

**WORKING TOWARDS  
FREEDOM FROM ABUSE:  
RECOGNIZING A “PUBLIC POLICY”  
EXCEPTION TO EMPLOYMENT-AT-WILL  
FOR DOMESTIC VIOLENCE VICTIMS**

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I.

INTRODUCTION:

THE NEED FOR A PUBLIC POLICY EXCEPTION TO  
EMPLOYMENT-AT-WILL FOR DOMESTIC VIOLENCE VICTIMS

*A. Overview of the Problem*

Approximately 1.8 million women each year are assaulted, raped, or stalked by an intimate partner.<sup>1</sup> In 1998, about one million violent crimes, including homicide, rape, sexual assault, assault, and robbery, were committed against current or former spouses, boyfriends, or girlfriends.<sup>2</sup> Sustained work and economic freedom can be a means to freedom from physical abuse. A study conducted in Chicago found that the majority of women “stressed the need for access to and personal control over money and other resources if a woman was to be able to leave an abusive partner.”<sup>3</sup> One survivor described the importance of work to her sense of self and safety:

Work to me is almost like life and death. It is everything. I would be afraid that I wouldn’t have an identity, that I would slip back into a person that didn’t want anything, that life would not have any value. Every day that I come to work, I’m

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1. See PATRICIA TJADEN & NANCY THOENES, NAT’L INST. OF JUSTICE & CTRS. FOR DISEASE CONTROL & PREVENTION, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE 9 (2000).

2. CALLIE MARIE RENNISON & SARAH WELCHANS, U.S. DEP’T OF JUSTICE, INTIMATE PARTNER VIOLENCE 1 (2000).

3. See Susan Lloyd, *Domestic Violence and Women’s Employment*, 3 NW. U. POL’Y RES. 2, (Spring 1998) (interviewing 276 domestic violence victims), <http://www.northwestern.edu/IPR/publications/nupr/nuprv03n1/lloyd.html>.

one day ahead of not being in a domestic violence relationship. . . . I don't ever want to be in a situation where I feel powerless. Being an employee means standing on your own feet, it means power over fear.<sup>4</sup>

But economic independence is difficult to achieve, because the experience of abuse is a direct cause of workplace problems for the vast majority of victims who work.<sup>5</sup> Approximately a quarter to half of domestic violence victims are fired or quit because of the impact of the abuse.<sup>6</sup> This statistic paints a troubling reality: thousands of employees who are suffering from intimate partner abuse, and who may be struggling to leave their violent partners, are at great risk of losing their jobs.

Domestic violence interferes with the work life of victims in numerous ways and frequently jeopardizes employment. A victim may need to take off time to relocate her family, testify against her batterer in a criminal trial, or obtain medical care or a civil restraining order.<sup>7</sup> A batterer and victim may work at the same place, and the victim may feel constantly threatened and harassed;<sup>8</sup> moreover, the employer may decide to favor the perpetrator of violence over the

4. JODY RAPHAEL, SAVING BERNICE: BATTERED WOMEN, WELFARE AND POVERTY 115 (2000) (quoting abuse survivor Bernice Hampton).

5. See, e.g., Richard M. Tolman & Jody Raphael, *A Review of Research on Welfare and Domestic Violence*, 56 J. SOC. ISSUES 655, 664-70 (2000) (describing several studies documenting batterers' interference with abuse victims' attempts to work); WOMEN'S BUREAU, U.S. DEP'T OF LABOR, No. 96-3, DOMESTIC VIOLENCE: A WORKPLACE ISSUE 1 (1996) (finding that 96% of domestic violence victims experience work problems as a result of their abuse or abuser).

6. See U.S. GEN. ACCT. OFFICE, DOMESTIC VIOLENCE: PREVALENCE AND IMPLICATIONS FOR EMPLOYMENT AMONG WELFARE RECIPIENTS 19 (1998) (summarizing three studies that found between a quarter and a half of domestic violence victims lost their jobs for a reason related to domestic violence); WOMEN'S BUREAU, *supra* note 5, at 1 (finding that 30% of victims were fired).

7. Sophia Apessos, a reporter for the Memorial Press Group, was fired after she missed work to obtain a civil protective order. See Verified Compl. and Jury Demand at 7, *Apessos v. Mem'l Press Group*, No. PLCV2001-01474 (Mass. Dist. Ct. Dec. 10, 2001). Ms. Apessos' case is discussed in more detail in Part III.A.

8. Achara Tanatchangsang worked at the same recycling plant as her ex-boyfriend, Christopher Blake. She informed the manager of his threats and violence, and the company put him on leave. Soon thereafter, he came into the plant, talked to some co-workers, and shot Ms. Tanatchangsang. Laura Trujillo, *Family Sues After Workplace Slaying*, SUNDAY OREGONIAN, May 18, 1997, at D3. See also *Violence Against Women in the Workplace: The Extent of the Problem and What Government and Businesses Are Doing About It Before the Senate Comm. on Health, Educ., Labor and Pensions*, 107th Cong. 6 (2002) (statement of Kathy Rodgers, President, NOW Legal Defense and Education Fund) (describing a California employer's failure to respond to an employee's concerns when her abuser transferred to her office in order to harass her at work).

victim.<sup>9</sup> As more domestic violence victims escape from their homes, batterers have increasingly sought their victims at work, one place where they can be located easily.<sup>10</sup> Abusers may harass employees at work, and employers may react by firing, rather than trying to assist, employees.<sup>11</sup> Many victims may choose to stay in abusive relationships instead of looking for outside support because they fear that their employers will respond negatively to their situation.<sup>12</sup> Employees report that employers frequently discriminate against them after finding out that an employee is an abuse victim, and the discrimination may take the form of poor evaluations or, ultimately, termination of employment.<sup>13</sup> Domestic violence victims thus bear the burden of battering in their work lives as well.

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9. Maureen Valdez worked at the same company as her abusive partner. After her partner smashed her car headlights in the company's parking lot and warned a co-employee that he would kill Ms. Valdez if she continued to work at the company, the company fired Ms. Valdez and continued to employ the abuser. See *Valdez v. Truss Components, Inc.*, No. CV98-1310-RE, 1999 U.S. Dist. LEXIS 22957, at \*4 (D. Or. Aug. 19, 1999).

10. See Joseph Pereira, *Employers Confront Domestic Abuse*, WALL ST. J., Mar. 2, 1995, at B1. The story of Francesia La Rose is just one example. After La Rose ended her relationship with Patrick Thomas, he allegedly kidnapped and raped her. She obtained a restraining order against Thomas, requested that her employer move her to a desk "out of sight of the entranceway," and provided a photo of Thomas to the office security guards. Her employer kept her in a visible location, and the office building's security guards failed to look out for Thomas, who walked into the building and killed La Rose. See *id.*; Jean Hellwege, *Claims for Domestic Violence in the Workplace May Be on the Rise*, TRIAL, May 1995, at 94.

11. See *Violence Against Women in the Workplace: The Extent of the Problem and What Government and Businesses Are Doing About It Before the Senate Comm. on Health, Educ., Labor and Pensions*, 107th Cong. 3-4 (2002) (statement of Kathy Evisch, Board Member and Vice President, Women Against Domestic Violence) (testifying that two employers, without looking for help from the police or at other options, dismissed her because of harassment at work).

12. See Abby Ellin, *Domestic Abuse Victims Find Help at Work*, SAN DIEGO UNION-TRIB., Mar. 6, 2000, at C1 (reporting that employees are often afraid to ask for time off to get legal or medical help because they believe that employers will lose respect for them).

13. For example, Philloria Green told a co-worker that she was raped and beaten by her estranged husband at gunpoint. The co-worker informed their employer, who then dismissed Ms. Green. See *Green v. Bryant*, 887 F. Supp. 798, 800 (E.D. Pa. 1995). According to Ms. Green, the employer told her that the discharge had nothing to do with her work performance, but "was based solely upon her being the victim of a violent crime." *Id.* For a detailed discussion of Ms. Green's case, see discussion *infra* Part III.A. See also *Violence Against Women in the Workplace: The Extent of the Problem and What Government and Businesses Are Doing About It Before the Senate Comm. on Health, Educ., Labor and Pensions*, *supra* note 8 (describing how employees in New York and New Jersey were fired after employers discovered that they experienced domestic violence).

This Note explores one possible remedy for domestic violence victims who lose their jobs because of discrimination against those who are battered or because they miss work in order to seek legal assistance.<sup>14</sup> Nearly all state courts now recognize common law wrongful discharge suits brought by employees who allege that their termination violates “public policy.”<sup>15</sup> Employees who are fired for a reason directly stemming from intimate partner abuse should be able to invoke the public policy exception to the employment-at-will rule, because their dismissal violates state policies supporting the rights of domestic violence victims and the public interest in combating abuse. Recognizing a public policy exception in these situations builds on the work done by battered women’s advocates challenging the notion that domestic violence is a “private” concern and addresses the obstacles faced by employees who experience domestic violence.<sup>16</sup>

In the next section, I review existing avenues of relief for employees who face dismissal as a result of domestic violence. For most victims, these remedies are unavailable or inadequate; suits alleging wrongful discharge in contravention of public policy would be the only means to regain employment.

