives inherent in the UI systems affect low-wage workers severely. Low-wage workers have less access to such work benefits as vacation days, health insurance, and sick leave, and fewer personal financial resources to cope with family problems, illness, or other compelling problems.\textsuperscript{171} Thus, they are less able to avoid discharge (or quitting "voluntarily") for calling in sick or tardiness—scenarios that will render them ineligible for benefits.\textsuperscript{172} During times of high labor supply, low-wage workers are most vulnerable to being replaced by more skilled or less

unemployment. \textit{See generally Objectives Jeopardized, supra note 1} (finding that 10\% higher wage replacement results in 4\% increase in recipiency).

170. Illinois unemployment claimants are eligible for twenty-six weeks of benefits. In addition, federally funded extended unemployment benefits are also available under certain circumstances. The six-month time limit on the receipt of unemployment benefits reflects old expectations that laid-off workers would be recalled to their previous job. In this recession, the percentage of UI recipients who exhaust six months of benefits before finding replacement employment is comparatively higher. \textit{See Maurice Emsellem, The "Jobless Recovery" & the Gaps in the Federal Unemployment Insurance Safety Net 3-4} (National Employment Law Project, 2002) \textit{available at} http://www.nelp.org/docUploads/pub44.pdf. \textit{See also Objectives Jeopardized, supra note 1, at 14} (stating that “[u]nemployed workers are now without jobs for longer periods of time—often exhausting all their UI benefits—and many are not able to return to their former positions because their jobs have been abolished”).

171. A recent study of low-wage workers in Chicago found that 30\% of these workers “were not allowed to take a sick or vacation day, paid or unpaid, without risking their jobs.” \textit{Rebekah Levin & Robert Ginsburg, Sweatshops in Chicago: A Survey of Working Conditions Economic Income and Immigrant Communities 3} (2000) \textit{available at} http://www.impactresearch.org/documents/sweatshopreportpdf. “In 1997, about 70\% of low-wage workers were employed in retail trade and services.” \textit{Safety Net, supra note 1, at 22}. These industries tend not to use layoffs to terminate employees, and they have the overall lowest reciprocity rates. \textit{Id.} at 21-22. Low-wage workers also have lower unionization rates to protect them from unfair discharges. \textit{Id.} at 22.

172. Low-wage workers often struggle to maintain employment while juggling significant stressors such as inadequate housing, child care for children with serious health problems, and transportation barriers. \textit{See Hard Labor 67} (Joel F. Handler & Lucie White, eds., 1999). According to a recent survey of low-income parents, “[n]early half of the [respondents] reported that they have experienced some kind of sanction, including terminations, lost wages, denied promotions, and written and verbal warnings as a result of trying to meet family needs.” \textit{Id.} at 1. Two-thirds of those surveyed had a child with a chronic health condition or “special learning need.” \textit{Id. See Keeping Jobs and Raising Families in Low-Income America: It Just Doesn't Work} 1 (Radcliffe Pub. Pol'y Center & to 5 Nat’l Ass’n of Working Women, 2002) \textit{available at} http://www.radcliffe.edu/pubpol/boundaries.pdf. \textit{See Michele Casey, et al., An Overview of Transportation Issues Affecting the Welfare-to-Work Populations: The TRUC Program, Clearinghouse Rev. Jan./Feb. 2001, at 637} (finding that 58\% of low-income workers living in the Champaign-Urbana area missed work due to transportation problems).
encumbered employees. During recessions, low-wage jobs are among the first eliminated because they typically involve the least responsibility. If low-wage workers apply for UI benefits, their applications are often denied for not having enough wages in their "base period." Low-wage workers are almost twice as likely to become unemployed as all other workers combined, but fewer than two in ten low-wage workers actually receive UI benefits. Even if they do receive unemployment benefits for six months, low-wage workers typically have the most difficulty locating new employment. In short, so few low-wage workers choose to become unemployed to receive UI benefits that the UI system does not have to rely on judicially-crafted barriers to reduce their number artificially.

These worker disincentives stand in strong contrast to well-documented employer practices designed to avoid the costs associated with unemployment. Employers regularly misclassify employees as independent contractors, hire through temporary

173. As Harvey notes, employers' hiring standards increase along with the supply of available labor. See Harvey, supra, note 23, at 709 n.112 ("At the top of the business cycle and in geographic areas where aggregate demand [for workers] is above average, employers find a larger portion of the labor force 'employable' as compared to other points in the business cycle and in geographic areas where aggregate demand is less robust").