*B. Remedies and Resources Available to Employees Who Experience Domestic Violence*

Employees have limited options when their employment is terminated due to the effects of domestic violence. Domestic violence victims dismissed from their jobs often do not qualify for unemployment insurance and thus may lack the economic means to escape abusive situations.<sup>17</sup> In order to receive unemployment benefits, employees must have left their jobs voluntarily for “good cause” or must not have been discharged for misconduct.<sup>18</sup> Many state agencies and courts have concluded that these requirements are not met when domestic violence victims quit in order to seek safety or when they are fired for missing work in order to obtain assistance, be-

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14. This paper will not deal with situations where domestic violence victims are fired after seeking medical leave for injuries sustained as a result of abuse. These employees should have recourse under the Family Medical Leave Act, *see* 29 U.S.C. §§ 2611–2614 (1994), or state family and medical leave laws.

15. *See infra* note 47.

16. *See infra* note 95.

17. *See* ROBIN R. RUNGE ET AL., UNEMPLOYMENT INSURANCE AND DOMESTIC VIOLENCE: LEARNING FROM OUR EXPERIENCES 9 (2001), *available at* <http://www.dcej.org/pub92.pdf> (last visited Aug. 29, 2002).

18. *See id.* at 6–9.

cause the employer is not at fault.<sup>19</sup> Only eighteen states explicitly provide unemployment insurance, in certain circumstances, to employees who must quit or are fired for reasons related to domestic violence.<sup>20</sup>

Ideally, employees would be able to approach their employers for support without fear of discrimination. Some companies have implemented programs to educate employees about domestic violence and to provide leave and other aid to victims who need to pursue legal action,<sup>21</sup> and Illinois and New York have mandated that domestic violence commissions craft model workplace policies that private employers can voluntarily adopt.<sup>22</sup> A report issued by the American Bar Association Commission on Domestic Violence recommended several steps employers should take to assist their employees and prevent liability, including: training employees about domestic violence issues and safety planning, honoring protective orders in the workplace, and developing time-off policies which allow employees who are victims of domestic violence to miss work for reasons related to their status without fear of losing their

19. See, e.g., *Hall v. Fla. Unemployment Appeals Comm'n*, 697 So. 2d 541, 542-3 (Fla. Dist. Ct. App. 1997) (rejecting a claim for unemployment compensation when the claimant resigned from her position in order to move away from an abusive spouse); *Pagan v. Bd. of Review*, 687 A.2d 328, 329 (N.J. 1997); see also RUNGE, *supra* note 17, at 9-12. But see *Gilbert v. Dep't of Corr.*, 696 So. 2d 416, 417 (Fla. Dist. Ct. App. 1997) (granting benefits to a claimant who was discharged for excessive absenteeism caused by abuse).

20. See CAL. UNEMP. INS. CODE §§ 1030(b)(4), 1032, 1256 (West Supp. 2002); COLO. REV. ST. § 8-73-108(4)(r) (2001); CONN. GEN. STAT. § 31-236(a)(2)(A) (Supp. 2002); DEL. CODE ANN. tit. 19, § 3315(1) (Supp. 2000); ME. REV. STAT. ANN. tit. 26, § 1043(23)(B)(3) (West 2001); MASS. GEN. LAWS ANN. ch. 151A, §§ 1, 14, 25, 30 (West Supp. 2002); MINN. STAT. ANN. § 268.095(1)(8) (West Supp. 2002); MONT. CODE ANN. § 39-51-2111 (2001); NEB. REV. STAT. § 48-628(1)(a) (2001); N.H. REV. STAT. ANN. § 282-A:32(I)(a)(3) (1999); N.J. STAT. ANN. § 43:21-5(j) (West 2002); N.Y. LAB. LAW ANN. § 593(1)(a) (McKinney 2001); N.C. GEN. STAT. ANN. § 96-14(1)(b)(1f) (West Supp. 2002); OR. REV. STAT. § 657.176(12) (2001); R.I. GEN. LAWS § 28-44-17.1 (2001); Act of Mar. 12, 2002, ch. 8, 2002 Wash. Legis. Serv. 24 (West) (to be codified at WASH. REV. CODE §§ 50.20.050, 50.20.100, 50.20.240, 50.29.020); WIS. STAT. § 108.04(7)(s) (2001); WYO. STAT. ANN. § 27-3-311(a)(i)(C) (2001).

21. See Kelly McMurry, *Workplace Violence: Can It Be Prevented?*, TRIAL, Dec. 1995, at 10 (describing policies at Liz Claiborne, Inc. and Polaroid Corp.); see also *Working to End Domestic Violence: American Workplaces Respond to an Epidemic*, Family Violence Prevention Fund, at <http://endabuse.org/newsdesk/papers/workbrief.php3> (last visited Mar. 15, 2002) (outlining model workplace practices).

22. See 20 ILL. COMP. STAT. ANN. 605/605-550 (West Supp. 2002); N.Y. LAB. LAW § 10-b (McKinney 2001); N.Y. EXEC. LAW § 575 (West Supp. 2002).

jobs.<sup>23</sup> Unfortunately, the majority of employers have yet to develop internal policies with regard to domestic violence.<sup>24</sup>

Employees who are discharged for a reason related to domestic violence may have some legal recourse under existing laws. While the House and Senate are currently considering a bill that would extend employment leave and unemployment insurance to domestic violence victims and prohibit discrimination against employees based on his or her status as a victim of abuse,<sup>25</sup> only one governmental body, the City of New York, offers a comprehensive prohibition on discrimination against victims of abuse.<sup>26</sup> No state has yet followed suit. A handful of state legislatures have enacted statutes that provide limited protection for abuse victims when they seek employment leave.<sup>27</sup> Some states and counties protect state and municipal employees from retaliation for taking leave to obtain treatment and legal assistance or to make safety arrangements.<sup>28</sup>

23. See James A. Hardeman, *Employee Assistance Programs*, in *THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE: A LAWYER'S HANDBOOK* 10-1-10-2 (Deborah M. Goelman et al. eds., 1996).

24. See *id.* at 10-1.

25. See Victims' Economic Security and Safety Act of 2001, S. 1249, H.R. 2670, 107th Cong. (2001).

26. See N.Y.C. ADMIN. CODE § 8-107.1 (Supp. 2001) (barring employment discrimination against an individual based on the actual or perceived status of the individual as a victim of domestic violence).

27. See CAL. LAB. CODE ANN. §§ 230, 230.1 (West Supp. 2002) (entitling domestic violence victims who identify themselves as such to their employers to take time from work "to obtain or attempt to obtain any relief, including, but not limited to, a temporary restraining order, restraining order, or other injunctive relief, to help ensure the health, safety, or welfare of a domestic violence victim or his or her child"); COLO. REV. STAT. § 13-14-102(4) (2002) (mandating that employers of fifty or more employees provide up to three days of leave for domestic violence victims who have been employed at least a year); ME. REV. STAT. ANN. tit. 26, § 850 (West Supp. 2001) (requiring an employer to give leave to domestic violence victim in order to prepare for and attend court proceedings and to obtain medical treatment and other necessary services); N.Y. PENAL LAW § 215.14 (McKinney 1999) (barring termination when an employee exercises her legal right to get a restraining order); R.I. GEN. LAWS § 12-28-10 (2000) (prohibiting discharge or discrimination against an employee who is a victim of domestic violence for getting a protective order).

28. FLA. EXEC. ORDER, WORKPLACE VIOLENCE PREVENTION WEEK, APRIL 13-19TH (1997) (providing leave and flexible scheduling); DOMESTIC VIOLENCE AND SEXUAL ASSAULT IN THE PUBLIC WORKPLACE: A KENTUCKY MODEL POLICY (2001) (mandating that the state make reasonable efforts to assist employees who are domestic violence victims); Md. Exec. Order No. 01.01.1998.25 (1998), <http://www.gov.state.md.us/gov/execords/1998/html/9825eo.html> (last visited Aug. 30, 2002) (barring adverse action against state employees because they are victims of domestic abuse); Mass. Exec. Order No. 398 (1997), <http://www.state.ma.us/EOPS/gcdv/398.htm> (last visited Aug. 30, 2002) (providing fifteen paid leave days

These laws cover a limited number of employees; overall, few state and local governments have addressed the employment rights of domestic violence victims.

Employees may have recourse when their testimony is necessary for the criminal prosecution of batterers.<sup>29</sup> Many states protect the jobs of crime victims, as well as the jobs of witnesses, who need to leave work to testify in criminal court.<sup>30</sup> Other states merely encourage employers to allow crime victims to testify or provide notification or intercession services and do not prohibit termination.<sup>31</sup> Because these laws generally require that the employee has received

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and encouraging the allowance of up to six months of unpaid leave); N.H. Exec. Order No. 2000-10 (2000), <http://www.state.nh.us/governor/eo/0010.html> (last visited Aug. 30, 2002) (prohibiting the penalization of abuse victims and requiring reasonable accommodation of work schedules); STATE OF NEW YORK DOMESTIC VIOLENCE POLICY (2000) (barring discrimination against battered employees, mandating flexible use of leave benefits, and requiring that state agencies take proactive measures before penalizing employees whose performance suffers as a result of abuse); Wash. Exec. Order No. 96-05 (1996), <http://www.washington.edu/admin/hr/pol.proc/work.violence/dom.viol.exec.order.html> (last visited Aug. 30, 2002) (ordering state agencies to develop policies that will provide reasonable scheduling and that will bar penalizing or disciplining employees solely because they are domestic violence victims); MIAMI-DADE CITY., FLA. CODE ch. 11A, art. VIII (1999) (providing up to thirty days of unpaid leave each year to domestic violence victims who need to obtain legal counsel or attend court hearings).