174. According to Harvey, "Even in periods of relative prosperity, low-wage workers experience levels of unemployment normally associated with recessions, while during recessions, their unemployment rises to depression levels." Harvey, supra note 23, at 743. "From 1992 to 1995, low-wage workers were twice as likely to be out of work as high-wage workers but only half as likely to receive unemployment benefits." SAFETY NET, supra note 1, at 13.

175. SAFETY NET, supra note 1, at 13. Low-wage workers are more likely to qualify if they worked full-time for more than thirty-five weeks. Id. Because using a dollar amount to qualify for benefits makes qualifying more arduous for those earning lower salaries, the State of Washington measures monetary eligibility according to the number of hours worked, but Michigan, New Jersey, and Ohio count the number of weeks worked when determining eligibility. Id. at 25 n.18.

176. See id. at 13 (noting that "If from 1992 to 1995... low-wage workers made up about 50% of the unemployed former workers, even though they were only about 30% of the total labor force"). Id. In March 1995, only about 18% of unemployed low-wage workers were collecting UI benefits. Id. at 5.

177. See Principal Strategies, supra note 25, at 709. Harvey concludes that for the past several decades in America "the great bulk of unemployment actually experienced in the United States... has been proximately caused by an insufficiency in the number of jobs available rather than by a structural mismatch between job seekers and available jobs or by a refusal on the part of unemployed persons to seek and accept available jobs." Id. See also Handler & White, supra note 149, at 66 (finding that the market for low-skilled labor is currently saturated with too few job openings to employ all of the low-wage job seekers).

178. See Pandya, supra note 41, at 941 (citing a study showing that Illinois employers did not report 13.6% of employees for the purpose of UI and of these unreported workers, 49% were misclassified as "independent contractors").
agencies,\(^{179}\) and pay employees in cash to avoid these costs.\(^{180}\) Moreover, the U.S. system of experience-rated tax assessment, where employer taxes are linked to unemployment receipt, gives employers every incentive to fight unemployment claims.\(^ {181}\)

Research indicates that when employer taxes are not linked to unemployment receipt, employers contest benefits seven times less often.\(^ {182}\) Thus, the proper administrative review process should include healthy skepticism of the employer’s evidence given the employer’s clear self-interest in every unemployment claim.\(^ {183}\) The concern to protect the public risk pool from those who are just trying to escape work should be balanced with an equal concern about employers who are trying to evade contributing their fair share. After all, unemployment compensation protects workers and employers alike against downturns in the market.\(^ {184}\)

Ideally, IDES should consider how often employers contest benefits and recognize that some employer strategies impede the proper functioning of the UI system. But hearings referees often do just the opposite, applying irrational levels of skepticism to the employee’s testimony, absolving the employer from the burden of proving the statutory elements of misconduct, and refusing to follow the actual language of the Act. In a recent administrative hearing, a referee made the following comment:

I only deal with what occurred. If, for example somebody works somewhere for 20 years, never had a problem, nicest guy in the world, mowed the lawn on his lunch hour, painted the washroom on his weekends off, best guy we ever had and one day he got in a fight with somebody. That’s all I deal with. That’s 20 years of great work, possibly ended because the person got in a fight with somebody. So that’s what I deal with. Not “Haven’t I been... for

\(^{179}\) Id. at 910-11.

\(^{180}\) There is also evidence, although unverified, that employers manipulate workers’ schedules and earnings to render them ineligible. OBJECTIVES JEOPARDIZED, supra note 1, at 5, 38-40. See Emsellem & Halas, supra note 56, at 306 (discussing the experience-rating system’s incentive for employers to file appeals).

\(^{181}\) See Emsellem & Halas, supra note 56, at 306-07 (pointing out that employers’ financial drive to contest unemployment claims has created an industry of “third-party employer representatives” that now exists to represent employers at unemployment hearings).

\(^{182}\) Id. at 305-06 (citing data from Advisory Council on Unemployment Competition showing that when Puerto Rico used a flat tax, employer appeal rates “were seven times lower than the national average”).