29. Approximately 450,000 criminal prosecutions are brought annually against perpetrators of intimate violence. *See* TJADEN & THOENES, *supra* note 1, at 53.

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30. *See, e.g.*, ALA. CODE § 15-23-81 (1995); ALASKA STAT. § 12.61.010-12.61.017 (Michie 2000); ARIZ. REV. STAT. § 13-4439 (West 2001); ARK. CODE ANN. § 16-90-1105 (Michie Supp. 2001); COLO. REV. STAT. § 24-4.1-303(8) (2001); CONN. GEN. STAT. § 54-85b (2001); DEL. CODE ANN. tit. 11, § 9409 (2001); HAW. REV. STAT. § 621-10.5 (2001); 725 ILL. COMP. STAT. ANN. 5/115-18 (West Supp. 2001); IOWA CODE § 915.23 (2001); MD. CODE ANN., CTS. & JUD. PROC. § 9-205 (Supp. 2001); MASS. GEN. LAWS ANN. ch. 268, § 14B (West 2000); MICH. COMP. LAWS §§ 780.762, 780.790, 780.822 (1999); MINN. STAT. § 611A.036 (West Supp. 2002); MISS. CODE ANN. § 99-43-45 (West 1999); MO. REV. STAT. § 595.209.1(14) (2000); MONT. CODE ANN. § 46-24-205(3) (2001); NEV. REV. STAT. § 50.070 (2001); N.Y. PENAL LAW § 215.14 (McKinney 1999); OHIO REV. CODE ANN. § 2930.18 (West Supp. 2002); S.C. CODE ANN. §§ 16-3-1550, 41-1-70 (West Supp. 2001); VT. STAT. ANN. tit. 13, § 5313 (Supp. 1998); VT. STAT. ANN. tit. 21, § 499 (Supp. 1998); VA. CODE ANN. § 18.2-465.1 (Michie Supp. 2002); WIS. STAT. § 103.87 (2000); WYO. STAT. ANN. § 1-40-209 (2001).

31. *See, e.g.*, FLA. STAT. ANN. § 960.001(1)(i) (West 2001); NEB. REV. STAT. § 81-1848(2)(h) (2001); N.M. STAT. ANN. § 31-26-4(J) (Michie 2002); N.C. GEN. STAT. § 15A-825(4) (2001); N.D. CENT. CODE § 12.1-34-04 (1997); OKLA. STAT. tit. 19, § 215.33 (2001); R.I. GEN. LAWS § 12-28-3(a)(7) (2001); TEX. CRIM. PRO. CODE ANN. § 56.02 (2001); UTAH CODE ANN. § 77-37-3(1)(g) (SUPP. 2002); W. VA. CODE § 61-11A-6(a)(8) (2002).

a subpoena, they may not cover domestic violence victims seeking civil protective orders. Thus, these laws afford no protection for the over one million victims of domestic violence who seek orders of protection every year<sup>32</sup> and need to take time off from work to appear in court.

Discharged employees may also be able to bring Title VII claims against an employer.<sup>33</sup> For example, female employees who are domestic violence victims can allege sex discrimination if the leave they take in order to obtain legal or medical assistance is treated differently from leave permitted for male employees. Additionally, an employee can make out a Title VII case if the employer indicated that adverse action was taken because the employee is an abused woman.<sup>34</sup> An employee may also be able to argue that an employer fostered a hostile work environment because harassment by a batterer constituted sexual harassment at the workplace. In *Fuller v. City of Oakland*, the Ninth Circuit ruled that an employer that was aware of an abusive relationship between employees could be held liable for failing to respond to the harassment.<sup>35</sup> *Fuller's* analysis could be extended to situations where the abuser is a non-employee,<sup>36</sup> but courts could decide to limit liability to situations where the abuser and victim are both employees. Only employees who can meet the requirements of Title VII—such as having an employer with at least 15 employees—will be able to invoke Title VII remedies.<sup>37</sup>

If an employee handbook outlines an employer's domestic violence policy or provides for time off work to receive medical or legal assistance, then an employee could bring a breach of contract claim against the employer if she is dismissed for needing to take leave as a result of domestic violence. Almost all states recognize the implied-in-fact contract exception to at-will employment,<sup>38</sup> and

32. See TJADEN & THOENES, *supra* note 1, at 54.

33. See 42 U.S.C. §§ 2000e–e17 (2002).

34. The case of Maureen Valdez illustrates how Title VII can be used to combat employer discrimination against domestic violence victims. Ms. Valdez alleged that her employer fired her on the basis of her gender while retaining her abusive ex-boyfriend. See *Valdez v. Truss Components, Inc.*, No. CV 98-1310-RE, 1999 U.S. Dist. LEXIS 22957, at \*4 (D. Or. Aug. 19, 1999).

35. 47 F.3d 1522, 1529 (9th Cir. 1995).

36. See, e.g., *Equal Employment Opportunity Comm'n v. Sage Realty Corp.*, 507 F. Supp. 599, 609–10 (S.D.N.Y. 1981) (holding that employers can be held liable for the sexual harassment of employees by non-employees).

37. See 42 U.S.C. § 2000e(b) (2002).

38. See Gabriel S. Rosenthal, Note & Comment, *Crafting A New Means of Analysis for Wrongful Discharge Claims Based on Promises in Employee Handbooks*, 71 WASH. L. REV. 1157, 1167 n. 64 (1996).



the success of these claims may turn on the language and distribution of the handbook.<sup>39</sup> As more employers develop official domestic violence policies, more employees may be able to rely on this sort of claim. Yet the vast majority of companies have not formally addressed the problem of domestic violence within their workforce.<sup>40</sup>

For most employees who are fired, the resources and legal remedies discussed above are either nonexistent or inapplicable to their situations. This Note argues that firing employees because they are battered or pursue legal assistance for domestic violence constitutes wrongful discharge in violation of public policy, such as policies protecting domestic violence victims, prohibiting assault and battery, ensuring access to the courts, and barring sex discrimination. To ignore the public interest at stake in these cases perpetuates the history of veiling intimate partner abuse as a personal matter best handled within the home. Part II reviews the employment-at-will doctrine and generally describes the state court approaches to public policy exceptions. Part III applies the law of wrongful discharge in violation of public policy to claims brought by domestic violence victims and identifies specific public policies that support these employees' claims; it also examines the limitations of the approach.

## II.

### THE DEVELOPMENT OF THE LAW OF WRONGFUL DISCHARGE AND THE PUBLIC POLICY EXCEPTION

#### A. *History of the Adoption of the Employment-at-Will Rule and the Creation of Public Policy Exceptions*

All states, except Montana,<sup>41</sup> have codified the employment-at-will doctrine, which holds that either an employer or an employee can end the relationship at any time, unless they enter into a contract that expressly changes the terms of the employment relationship. The employment-at-will rule evolved gradually in the United

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39. See *id.* at 1163–67.

40. See Hardeman, *supra* note 23, at 10-1.

41. Montana is the only state that has expressly rejected the employment-at-will doctrine and codified a comprehensive wrongful discharge law. The Wrongful Discharge from Employment Act of 1987 bars the discharge of employees (1) without “good cause”; (2) in retaliation for refusing to violate public policy or for reporting a violation of public policy; and (3) in violation of the express provisions of an employer’s own written personnel policy. See MONT. CODE ANN. §§ 39-2-901–914 (2001).

States. In colonial times, some employment relationships were terminable at will while others were governed by the English rule of employment periods of a year.<sup>42</sup> In the late 1800s, scholar Horace Gay Wood articulated the employment-at-will doctrine that became authoritative in the United States;<sup>43</sup> the Court of Appeals of New York reflected Wood's approach by finding that a real estate manager's indefinite hiring was not annual and he could be fired at will.<sup>44</sup> In two cases decided in the early 1900s, the United States Supreme Court characterized the employers' ability to terminate at will as a constitutionally protected right.<sup>45</sup> This holding was ultimately overturned in *NLRB v. Jones & Laughlin Steel Corp.*,<sup>46</sup> but the common law rule of at-will employment remains firmly entrenched.

Despite the presumption of at-will employment, most state courts have crafted exceptions allowing for common law causes of action for wrongful discharge when plaintiffs allege that their dismissal violates public policy.<sup>47</sup> A court first articulated the public

42. See Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 122 (1976).

43. Wood declared:

With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. . . . [I]t is an indefinite hiring and is determinable at the will of either party, and in this respect there is no distinction between domestic and other servants.