\(^{183}\) See Mehta & Theodore, supra note 42, at 6 (citing Lambert & Legan, 1999, for the determination that a one-time layoff of 50 workers can increase an employer’s UI tax rate by 2%-3%).

\(^{184}\) See U.S. DEPT OF LABOR, EMPLOYMENT & TRAINING ADMIN., A DIALOGUE: UNEMPLOYMENT INSURANCE AND EMPLOYMENT SERVICE PROGRAMS (tech. supp. at 16) (showing that recessions occurring after the creation of the UI system have been less severe, less frequent, and shorter), available at http://www.doleta.gov/dialogue (last visited Sep. 11, 2003).
"the last 20 years been the best guy you had," I say yes you have been. But we can't have people fighting.\footnote{185} The logic of this hearings referee exemplifies the agency's failure to evaluate UI claims in light of the real economic incentives driving employers to contest unemployment claims. When an excellent employee is terminated after twenty years of service, the referee should take notice. The employer's stated reason for discharge is often a pretext for some other, possibly illegal, reason for terminating the employee.\footnote{186} A referee should take the employer's account with a grain of salt, given the legislature's stated policy to ease the crushing impact of unemployment on the worker, his family, and society.\footnote{187} Twenty years of service reflects a superior work ethic, and such an individual is probably a low risk for causing unemployment in order to live shiftlessly on the government's nickel.\footnote{188}

Illinois courts that have refused to implement a legitimate public policy decision by the legislature have obstructed the path of social reform. The amendment of Section 602A was a victory for grass-roots union and low-wage worker advocates who gathered broad support for the reform. A decade later, it is clear that legislative change is not enough because IDES and the courts are determined to distort the statute through interpretation.\footnote{189} If the

\footnote{185. This quote is taken from an administrative hearing held at IDES on August 8, 2001, Docket # 1030234A. The Legal Assistance Foundation of Metropolitan Chicago was successful in getting the hearing referee's decision overturned in a subsequent administrative appeal to the Board of Review.\footnote{186. Of course a termination can be pretextual, although not illegal. "[S]ome cases of replacement will be due to seniority rights, availability of more efficient workers, or pure favoritism, and a careful examination of the facts will be necessary in order to determine the real reason for the discharge." Kemper, supra note 52, at 161. Nevertheless, employees today enjoy legal rights not recognized when the UI system was created and these rights must be considered during the administrative review of unemployment claims. Thus, in Lowe v. IDES (Ill. Cir. Ct., 01-L-50646 (Ill. Cir. Ct. June 9, 2003) (appeal pending). IDES probably erred in disqualifying a claimant janitor who was "fired" for spitting outdoors one day after he complained about religious harassment on the job.}\footnote{187. 820 ILL. COMP. STAT. 405/100 (2000).}\footnote{188. Even when an employer genuinely terminates an employee for cause, low-wage workers are more likely to be fired for incidental rule violations than are higher-paid workers whose occasional tardiness or absenteeism does not materially affect the quality of their work. Thus, higher-paid workers often have the double luxury of more official work benefits and more unofficial tolerance of occasional malfaeasance.}\footnote{189. Political accountability usually serves as a corrective device when courts exceed their judicial mandate to interpret laws as they are written by the legislature. Judges elected to Illinois Circuit and Appellate Courts do not want their names on poorly reasoned decisions that dilute or nullify legislative reforms. However, the public can only hold courts accountable when court decisions are available. As courts increasingly limit the number of decisions they release for publication, a curtain falls over the judiciary, protecting
Illinois judiciary's heightened scrutiny of workers deemed to have committed misconduct signals a return to the entrenched suspicion of jobless workers typical of the early twentieth century, then this retraction of public support comes at a particularly poor time. The American UI system balances a social welfare mission of supporting the jobless with the social insurance goal of protecting the economy against periods of recession by increasing spending. The more courts turn ordinary firings into firings for misconduct, the less the UI system can serve either of these basic functions. The UI system performs optimally as an economic stabilizer when 80% of the unemployed population receives 40% wage replacement. Throughout most of the United States, an average of 37% of unemployed workers obtain 33% wage replacement. Such low recipiency rates mean that, in times like these, when the economy needs a boost in spending, the dollars never make it into the hands of the workers who would spend them for food, clothing, and shelter. The result for the entire society is an extended recession. Moreover, for some low-wage workers, UI is now the only social welfare program available to help them when they are out of work. In times past, traditional welfare programs, such as Aid to Families with Dependent Children (AFDC), provided a safety net for poor families when a wage-earner became unemployed and did not qualify for unemployment compensation. However, in 1996 TANF replaced AFDC. TANF is a program of limited duration that focuses on transitioning individuals off welfare and into low-wage jobs. Thus, in this decade many of the lowest paid workers will not qualify for any substantial economic assistance if they are disqualified from the UI system. At a time when the UI system...
should be expanding to support and encourage this welfare to work philosophy, advocates cannot allow UI to erode.

V. POLICY RECOMMENDATIONS

The disqualification for misconduct is not fundamentally inconsistent with either of the dual purposes of the UI system—social welfare and social insurance. However, in order for the disqualification to further these goals, states need to reevaluate the objectives of the disqualification. Potentially, the disqualification could serve at least three competing functions: fraud prevention, employment stabilization, and risk allocation. We have already seen two of these. Fraud prevention, a central objective of the common law system described above, protects the public risk pool from individuals who attempt to collect benefits through the fraud of provoking their own termination. Disqualification for misconduct also impacts the stability of employment because it creates incentives that influence employers and employee behavior. How misconduct is defined affects the way employers treat employees at work, what behaviors they tolerate, and what benefits they offer. Likewise, the definition of misconduct communicates to employees behavior that is acceptable in the workplace and creates a serious incentive for workers to conform their behavior to minimally acceptable standards, or face the threat of an extended period of unemployment with no reliable income source.196

In addition, the misconduct disqualification helps distribute the risks, or costs, associated with unemployment between the employer, the state, and the employee. By funding UI benefits with employer taxes, states initially allocate the costs of unemployment between the state and the employer—under current laws. See generally VROMAN, supra note 20 (analyzing different factors that make it difficult for welfare leavers to qualify for UI benefits). See also GUSTAFSON & LEVINE, supra note 14, at 4-6.

196. Some commentators question whether this is an appropriate objective for the UI system because the threat of benefit forfeiture contributes to immobility in the labor force. Furthermore, the workplace standards are not established by statute but rather are judicially imposed. Harrison writes that:

The effect of such examination [of whether a worker left a specific position voluntarily or is involuntarily unemployed] is to transform the state unemployment compensation laws into little labor relations acts dealing with standards of conduct applicable to the worker in his relation to his employer. The standards, with their strong emphasis upon job immobility, are not only new and, it may fairly be said, repugnant to American traditions; they do not represent rules of conduct affirmatively established by any legislative body. Their enforcement comes through negative sanctions in the form of a denial of benefits from the system to which the worker who is out of a job, and ready and able to take one, looks for aid.

Harrison, supra note 18, at 122.
employer funding benefits and the state administering the UI system. However, workers also bear partial risk for unemployment. Even claimants who collect benefits bear some of the burden of unemployment because benefits replace only a fraction of their lost wages. When workers do not qualify for unemployment benefits under eligibility rules, they bear the entire burden of unemployment.

In Illinois, claimants disqualified for misconduct also bear the cost of unemployment alone because a finding of misconduct prohibits them from collecting any benefits for the whole time they are unemployed, rather than during some penalty period. Nevertheless, employers typically view UI as an employer-funded benefit that entitles the employer to a greater voice in policy debates over UI benefit amount, duration, and funding issues. States respond to pressure by redistributing the costs of unemployment. Expanding or contracting the definition of misconduct is one way to reallocate burdens and benefits.

Another form of reallocation is to adjust the penalty attached to a finding of misconduct. A third way is to alter the UI funding scheme by modifying the contributions of the employee, the employer, and the state. States commonly increase or decrease employer taxes. However, states could also tax workers in order to redistribute risk.