HORACE GAY WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 (1877). For discussion of the fallacies in Wood's assertion that the employment-at-will doctrine was entrenched in American law, and a historical explanation for the adoption of the doctrine, see Feinman, *supra* note 42, at 126.

44. See *Martin v. New York Life Ins. Co.*, 42 N.E. 416, 417 (N.Y. 1895).

45. See *Coppage v. Kansas*, 236 U.S. 1, 13–14 (1915); *Adair v. United States*, 208 U.S. 161, 172–75 (1908).

46. 301 U.S. 1 (1937).

47. In six states, courts have refused to hear wrongful discharge claims based on public policy violations. See *Hinrichs v. Tranquillaire Hosp.*, 352 So. 2d 1130, 1131–32 (Ala. 1977); *Smith v. Piezo Tech. and Prof'l Admin.*, 427 So. 2d 182, 184 (Fla. 1983); *Goodroe v. Ga. Power Co.*, 251 S.E.2d 51, 52 (Ga. Ct. App. 1978); *Tolliver v. Concordia Waterworks Dist. No.1*, 735 So. 2d 680, 682 (La. Ct. App. 1999); *Murphy v. Am. Home Prods. Corp.*, 448 N.E.2d 86, 89–90 (N.Y. 1983); *Pacheco v. Raytheon Co.*, 623 A.2d 464 (R.I. 1993).

After the Arizona Supreme Court recognized a wrongful discharge cause of action based on public policy, the legislature enacted a law prohibiting the courts from creating causes of action that have not been codified in statute. See ARIZ. REV. STAT. ANN. § 23-1501 (West 2001). The Employment Protection Act of 1996 permits employees to bring wrongful discharge claims only when they fall into one of the prescribed categories, such as firing based on jury service or the exercise of voting rights. It specifically prohibits Arizona courts from creating or changing the enacted causes of action. The Arizona Supreme Court first recognized a public

policy exception to the employment-at-will rule in 1959 in *Petermann v. International Brotherhood of Teamsters*.<sup>48</sup> The California District Court of Appeal upheld the wrongful discharge claim by an employee who alleged that he had been fired after he refused his employer's request to testify falsely before a legislative committee. While it recognized that "[p]ublic policy is a vague expression, and few cases can arise in which its application may not be disputed," the court nonetheless concluded that the public policy exception was justified by the "principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good."<sup>49</sup> The court held that the state's interest in preventing perjury justified a departure from employment-at-will:

To hold that one's continued employment could be made contingent upon his commission of a felonious act at the instance of his employer would be to encourage criminal conduct upon the part of both the employee and employer and would serve to contaminate the honest administration of public affairs. This is patently contrary to the public welfare. The law must encourage and not discourage truthful testimony. The public policy of this state requires that every impediment, however remote to the above objective, must be struck down when encountered.<sup>50</sup>

Thus, the court concluded that the state's policy against perjury could override its endorsement of the employment-at-will rule.

The public policy exception arose at a time of growing concern about the rights of employees. Scholars encouraged courts to recognize a wrongful discharge cause of action because of the employee's lack of protection from employer abuse, discrimination, and coercion.<sup>51</sup> They argued that employees had been fired for

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policy common law cause of action in *Wagenseller v. Scottsdale Memorial Hospital*, 710 P.2d 1025 (Ariz. 1985), which held that an employee could not be terminated for refusing to expose her buttocks, as such an act could have violated indecent exposure laws.

48. *Petermann v. Int'l Bhd. of Teamsters*, 344 P.2d 25, 27 (Cal. Dist. Ct. App. 1959).

49. *Id.* (quoting *Noble v. City of Palo Alto*, 89 Cal. App. 47, 50-51 (Ct. App. 1928)); *Safeway Stores v. Retail Clerks Int'l Ass'n*, 261 P.2d 721, 726 (Cal. 1953)).

50. *Id.*

51. See, e.g., Lawrence E. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1414 (1967); J. Peter Shapiro & James F. Tune, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335 (1974); Comment, *Towards A Property Right in Employment*, 22 BUFF. L. REV. 1081, 1108 (1973).

unjust reasons in a number of cases, pointing to the need for some minimum level of protection for employees.<sup>52</sup> Without a more flexible approach to employment-at-will, an employee had little choice but to be a “docile follower of his employer’s every wish.”<sup>53</sup>

By the 1970s and 1980s, numerous other state courts had chosen to follow *Petermann*’s recognition of public policy exceptions.<sup>54</sup> In *Monge v. Beebe Rubber Co.*, the New Hampshire Supreme Court held that “a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not the best interest of the economic system or the public good and constitutes a breach of the employment contract.”<sup>55</sup> The court addressed the factors that justify eroding employment-at-will: “In all employment contracts, whether at will or for a definite term, the employer’s interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment, and the public’s interest in maintaining a proper balance between the two.”<sup>56</sup> In *Palmateer v. International Harvester Co.*, the Illinois Supreme Court echoed these principles: “[I]t is now recognized that a proper balance must be maintained among the employer’s interest in operating a business efficiently and profitably, the employee’s interest in earning a liveli-

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52. See, e.g., Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 481 (1976) (discussing *Geary v. U.S. Steel Corp.*, 319 A.2d 174 (Pa. 1974)). In *Geary*, an at-will employee who reported the inadequate testing and potential dangers of a new product design was fired. He sued his employer for wrongful discharge, alleging that his termination was contrary to public policy. The Supreme Court of Pennsylvania refused to hear his claim, saying that the suit “beckon[s] us into unchartered territory” and “the law has taken for granted the power of either party to terminate an employment relationship for any or no reason.” 319 A.2d at 175–76. See also Cornelius J. Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 1–2 (1979) (predicting the abolition of employment-at-will because of the need to protect employees from unjust or arbitrary discharges).

53. Blades, *supra* note 51, at 1405.

54. See, e.g., *Nees v. Hock*, 536 P.2d 512, 515–16 (Or. 1975) (finding a cause of action when an employee sued after being dismissed for performing jury service); *Frampton v. Cent. Ind. Gas Co.*, 297 N.E.2d 425, 428 (Ind. 1973) (recognizing a cause of action for retaliatory discharge when an employee claimed that she had been fired for applying for workers’ compensation, describing such a discharge as a “wrongful, unconscionable act”). See generally Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1932 (1983).

55. 316 A.2d 549, 551 (N.H. 1974) (ruling in favor of a married woman who alleged that she was discharged because she refused to date her foreman).

56. *Id.*

hood, and society's interest in seeing its public policies carried out."<sup>57</sup>

In both the *Monge* and *Palmateer* formulations, the courts expanded the range of interests that must be balanced to include the employee's interest in her job. For a domestic violence victim, this interest takes on more than an economic dimension—physical safety and emotional well-being are intricately entwined with the ability to retain employment. The intersections of the public interest, employer interest, and employee interest in the context of domestic violence will be discussed further in Part III. The next section will generally describe the judicial approaches to crafting public policy exceptions.

### *B. State Court Approaches to the Public Policy Exception*

Since the creation of public policy exceptions, state courts have articulated more detailed guidelines for when a departure from employment-at-will is justified. The elements of this cause of action traditionally consists of establishing: 1) the existence of a clear public policy; 2) dismissal of employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy; 3) plaintiff's dismissal was motivated by conduct related to the public policy; and 4) the employer lacked overriding legitimate business justification for the dismissal.<sup>58</sup> The most difficult element for plaintiffs to establish is a clear public policy. The California Supreme Court noted that courts must take seriously the duty to weigh the employment-at-will rule against society's interest:

For at root, the public policy exception rests on the recognition that in a civilized society the rights of each person are necessarily limited by the rights of others and of the public at large; this is the delicate balance which holds such societies together. Accordingly, while an at-will employee may be terminated for no reason, or for an arbitrary or irrational reason, there can be no right to terminate for an unlawful reason or a purpose that contravenes fundamental public policy. Any

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57. 421 N.E.2d 876, 878 (Ill. 1981) (recognizing a cause of action when the plaintiff was fired for informing law enforcement that a co-employee might be involved in criminal activities).

58. See, e.g., *Painter v. Graley*, 639 N.E.2d 51, 57 n.8 (Ohio 1994) (citing Henry H. Perritt, Jr., *The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?*, 58 U. CIN. L. REV. 397, 398–99 (1989)).

other conclusion would sanction lawlessness, which courts by their very nature are bound to oppose.<sup>59</sup>

While this balancing requires courts to scrutinize the particular facts and policies raised in every case, state courts have developed broad rules governing the categories of discharges that can be found to violate public policy and the sources of public policy that will substantiate a wrongful discharge claim.

#### 1. Categories of Discharges that Violate Public Policy

State courts have recognized certain categories of termination as the bases for wrongful discharge suits: 1) discharges for refusing to violate criminal or civil laws; 2) discharges for satisfying legal or civic obligations; 3) discharges for exercising statutory or constitutional rights or privileges; and 4) discharges for "reasons deemed repugnant to public policy."<sup>60</sup> Some state courts have designated only particular categories of discharges as permissible.<sup>61</sup> Others have not limited the categories from which they can carve out exceptions.

The most readily accepted public policy violations involve discharges for refusal to violate the law. Without legal recourse, "[e]mployees faced with the choice of losing their jobs or committing an illegal act for which they might not be caught would feel pressure to break the law simply out of financial necessity."<sup>62</sup> Courts have recognized the public policy exception to at-will employment in the context of employee refusal to violate a variety of

59. *Gantt v. Sentry Ins.*, 824 P.2d 680, 686–87 (Cal. 1992). The court analogized judicial recognition of wrongful discharge claims to the judicial refusal to enforce contracts contrary to the law or the public interest. *See id.* at 687.

60. *See, e.g.,* STUART H. BOMPEY ET AL., *WRONGFUL TERMINATION CLAIMS: A PREVENTIVE APPROACH* 43 (2d. ed. 1991); Note, *supra* note 54, at 1936–37.

61. *See* *McArn v. Allied Bruce-Terminix Co.*, 626 So. 2d 603, 607 (Miss. 1993) (holding that an employee can bring a claim based on a public policy exception only when she was fired for refusing to participate in an illegal act or for reporting an employer's illegal act); *Kofoid v. Woodard Hotels, Inc.*, 716 P.2d 771, 774 (Or. Ct. App. 1986) (holding that an employee who was discharged as part of a plan to eliminate women from the staff cannot assert a public policy exception because she was not terminated for fulfilling a societal obligation or for pursuing important statutory rights); *Peterson v. Glory House of Sioux Falls*, 443 N.W.2d 653, 655 (S.D. 1989) (holding that the public policy exception can only be asserted when an employee is discharged for refusing to commit an illegal act or is whistleblowing); *Winters v. Houston Chron. Publ'g Co.*, 795 S.W.2d 723, 724 (Tex. 1990) (declining to recognize an exception for employees discharged for reporting illegal activities).

62. *McClanahan v. Remington Freight Lines, Inc.*, 517 N.E.2d 390, 393 (Ind. 1988).

laws,<sup>63</sup> including refusals to commit perjury<sup>64</sup> and to engage in price fixing<sup>65</sup> and for insisting on compliance with state food, drug, and cosmetic regulations.<sup>66</sup> Domestic violence victims are unable to draw on this category, since a domestic violence-related dismissal most likely will not result from their refusal to break the law on behalf of their employers.

Courts have recognized public policy exceptions for discharges based on the performance of civic or legal duties, such as serving jury duty<sup>67</sup> or honoring a subpoena.<sup>68</sup> The New Hampshire Supreme Court allowed a plaintiff to recover when he was fired after refusing to require other employees to travel at night to the bank with a large amount of money.<sup>69</sup> Courts have also recognized wrongful discharge claims when employees refused to violate a professional code of ethics.<sup>70</sup> Firing domestic violence victims who went to testify in court under subpoena or as otherwise compelled by law would fall into this category.<sup>71</sup>

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63. *See, e.g.,* Woodson v. AMF Leisureland Ctrs., Inc., 842 F.2d 699 (3d Cir. 1988) (finding for employee who refused to serve alcohol to someone who was drunk); Shaw v. Russell Trucking Co., 542 F. Supp. 776 (W.D. Pa. 1982) (ruling in favor of an employee who refused to drive a truck load over the weight permitted by state law); Martin Marietta Corp. v. Lorenz, 823 P.2d 100 (Colo. 1992) (finding for employee who refused to fraudulently attest to the quality of materials used by employer); Coman v. Thomas Mfg. Co., 381 S.E.2d 445 (N.C. 1989) (holding an exception exists for employee who would not falsify records and drive excessive hours in violation of federal regulations).

64. *Petermann v. Int'l Bhd. of Teamsters*, 344 P.2d 25, 27 (Cal. Dist. App. Ct. 1959).

65. *See Tameny v. Atl. Richfield Co.*, 610 P.2d 1330 (Cal. 1980).

66. *See Garibaldi v. Lucky Food Stores*, 726 F.2d 1367 (9th Cir. 1984) (finding that discharge for reporting shipment of adulterated milk violates California public policy); *Sheets v. Teddy's Frosted Foods, Inc.*, 427 A.2d 385 (Conn. 1980).

67. *See Nees v. Hocks*, 536 P.2d 512, 515-16 (Or. 1975); *Reuther v. Fowler & Williams, Inc.*, 386 A.2d 119, 120 (Pa. Super. Ct. 1978).

68. *See Ludwick v. This Minute of Carolina, Inc.*, 337 S.E.2d 213, 216 (S.C. 1985).

69. *See Cloutier v. Great Atl. & Pac. Tea Co.*, 436 A.2d 1140, 1145 (N.H. 1981) (invoking the Occupational Safety and Health Act).

70. *See, e.g., Gen. Dynamics Corp. v. Superior Ct.*, 876 P.2d 487, 501-505 (Cal. 1994) (holding that in-house counsel can bring wrongful discharge claim when fired for taking action required by professional ethical rules); *Mariani v. Rocky Mountain Hosp.*, 902 P.2d 429, 433 (Colo. Ct. App. 1994) (recognizing an accountant's claim when she was fired for refusing to violate the professional rules of accounting).

71. For example, some states require those who obtain temporary protective orders on a weekend to appear in court the next business day to file a formal complaint. *See, e.g.,* MASS. GEN. LAWS ANN. ch. 209A, § 5 (West 2001).

Courts have accepted plaintiffs' arguments for a public policy exception based on the exercise of constitutional and statutory rights in a number of contexts. The earliest cases establishing an exception to employment-at-will on these grounds arose when employers fired employees who had applied for workers' compensation.<sup>72</sup> Courts have also allowed claims to proceed based on the right to refuse polygraph exams,<sup>73</sup> the right to participate in a union,<sup>74</sup> and the first amendment right to choose not to participate in lobbying efforts.<sup>75</sup> Domestic violence victims have been discharged because they exercised a number of constitutional and statutory rights, including the right to obtain an order of protection in family court, the right to work free from sex discrimination, and the right to workplace safety.

Courts have also found exceptions to employment-at-will based on public policy that do not fall within any of the three categories listed above, and can be generally described as discharges for reasons repugnant to public policy. For example, the New Hampshire Supreme Court upheld the wrongful discharge claim of an employee who was fired because his supervisor desired "revenge" for the employee's refusal to lie to the company's president.<sup>76</sup> The Oregon Supreme Court ruled that refusing to sign a false letter supported the public policy of the state.<sup>77</sup> The Arizona Supreme Court concluded that an employee who would not expose her buttocks had a meritorious claim, even though the exposure was only arguably covered by the law against indecent exposure.<sup>78</sup> Given the

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72. See *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353 (Ill. 1978); *Frampton v. Cent. Ind. Gas Co.*, 297 N.E.2d 425, 427–28 (Ind. 1973); *Sventko v. Kroger Co.*, 245 N.W.2d 151 (Mich. Ct. App. 1976). But some courts have ruled that these types of suits can succeed only when a statute explicitly contemplates wrongful discharge claims. See, e.g., *Green v. Amerada-Hess Corp.*, 612 F.2d 212 (5th Cir. 1980).

73. See, e.g., *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363, 1365 (3d Cir. 1979); *Heller v. Dover Warehouse Mkt., Inc.*, 515 A.2d 178, 180–81 (Del. Super. Ct. 1986); *Ambroz v. Cornhusker Square Ltd.*, 416 N.W.2d 510 (Neb. 1987); *Cordle v. Gen. Hugh Mercer Corp.*, 325 S.E.2d 111 (W. Va. 1984). But see *Larsen v. Motor Supply Co.*, 573 P.2d 907 (Ariz. Ct. App. 1977); *Ballaron v. Equitable Shipyards, Inc.*, 521 So. 2d 481 (La. Ct. App. 1988).

74. See, e.g., *Stepanischen v. Merchants Despatch Transp. Corp.*, 722 F.2d 922, 927–29 (1st Cir. 1983); *Glenn v. Clearman's Golden Cock Inn, Inc.*, 13 Cal. Rptr. 769, 770–2 (Ct. App. 1961). But see *Anco Constr. Co. v. Freeman*, 693 P.2d 1183, 1186 (Kan. 1985).

75. See *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894 (3d Cir. 1983).

76. See *Cilley v. N.H. Ball Bearings, Inc.*, 514 A.2d 818, 821 (N.H. 1986).

77. See *Delaney v. Taco Time Int'l, Inc.*, 681 P.2d 114, 118 (Or. 1984).

78. See *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 1035–36 (Ariz. 1985).



state's strong interest in combating domestic violence, firing employees because of their status as abuse victims is certainly repugnant to public policy. For this last category of dismissal, the sources of public policy referred to by the courts become especially important because they define the scope of what qualifies as repugnant to public policy.

## 2. Sources of Public Policy

State courts have varied in their acceptance of different types of sources of public policy. They most readily depart from the employment-at-will doctrine when the legislature has already set out the public policy to be enforced. Thus, a number of courts have limited the sources from which public policy can be derived. Some courts have only recognized policies embodied as prohibitions in the constitution or state law.<sup>79</sup> Other courts have ruled that the policy must provide "specific guidance to a reasonable person," since an employer should not be liable where the standard is too general or vague.<sup>80</sup> In the states that have narrowed the sources of public policy, domestic violence victims may have a more difficult time bringing claims if the accepted public policies are so circumscribed that they do not cover the facts of their case.