How a state handles the disqualification for misconduct directly affects how these competing functions (fraud, employment stabilization, and risk allocation) are served. The Illinois cases discussed throughout this article use an expansive definition of misconduct that results in widespread forfeiture of benefits. These decisions put the risks associated with unemployment disproportionally on the worker, create unproductive employer incentives, and fail to affect employee behaviors because the standards applied are arbitrary and not reflective of today's labor market. On the other hand, an overly narrow definition of misconduct, that disqualifies only a small number of discharged

197. The experience-rated method of funding is a key element driving employers to stabilize employment by keeping workers on throughout economic slowdowns.
198. Unfortunately, this lopsided funding has driven courts to interpret UI statutes to require employer fault before workers can collect benefits. For detailed analysis of this historic judicial trend see Simrell, supra note 42 (discussing the historical effect of experience rating).
199. See generally BALDWIN & MCHUGH, supra note 6 (providing a detailed discussion on legislative changes made on a state-by-state basis to counteract plummeting trust fund balances).
200. Although American workers do not pay UI taxes to the government today, four states used to fund their UI systems in part with worker contributions. Eveline M. Burns, Unemployment Compensation and Socio-Economic Objectives, 55 YALE L.J. 1, 4 n.12 (1945).
claimants, might unfairly shift the burden of unemployment onto
the employers who already contribute substantial funds to the
system. A narrow definition could render the system more
vulnerable to fraud as benefits become more easily obtainable.
Such definition could also be inconsistent with government
interests due to the increased administrative costs resulting from
more individuals collecting benefits. Between these two extremes,
several states are currently using innovative ways to vary the
definition and penalty for misconduct.

A. Denial Periods

In the majority of states, a finding of misconduct disqualifies
a claimant for the entire period of unemployment, until she
becomes reemployed for a specified number of weeks with earnings
sufficient to requalify. For example, a claimant disqualified for
misconduct in Illinois must work at least four weeks and have
earnings in each of those weeks that equal or exceed his/her
weekly benefit amount to 

Ten states limit the period
during which benefits are denied for misconduct: after three weeks
to twenty-six weeks, claimants can begin receiving benefits. See
Figure I.

Before 1980, denial periods were the most common penalty for
a finding of misconduct. Among states that used denial periods,
the primary justification was that, although workers who commit
a disqualifying act of misconduct are at fault for becoming
unemployed, when unemployment extends beyond the denial
period, it is no longer attributable to the worker's act of
misconduct, but rather to the market. For this reason, states
stepped in and paid benefits following the expiration of the denial
period. But states gradually moved away from denial periods, in
part to reduce costs, a trend that accelerated after the recessions

201. Thirty-eight states use durational disqualifications exclusively. Among
those states, the requalification period ranges from three weeks to fifty-two
weeks. See, e.g., FLA. STAT. ANN. §§ 443.101, 443.036 (West 2002); KAN. STAT.
ANN. § 44-706 (Supp. 2001). A few additional states use both durational and
denial periods. See Figure I, supra page 46.
203. Colorado and North Carolina use denial periods, not as a tempered
penalty for misconduct, but rather to penalize workers who commit lesser
offenses not rising to the level of misconduct. See COLO. REV. STAT. § 8-73-108
(2001) (assigning a denial period of ten weeks to a list of employee infractions
that includes insubordination, rudeness, carelessness, wilful neglect, and
shoddy work); N.C. GEN. STAT. § 96-14 (2002) (using a common-law definition
of misconduct and a statutory disqualification of "significant fault" which
results in a nine-week denial period that can be extended to thirteen weeks or
shortened to four weeks based on the presence of aggravating or mitigating
factors).
204. Kempfer, supra note 52, at 151.
205. Id.
of the early 1980’s and left several state unemployment trust funds insolvent.\textsuperscript{206} By 1993, forty-seven states had switched to durational disqualifications.\textsuperscript{207}

FIGURE I: Current List of Denial Period States

<table>
<thead>
<tr>
<th>STATE</th>
<th>STATUTORY STANDARD</th>
<th>PENALTY</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Misconduct</td>
<td>Denial period 3-7 wks (according to severity)</td>
</tr>
<tr>
<td>Alaska</td>
<td>Misconduct</td>
<td>Denial period 5 wks</td>
</tr>
<tr>
<td>Arkansas</td>
<td>Misconduct</td>
<td>Denial period 8 wks</td>
</tr>
<tr>
<td>Maryland</td>
<td>Aggravated misconduct</td>
<td>Denial period and possible wage cancellation</td>
</tr>
<tr>
<td>Missouri</td>
<td>Misconduct</td>
<td>Denial period 4-16 wks (according to severity)</td>
</tr>
<tr>
<td>Nebraska</td>
<td>Gross misconduct</td>
<td>Denial period 7-10 (according to severity)</td>
</tr>
<tr>
<td>New Jersey</td>
<td>Gross misconduct;</td>
<td>Durational</td>
</tr>
<tr>
<td>South Carolina</td>
<td>Discharge for cause</td>
<td>Denial period 5-26 wks (according to severity)</td>
</tr>
<tr>
<td>Vermont</td>
<td>Gross misconduct;</td>
<td>Durational</td>
</tr>
<tr>
<td>West Virginia</td>
<td>Gross misconduct;</td>
<td>Denial period 6-12 wks (according to severity)</td>
</tr>
<tr>
<td></td>
<td>Misconduct</td>
<td>Denial period 6 wks</td>
</tr>
</tbody>
</table>