On the other end of the spectrum, some courts draw from a broad range of policy sources. The New Hampshire Supreme Court has not required that the policies be codified as statute, and has declined mandating a "strong and clear public policy."<sup>81</sup> Indeed, the court ruled that the existence of a public policy limiting the employer's right to terminate is a jury question.<sup>82</sup> The Ohio Supreme Court ruled that the existence of a clear public policy sufficient to support a wrongful discharge claim may be found in sources such as the federal and state constitutions, statutes, administrative rules and regulations, and common law.<sup>83</sup> And the Vermont Supreme Court ruled that a discharge based solely on age is

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79. See, e.g., *Gantt v. Sentry Ins. Co.*, 824 P.2d 680, 687–88 (Cal. 1992), *rev'd on other grounds*, *Green v. Ralee Eng'g Co.*, 960 P.2d 1046 (Cal. 1998); *Blair v. Physicians Mut. Ins. Co.*, 496 N.W.2d 483, 487 (Neb. 1993).

80. *Birthisel v. Tri-Cities Health Servs. Corp.*, 424 S.E.2d 606, 612 (W. Va. 1992).

81. *Cloutier v. Great Atl. & Pac. Tea Co.*, 436 A.2d 1140, 1144 (N.H. 1981).

82. See *Cilley v. N.H. Ball Bearings*, 514 A.2d 818, 821 (N.H. 1986).

83. See, e.g., *Painter v. Grale*, 639 N.E.2d 51, 56 (Ohio 1994). Plaintiffs who rely on state constitutional provisions as a source of public policy may not need to show state action, even when they are barred by the state action requirement from bringing a direct constitutional claim. See *Luedtke v. Nabors Ala. Drilling, Inc.*, 768 P.2d 1123, 1132–33 (Alaska 1989).

contrary to society's concern for equity and justice and therefore contravenes the state's clear and compelling public policy, even though the state had not yet included age in its anti-discrimination statute.<sup>84</sup> In states that rely on public policies articulated by a wide range of sources, domestic violence victims may point to state efforts to combat domestic violence to buttress their claims.

As the discussion above suggests, courts have great discretion in deciding whether an asserted public policy is sufficient to justify a wrongful discharge claim. In Part III, this Note argues that domestic violence victims can draw on state law precedent on the public policy exception and existing constitutional and statutory provisions to assert their own employment rights. Part III also describes some of the limitations of wrongful discharge claims for domestic violence victims.

### III.

#### APPLYING THE LAW OF WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY TO RECOGNIZE CLAIMS BROUGHT BY DOMESTIC VIOLENCE VICTIMS

##### A. *The Public Versus Private Distinction in Wrongful Discharge Law and the Discourse of Domestic Violence*

For most courts presented with public policy exception claims, the focal inquiry is whether the employee's claim protects the interests of the community. The *Monge* and *Palmateer* courts weighed the employer's interest in the dismissal against the public's and employee's interest in continued employment, with the employee's asserted interest implicating the public good.<sup>85</sup> As one court described the typical balancing test, "[T]he policy in question must involve a matter that affects society at large rather than a purely personal or proprietary interest of the plaintiff or employer."<sup>86</sup> Once a court has characterized a dispute as a private one, it then refuses to accept a public policy claim. When courts conclude that the public policy invoked by the employee is outweighed by a larger public interest on the side of the employer, they generally find no cause of action.<sup>87</sup>

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84. *Payne v. Rozendaal*, 520 A.2d 586, 588–89 (Vt. 1986).

85. See discussion *supra* Part II.A.

86. *Gantt v. Sentry Ins.*, 824 P.2d 680, 684 (Cal. 1992).

87. See, e.g., *Hennessey v. Coastal Eagle Point Oil Co.*, 609 A.2d 11, 21 (N.J. 1992) (finding that a "public interest in ensuring that workers in safety-sensitive positions are drug-free" may outweigh individual right to privacy, depending on the nature of the employee's job).

The inquiry into what constitutes a public interest is especially difficult because the state is “inextricably involved” in employment contracts,<sup>88</sup> whether by enforcing contractual terms, monitoring for discrimination or other unlawful conduct, or dictating the permissible range of contractual provisions. Some courts have described the public policy exception as a means to protect broadly defined interests, such as “policy underlying existing laws designed to protect property rights, personal freedoms, health, safety, or the welfare of the people in general.”<sup>89</sup> Others have attempted to restrict the range of permissible interests: “[W]e will construe public policies narrowly and will generally utilize those based on prior legislative pronouncements or judicial decisions, applying only those principles which are so substantial and fundamental that there can be virtually no question as to their importance for promotion of the public good.”<sup>90</sup> Indeed, state courts have taken contradictory positions on whether an asserted public interest allows for a common law cause of action.<sup>91</sup> For example, state courts have ruled in conflicting ways on whether state public policy supports departures from employment-at-will when an employee is discharged for complaining about a deduction of wages,<sup>92</sup> protesting the employer’s

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88. MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 103 (1987).

89. *Miller v. SEVAMP Inc.*, 362 S.E.2d 915, 918 (Va. 1987) (rejecting claim brought by an employee who was discharged for exercising a right provided in a personnel manual).

90. *Berube v. Fashion Ctr., Ltd.*, 771 P.2d 1033, 1043 (Utah 1989).

91. Much academic criticism has attacked the perceived lack of principled judicial line-drawing. As one scholar has noted:

All dismissals without “just cause,” no matter how “private” their motivation, undermine the community’s interest in economic productivity, stable employment, and fairness in the workplace.

Courts that have tried to define “public” and “private” as discrete realms of judicial concern have been unable to provide a reasoned elaboration of the distinction. The basis on which the courts separate public from private appears to be an ad hoc judgment uninformed by detailed examination of the merits of drawing the line in one place rather than another. As a result, the cases have yielded an unpredictable and sometimes counterintuitive pattern of holdings.

Note, *supra* note 54, at 1948–49.

92. Compare *Phillips v. Gemini Moving Specialists*, 74 Cal. Rptr. 2d 29, 34 (Cal. Ct. App. 1998) (finding that prompt payment of wages is a fundamental public policy, and employer may not use its right of setoff to bypass the general bar against attachment of wages), with *Abrams v. Echlin Corp.*, 528 N.E.2d 429, 431, 435 (Ill. App. Ct. 1988) (rejecting wrongful discharge claim based on dispute over owed commissions).

drug testing policy,<sup>93</sup> and applying for unemployment insurance.<sup>94</sup> These outcomes illustrate the flexibility of the doctrine and the importance of careful examination and balancing of the interests involved.

For employees who are domestic violence victims, the public-private dichotomy that determines the availability of a judicial remedy has particularly profound implications. Advocates for domestic violence victims have long challenged the notion that battering is a private problem, created and best handled within the sphere of the family.<sup>95</sup> As a result of the state's (selective) refusal to recognize society's interest in the arena of family relations, "the woman is relegated to self-help, while the man who beats her receives the law's tacit encouragement and support."<sup>96</sup> Until the late 1800s, laws allowed men to chastise their wives physically without fear of prosecution.<sup>97</sup> Marital rape was not considered a crime.<sup>98</sup> Police and

93. The Alaska Supreme Court recognized that a discharge following a positive result on an employer's drug test was contrary to the state's public policy protecting an employee's right to withhold certain private information from his employer when the test was done without employees' knowledge. *Compare* Luedtke v. Nabors Alaska Drilling Inc., 768 P.2d 1123, 1131-32 (Alaska 1989) (balancing the policy supporting employee privacy against the policy in favor of health and safety), *with* Folmsbee v. Tech Tool Grinding & Supply, Inc., 630 N.E.2d 586, 590 (Mass. 1994) (finding no public policy exception based on privacy rights guaranteed by state and federal constitutional and statutory law when employee refuses to take a drug test).

94. *Compare* White v. Ultramar Inc., 73 Cal. Rptr. 2d 262 (Ct. App. 1998), *aff'd*, 981 P.2d 944 (Cal. 1999) (terminating an employee for testifying at a former employee's unemployment compensation hearing contravenes the public policy in favor of unemployment insurance benefits), *with* Lawson v. Haven Hubbard Homes Inc., 551 N.E.2d 855, 860 (Ind. Ct. App. 1990) (terminating an employee after she applies for unemployment benefits does not violate public policy, because the employee could still receive unemployment benefits as provided by statute).

95. See ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 91-97 (2000). Indeed, "[t]he dichotomy between the private and the public is central to almost two centuries of feminist writing and political struggle; it is, ultimately what the feminist movement is about." Carol Pateman, *Feminist Critiques of the Public/Private Dichotomy*, in PUBLIC AND PRIVATE IN SOCIAL LIFE 281 (S. I. Benn & G. F. Gaus eds., 1983). For an analysis of the feminist critiques of the public/private rubric, including in the area of domestic violence, see Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1 (1992).