Although not so designed, denial periods in the UI system resemble comparative negligence theories of liability in distributing risk between responsible parties according to their fault. If the employer is 100% responsible for a job separation, a straight lay-off situation, then the employee receives benefits without penalty for the maximum number of weeks offered in that state. However, if the employee is terminated for good cause or for misconduct, situations where the employee is partially at fault, then the employee shares the risk of unemployment with the employer by waiting out a denial period during which she or he receives no benefits. Four states fix the comparative liability of both parties by setting the length of the denial period by statute.\textsuperscript{208}

\textsuperscript{206} BALDWIN & MCHUGH, \textit{supra} note 6, at 9-10.
\textsuperscript{207} Id.
\textsuperscript{208} Although the application of comparative negligence to unemployment disqualifications is an interesting theory for states to consider, this approach
Six states make the comparative liability of the worker more precise, by setting the range of the denial period in the statute and directing the administrative agency to determine the actual length of denial based on the severity of the worker's misconduct. Denial periods further all three objectives of disqualifications. Because a denial period still leaves a claimant with no income for one to three months, it effectively deters fraud. However, unlike durational disqualifications, denial periods do not dump all of the costs of unemployment on the worker. Rather the costs are shared among the worker, state, and employer.

B. Degrees of Misconduct and Denial Periods

Seven states combine the use of penalty weeks with statutory misconduct definitions graded according to severity. Maryland provides the clearest example of this approach because it uses a three-tiered system of misconduct. Malicious behavior that disregards the property, safety, or life of others, is defined as "aggravated misconduct." Of lesser severity, "gross misconduct" is conduct which, although not malicious, grossly disregards employment rules and obligations. The last tier, simple "misconduct," is statutorily undefined but resembles "just cause" in case law because it includes acts for which the worker is at fault, but which are not intentional in nature. Simple does take UI another step away from being a program geared primarily toward providing for the social welfare of the unemployed, and employer fault is irrelevant for that purpose. Simrell, supra note 42, at 198-99. In addition, penalizing workers through denial of unemployment benefits can contribute to labor immobility. Id.

209. Id.
210. Aggravated misconduct is defined as:

behavior committed with actual malice and deliberate disregard for the property, safety or life of others that:
(i) affects the employer, fellow employees, subcontractors, invitees of the employer, members of the public, or the ultimate consumer of the employer's product or services; and
(ii) consists of either physical assault or property loss or damage so serious that the penalties of misconduct or gross misconduct are not sufficient.


211. Gross misconduct is defined as, conduct of an employee that is:
(i) deliberate and wilful disregard of standards of behavior that an employing unit rightfully expects and that shows gross indifference to the interests of the employing unit; or
(ii) repeated violations of employment rules that prove a regular and wanton disregard of the employee's obligations.

Id. § 8-1002.

212. See Bush v. Becton Dickinson & Co., 2084-BR-94 (finding that claimant's continued lateness after warnings was misconduct even though it was caused by needs of her mentally retarded child). But see Day v. Sinai Hosp., 540 B.R. 85 (finding no misconduct where claimant's bizarre, loud and
misconduct still does not include isolated instances of poor performance or trivial infractions.\textsuperscript{213}

While Maryland created separate categories to correspond with extreme acts of misconduct, other states use a traditional common law definition of misconduct in conjunction with a lesser standard, such as good cause or "significant fault," which carries a lighter penalty.\textsuperscript{214} These state misconduct classifications vary widely in their specificity, with some states leaving both degrees of misconduct statutorily undefined.\textsuperscript{215} Lastly, several additional states, including Illinois, single out specific acts such as commission of a felony or violation of drug-free workplace policies as a separate category of misconduct.\textsuperscript{216}