96. See SCHNEIDER, *supra* note 95, at 89.

97. Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 40-41 (1994). Blackstone argued that a husband must have the right to chastise his wife since he could be liable for crimes the wife committed:

The husband also, by the old law, might give his wife moderate correction. For, as he is to answer for her misbehavior, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in

district attorneys have systematically under-enforced laws criminalizing acts of domestic violence.<sup>99</sup> Certain attitudes lay behind the refusal to criminally punish violent acts against one's intimate partner: 1) domestic disputes are private matters and thus domestic violence is not truly criminal;<sup>100</sup> 2) victims of domestic violence have consented or contributed to the abuse;<sup>101</sup> and 3) domestic violence is not as serious a crime as crimes committed outside the domestic sphere.<sup>102</sup>

Feminist scholars have argued that the failure to address domestic violence in the public sphere contributes to re-victimization perpetrated by society as a whole.

When clerks in a local court harass a woman who applies for a restraining order against the violence in her home, they are part of the violence. Society is organized to permit violence in the home; it is organized through images in mass media and through broadly based social attitudes that condone violence. Increased unemployment correlates with increased family violence. Society permits such violence to go unchallenged through the isolation of families and the failures of police to respond. Public, rather than private, patterns of conduct and

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the same moderation that a man is allowed to correct his apprentices or children . . . .

1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*444. By the late 19th century, "wife whipping" had been abolished in many states. See, e.g., *Fulgham v. State*, 46 Ala. 143 (1871).

98. For a discussion of the history and current status of marital rape laws, see Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373 (2000).

99. See LAWRENCE W. SHERMAN, POLICING DOMESTIC VIOLENCE: EXPERIMENTS AND DILEMMAS 26-27 (1992).

100. See Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2158 (1995) (noting that the tendency to view domestic violence as a private matter is derived from the belief that a man could discipline his wife without interference from the state); Malinda L. Seymore, *Isn't It a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence*, 90 NW. U. L. REV. 1032, 1036 (1996).

101. See Natalie Loder Clark, *Crime Begins at Home: Let's Stop Punishing Victims and Perpetuating Violence*, 28 WM. & MARY L. REV. 263, 288 (1987) (observing that "[w]hat will often appear as consent in this area actually is a form of forgiveness or acceptance. . . . Failure to move out of the home and get a divorce, however, cannot reasonably be said to equal consent to abuse."); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1876 (1996) (noting that defendants in domestic violence cases sometimes assert that violence resulted from the victim "liking it rough").

102. See Clark, *supra* note 101, at 279 (noting that "many people view so-called simple assaults as minor crimes, sometimes even if committed repeatedly, as long as the perpetrator was legally present in the victim's home").

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morals are implicated. Some police officers refuse to respond to domestic violence; some officers themselves abuse their spouses. . . . Some clerks and judges think domestic violence does not belong in court. These failures to respond to domestic violence are public, not private, actions.<sup>103</sup>

In the last few decades, legal reform has succeeded in shifting the border between public and private in the context of domestic violence. Domestic violence victims can now obtain restraining orders, violation of which carries criminal penalties. Courts have ruled that police officers may be liable for money damages when they fail to enforce orders of protection or to make arrests for domestic violence offenses.<sup>104</sup> The enactment of mandatory arrest and no-drop prosecution policies further reflects the growing consensus that law enforcement should treat domestic violence as a serious crime, worthy of public concern.<sup>105</sup>

103. Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1671–72 (1990).

104. See, e.g., *Coffman v. Wilson Police Dep't*, 739 F. Supp. 257, 265 (E.D. Pa. 1990) (finding that a court-issued order of protection creates a special relationship between the police and complaining witness that creates a right to reasonable police response); *Berliner v. Thompson*, 578 N.Y.S.2d 687, 688–90 (App. Div. 1992) (concluding that police's failure to personally serve an order of protection on decedent's husband and failure to respond adequately to pleas for assistance from decedent's mother-in-law creates a special relationship with police); *Nearing v. Weaver*, 670 P.2d 137, 140–42 (Or. 1983) (permitting suit for common law negligence and for failure to comply with the mandatory arrest statute when defendant police officers did not arrest plaintiff's husband after he violated an order of protection).

In *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 202–03 (1989), the Supreme Court held that the Due Process Clause does not impose an affirmative duty to protect on the state. *DeShaney* has led many lower courts to reject § 1983 claims brought by domestic violence victims against the state alleging failure to protect them from battering. See, e.g., *Hynson v. City of Chester*, 731 F. Supp. 1236, 1239–40 (E.D. Pa. 1990); *Dudosh v. City of Allentown*, 722 F. Supp. 1233, 1235 (E.D. Pa. 1989). However, *DeShaney* also recognized that law enforcement may have an affirmative duty of care when the state limited the individual's freedom to act to ensure her own safety, or when the state rendered the victim more vulnerable to danger. See *DeShaney*, 489 U.S. at 200–01. Lower courts have used the state-created danger analysis in adjudicating claims against police officers. See, e.g., *Kneipp v. Tedder*, 95 F.3d 1199, 1208–11 (3d Cir. 1996); *Uhlrig v. Harder*, 64 F.3d 567, 572 (10th Cir. 1995); *Reed v. Gardner*, 986 F.2d 1122, 1125 (7th Cir. 1993); *Dwares v. City of New York*, 985 F.2d 94, 99 (2d Cir. 1993); *Freeman v. Ferguson*, 911 F.2d 52, 54–55 (8th Cir. 1990).

105. I do not mean to suggest that mandatory arrest and no-drop prosecution policies have not proven to be problematic; these reforms to some degree have stripped victims of the power to make decisions about police involvement and prosecution and thus may not serve their needs. See Alisa Smith, *It's My Decision, Isn't It?: A Research Note on Battered Women's Perceptions of Mandatory Intervention Laws*,

To date, only one court has issued a reported opinion dealing with the wrongful discharge claim of a domestic violence victim. In *Green v. Bryant*, the judge rejected the plaintiff's claim that her employer terminated her in violation of public policy.<sup>106</sup> The plaintiff alleged that after her employer discovered that she had been raped and beaten by her estranged husband, the employer fired her "based solely upon her being the victim of a violent crime."<sup>107</sup> The court held that the two public policies asserted by Ms. Green did not protect her from discharge. First, it ruled that the public policy in favor of privacy did not offer her any relief, since she made no allegation that the defendant initiated the conversation or required disclosure of the information.<sup>108</sup> Secondly, the victim's rights statutes relied upon by the plaintiff might allow her to recover economic losses from her husband or the Crime Victim's Compensation Board, but do "not create employment rights or privileges."<sup>109</sup> The opinion ultimately concluded that Ms. Green's dismissal did not implicate any public interest.

The *Green* court failed to evaluate the asserted public policies in light of the evolution in the perception and treatment of domestic violence issues. To characterize the domestic violence victim's interest in maintaining employment as essentially a private interest ignores years of activism exposing the prevalence, severity, and impact of domestic violence. Research on the dynamics of domestic violence has shown that employment is crucial to escape from abuse.<sup>110</sup> Furthermore, the reaction of employers to domestic violence victims impacts whether other employees decide to take safety

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6 VIOLENCE AGAINST WOMEN 1384 (2000) (finding that a significant number of domestic violence victims do not think mandatory intervention laws will benefit them and that they are less likely to report future violence). Furthermore, perpetrators of abuse have frequently brought charges under the new laws to harass and control their partners. See, e.g., Margaret E. Martin, *Double Your Trouble: Dual Arrest in Family Violence*, 12 J. FAM. VIOLENCE 139, 150 (1997); see also Jan Hoffman, *When Men Hit Women*, N.Y. TIMES MAG., Feb. 16, 1992, at 26 (noting that mandatory arrest policies have led to the arrest of both spouses in 14% of cases in Connecticut); Leef Smith, *Increasingly, Abuse Shows Female Side: More Women Accused of Domestic Violence*, WASH. POST, Nov. 18, 1996, at B1. Notwithstanding the serious criticisms of mandatory arrest and no-drop prosecution laws, these laws clearly reflect the legislative judgment that society must assert its interest in combating domestic violence.

106. *Green v. Bryant*, 887 F. Supp. 798 (E.D. Pa. 1995).

107. *Id.* at 800.

108. See *id.* at 801.

109. *Id.*

110. See Lloyd, *supra* note 3.

measures to stop their own abuse.<sup>111</sup> The employer's decision to terminate thus has widespread effects—it may end any opportunity for the fired employee to escape abuse and also may influence the choice of third parties to pursue their own safety.<sup>112</sup> Given the legislative policies that have developed to address domestic violence as a societal issue, courts should not regress to the tradition of veiling domestic violence as a private concern.