The primary function served by designating categories of misconduct is that states can assign them different penalties. The most severe level of misconduct is met with durational disqualification and/or a long requalification period. For example, in Maryland, a claimant who commits aggravated misconduct cannot re-qualify for benefits until she has earned at least thirty times the weekly benefit amount in subsequent employment.\textsuperscript{217}

\textsuperscript{213} See Proctor v. Atlas Pontiac, 144 B.R. 87 (holding that one mistake made after only 31 days on the job was not misconduct). See also Forest v. Tys, Inc., 452 B.R. 89 (finding misconduct does not include nondisruptive expression of displeasure with working conditions) (copies of these decisions available at LAFMC).

\textsuperscript{214} See N.C. GEN. STAT. § 96-14 (2002); see also COLO. REV. STAT. § 8-73-108 (2001). While these two states use denial periods to penalize workers under the lesser standard, some states use durational disqualifications for all categories of misconduct but assign a shorter requalification period for lesser acts of misconduct. See KAN. STAT. ANN. § 44-706 (Supp. 2001) (requiring three weeks of reemployment to requalify after a finding of misconduct and eight weeks after a finding of gross misconduct); see also IND. CODE ANN. § 22-4-15-1 (Michie 1997 & Lexis Supp. 2001) (stating that discharge for just cause results in durational disqualification with requalification set at eight weeks; all wage credits are cancelled for a finding of gross misconduct).

\textsuperscript{215} See D.C. CODE § 51-110 (Lexis 2001) (stating that example of misconduct may be found in the regulations of the Unemployment Compensation Board); see also 21 VT. STAT. ANN. § 1344 (2001) (noting that an individual is disqualified if he was discharged for misconduct, without defining misconduct).

\textsuperscript{216} See 820 ILL. COMP. STAT. 405/602 (2000) (stating misconduct includes theft and conviction of a felony); ALA. CODE § 25-4-78 (2000) (stating misconduct includes sabotage, use of illegal drugs, endangering safety of others and refusal to submit to drug testing); GA. CODE ANN. § 34-8-194 (1999) (misconduct includes theft, embezzlement, assault or bodily injury); LA. REV. STAT. § 23:1601 (West 2003) (stating misconduct includes misappropriation of property and damage to reputation of the base employer); MICH. COMP. LAWS § 421.29 (2001) (misconduct includes assault, battery, theft, destruction of property, use of illegal drugs and refusal to submit to drug testing).

\textsuperscript{217} See MD CODE ANN., Lab. & Empl. § 8-1002.1(c)(2) (1999) (describing
Some states, such as New Jersey, also disregard the earnings from a job from which the worker was terminated for gross misconduct when calculating the base-period earnings required for a claimant to re-qualify.\textsuperscript{218} For lesser categories of misconduct, penalties usually take the form of denial periods and range from four to sixteen weeks.\textsuperscript{219} North Carolina even considers aggravating and mitigating factors before assigning any penalty in the range of the denial period provided for by statute.\textsuperscript{220} Returning again to the analogy of comparative negligence, the extreme penalties correspond to situations in which the worker bears almost total responsibility for the separation from employment; the penalties reflect a more balanced allocation of blame.

States that use denial periods to treat acts of misconduct according to severity avoid the arbitrariness seen in Illinois' one-size-fits-all standard, where a worker who assault a co-worker receives the same treatment as a working mother who misses work due to child care problems. Denial periods distribute the risks associated with unemployment more fairly because the worker "pays" by losing benefits only when she is at fault, and may eventually collect benefits when she does not commit an act of gross misconduct. Of course, the ability of denial periods and misconduct classifications to increase recipiency rates could be undercut by courts or legislatures that demand a standard of conduct that is unrealistic in today's labor market. The ability of the disqualification to stabilize employment is contingent upon realistic disqualification standards. Therefore, further research is necessary to ensure that conservative states, such as Illinois, would not simply use denial periods to deprive all unemployment claimants of benefits for the first four to sixteen weeks.

Misconduct gradations are not the hallmark of worker-friendly misconduct jurisprudence. States that combine a traditional misconduct definition and durational disqualification with a lesser category of just cause disqualifications and a denial period may end up disqualifying more workers for more weeks overall. A worker terminated for "shoddy work" faces a ten week denial period in Colorado, while this worker would be immediately eligible in Illinois where "shoddy work" has not been held to rise to


\textsuperscript{219} See Mo. ANN. STAT. § 288.050 (West Supp. 2003) (noting that for states that distinguish among acts of misconduct according to severity, Missouri's denial period represents both the high and the low figure ranging from four to sixteen weeks).

\textsuperscript{220} In North Carolina, a finding of "significant fault" will result in a nine week denial period, in the typical case. However, the Commission can consider aggravating or mitigating circumstances and adjust the penalty in accordance with the 4-13 week range provided in the statute. N.C. GEN. STAT. § 96-14 (2002).
Unemployment Insurance Disqualification

the level of misconduct. Likewise, states that choose not to grade acts of misconduct according to severity do not necessarily disadvantage workers. The State of Washington uses a misconduct definition strikingly similar to Illinois', but requires employers to prove (a) actual detriment to their business operations and (b) worker conduct that is intentional, grossly negligent, or repeated after warnings.

Thus, the remedy for improving the Illinois misconduct disqualification is not necessarily the creation of a new statutory scheme of graduated misconduct definitions, each with its own penalties. Like Washington, Illinois has a misconduct definition that should serve to legitimately balance the three objectives of disqualifications. While a liberal construction of the statute may shift the burden of unemployment away from the worker and onto employers and the state, this is a legitimate public policy choice that is not unprecedented or inconsistent with the declaration of public policy in the Illinois statute. The proper role for the Illinois judiciary is to interpret that statute as written, consistent with current labor conditions. If, under that natural interpretation of the plain language of the statute, unemployment benefits prove too costly, then the legislature can choose to redistribute the costs, either by altering the misconduct definition, changing the penalties, or shifting the funding. Illinois courts should not reallocate these risks by misconstruing the language of the statutory misconduct definition. In a representative democracy, the legislature retains the power to choose among broad policy options for reforming the UI system, and the courts should not interfere with that process by misreading the language of the statute.

VI. CONCLUDING REMARKS

This article is not a critique of current advocacy efforts on behalf of low-wage workers. Rather it seeks to point out some troubling developments in misconduct disqualification jurisprudence and make the case for including the disqualification for misconduct more prominently in the national discussion of ways to modernize the UI system. Clearly, if an unemployed worker cannot even submit an application for unemployment

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222. See WASH. REV. CODE § 50.04.293 (2002) (defining misconduct as "an employee's act or failure to act in willful disregard of his or her employer's interest where the effect of the employee's act or failure to act is to harm the employer's business").
compensation because eligibility rules are complex, archaic, or simply unrealistic, then low recipiency rates will continue to be a major problem. But, antiquated eligibility rules have been on everybody's minds in the last few years.

The General Accounting Office has issued several reports evaluating the overall effectiveness of the UI system as well as its availability for low-wage workers, and the recommendations of these reports focus largely on eligibility issues. Early versions of the federal economic stimulus package enacted in March 2002 would have extended benefits to part-time workers and utilized an alternate base period for determining which workers met monetary eligibility thresholds, so that more part-time, temporary, and low-wage workers would qualify for benefits. Several states have revamped their UI systems in the last few years to include the recommendations of advocates and the General Accounting Office. These states have adopted alternate base periods, and specific provisions for victims of domestic violence and part-time workers. In 1999, the Illinois House of Representatives convened a special committee of the Labor and Commerce Committee to examine problems within the state UI system and propose solutions. The testimony centered predominately on improving eligibility provisions.

Yet disqualifications are receiving relatively little attention in the course of these programmatic reviews. Even though disqualification doctrines appear to suffer from many of the same defects being identified by advocates with eligibility guidelines, they still reflect the paradigm of the 1930's worker (full-time, long-term, with a non-working spouse) and unfairly penalize workers, particularly low-wage workers who do not fit that paradigm.

Disqualification jurisprudence should allow workers benefits when they are compelled to leave a job because of domestic violence or family emergencies as well as when they are fired for "misconduct" because balancing competing responsibilities makes their work performance suffer. For this reason, the misconduct disqualification deserves public attention during this historic time of reevaluation of the unemployment system. In Illinois, the statutory language of the misconduct statute still awaits a modern interpretation and public debate may encourage courts to start getting misconduct cases right.