While *Green* foreclosed a cause of action on the facts presented, the opinion suggested that other employees could successfully bring wrongful discharge claims. The court noted that “[i]t might be a different case, and a closer question as to the public policy exception, if plaintiff alleged that she was discharged because she had applied for victim compensation or had sought a protective order.”<sup>113</sup> Thus, *Green* explicitly recognized that a domestic violence victim may have some relief under the public policy exception if she “exercised a right or privilege granted by the law.”<sup>114</sup>

More recently, a court denied a motion to dismiss a wrongful discharge claim brought by a domestic violence victim in an unpublished opinion.<sup>115</sup> According to the complaint, the plaintiff was attacked by her husband and obtained a temporary abuse prevention order.<sup>116</sup> She took off one day of work in order to obtain an extension on the protective order, to appear at the arraignment, and to have the police take pictures of her injured face. When she returned to work, she was fired. The court identified three public policies underlying her suit: access to the courts, availability of orders of protection for domestic violence victims, and citizen cooperation with the police. The court also noted that the “public policy interests here are primal, not complex: the protection of a victim from physical and emotional violence; and the protection of a victim's livelihood.”<sup>117</sup>

Part III.B. expands on *Apessos* and the dicta in *Green* and identifies public policies that could support wrongful discharge claims

111. See Ellin, *supra* note 12 (reporting that victims stay in violent relationships because they fear revealing the abuse to their employers).

112. One scholar has advocated use of a third-party effects analysis to determine whether an asserted policy gives rise to a wrongful discharge claim. See Stewart J. Schwab, *Wrongful Discharge Law and the Search for Third-Party Effects*, 74 TEX. L. REV. 1943 (1996).

113. *Green*, 887 F. Supp. at 801.

114. *Id.*

115. *Apessos v. Mem'l Press Group*, No. 01-1474-A, 2002 Mass. Super. LEXIS 404, at \*1 (Mass. Super. Ct. Sept. 30, 2002).

116. *Id.*

117. *Id.* at \*9.



brought by employees fired because of their status as domestic violence victims or for taking proactive measures to attain freedom from abuse. Employees who are domestic violence victims could invoke several of the general categories of impermissible discharges: discharges when an employee exercises her legal rights, discharges when an employee fulfills a civic duty, and discharges for reasons deemed repugnant to public policy. They could argue that the public interest is advanced when they are allowed to work free from discrimination based on their experience of abuse and free from fear of discharge when they pursue civil protective orders as guaranteed by statute. Furthermore, the state's interest in combating and exposing domestic violence is furthered when these employees go to court and report the violence they have experienced.

*B. Public Policies that Could Be Invoked by Employees Who Are Domestic Violence Victims*

The basic inquiry for courts faced with a public policy-based claim is whether the public good is sufficiently implicated by the employee's interest in continued employment. Is there a public policy that justifies protection of an employee's job? This is a different question from whether the employer may have a legitimate business-driven reason for dismissing a domestic violence victim. Some employees are simply unable to perform their duties at work because of the domestic violence in their lives.<sup>118</sup> They may need to take off significantly more time than other employees in order to seek assistance. Courts and juries might ultimately conclude that the dismissal of a particular employee does not jeopardize the asserted public policy or that it was not motivated by conduct related to the public policy, but these fact-intensive inquiries are separate from the initial determination about whether public policies exist that support the plaintiff's cause of action.

A number of public policies could form the basis for a wrongful discharge claim brought by a domestic violence victim, including: 1) statutes protecting the employment rights of domestic violence victims; 2) statutes and other policies protecting domestic violence victims; 3) crime victim and witness protection statutes; 4)

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118. Jody Raphael, a leading policy analyst on domestic violence issues, recounts her personal experience with firing an employee who had suffered from abuse. After a serious car accident, the employee suffered from posttraumatic stress disorder and experienced flashbacks to her years of domestic violence. Raphael eventually dismissed the employee with a severance package because she was unable to perform any aspect of her position. See RAPHAEL, *supra* note 4, at 130.

statutes and policies supporting the right to physical safety; 5) policies guaranteeing individuals' right to go to court; and 6) federal and state anti-discrimination statutes. The applicability of these public policies to individual cases turns on the circumstances of the dismissal and whether the public policies are derived from sources of policy that are accepted by the state's courts.

1. State Statutes and Policies Protecting the Employment Rights  
of Domestic Violence Victims

While only New York City has passed a comprehensive ban on employment discrimination against domestic violence victims,<sup>119</sup> several state enactments provide employment leave for victims of violence.<sup>120</sup> Employees may bring a statutory wrongful discharge claim directly under the law when the statute authorizes such a suit.<sup>121</sup> But when the statute or ordinance does not explicitly authorize a cause of action for the employee, the employee can instead rely upon these legislative pronouncements as public policy supporting a common law wrongful discharge action.

For example, Maine's Employment Leave for Victims of Violence Act, which guarantees reasonable and necessary leave to pursue legal, medical, and other assistance, provides that the Department of Labor may assess civil penalties against the employer of up to \$200 for each violation of the law; it does not mention any relief for the employee.<sup>122</sup> Employees who are fired for taking leave under Maine's law would have a strong argument that their dismis-

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119. See N.Y.C. Admin. Code § 8-107.1 (2001) (barring employment discrimination against an individual based on the actual or perceived status of the individual as a victim of domestic violence).

120. See CAL. LAB. CODE ANN. §§ 230, 230.1 (West Supp. 2002) (entitling domestic violence victims who identify themselves as such to their employers to take time from work "to obtain or attempt to obtain any relief, including, but not limited to, a temporary restraining order, restraining order, or other injunctive relief, to help ensure the health, safety, or welfare of a domestic violence victim or his or her child"); COLO. REV. STAT. § 13-14-102(4) (2002) (mandating that employers of 50 or more employees provide up to three days of leave for domestic violence victims who have been employed at least a year); ME. REV. STAT. ANN. tit. 26, § 850 (West Supp. 2001) (requiring an employer to give leave to domestic violence victims in order to prepare for and attend court proceedings, and obtain medical treatment and other necessary services); N.Y. PENAL LAW § 215.14 (McKinney 1999) (barring termination when an employee exercises her legal right to get a restraining order); R.I. GEN. LAWS § 12-28-10 (2001) (prohibiting discharge or discrimination against an employee who is a victim of domestic violence for getting a protective order).

121. See CAL. LAB. CODE ANN. § 230.1(c)-(d) (West Supp. 2002); R.I. GEN. LAWS § 12-28-10 (2000).

122. See ME. REV. STAT. ANN. tit. 26, § 850(3) (West Supp. 2001).

sal violated a clearly articulated public policy. This law plainly exemplifies the state's public policy supporting the employment rights of domestic violence victims. While laws mandating employment rights for domestic violence victims serve as a particularly strong statement of public policy, most domestic violence victims will need to point to other public policies because few governments have enacted these laws.

## 2. Statutes Protecting Domestic Violence Victims

All fifty states, plus the District of Columbia, have recognized the need to address domestic violence as a societal problem and specifically enacted legislation authorizing protective orders.<sup>123</sup> Domestic violence victims may obtain a judicially enforceable order that bars further harassment and violence by the perpetrator and may also dictate that the perpetrator stay completely away from the

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123. See ALA. CODE §§ 30-5-1-30-5A-7 (Michie Supp. 2001); ALASKA STAT. §§ 18.66.100 – 18.66.180 (Michie Supp. 2001); ARIZ. REV. STAT. §§ 13-3601 – 3602 (2001); ARK. CODE. §§ 9-15-101-9-15-211 (Michie Supp. 2002); CAL. FAM. CODE ANN. §§ 6200-6389 (West 2002); COLO. REV. STAT. §§ 14-4-401-14-4-105 (2001); CONN. GEN. STAT. §§ 46b-15, 46b-38a (2001); DEL. CODE ANN. tit. 10, §§ 1041-1048 (Michie 2001); D.C. CODE ANN. §§ 16-1001-16-1006 (2001); FLA. STAT. ANN. §§ 741.28-741.32 (2001); GA. CODE ANN. §§ 19-13-1-19-13-6 (Supp. 2002); HAW. REV. STAT. §§ 586-1-586-11 (Supp. 2001); IDAHO CODE §§ 39-6301-39-6312 (2001); 725 ILL. COMP. STAT. 5/112A (2001); IND. CODE §§ 34-26-5-1-34-26-5-19 (2002); IOWA CODE §§ 236.1-236.14 (2001); KAN. STAT. ANN. §§ 60-3101-60-3111 (2001); KY. REV. STAT. ANN. §§ 403.715-403.785 (2001); LA. REV. STAT. ANN. §§ 46:2131-46:2142 (2001); ME. REV. STAT. ANN. tit. 19A, §§ 4001-4014 (1998 & Supp. 2001); MD. CODE ANN. FAM. §§ 4-501-4-514 (2001); MASS. GEN. LAWS ch. 209A, §§ 1-9 (1998 & Supp. 2002); MICH. COMP. LAWS §§ 600.2950, 600.2950A (Supp. 2002); MINN. STAT. § 518B.01 (Supp. 2002); MISS. CODE ANN. §§ 93-21-1-93-21-29 (1999 & Supp. 2001); MO. REV. STAT. §§ 455.010-455.085 (2000 & Supp. 2001); MONT. CODE ANN. § 40-15-101-40-15-302 (2001); NEB. REV. STAT. §§ 42-901-42-929 (2001); NEV. REV. STAT. §§ 33.017-33.100 (2001); N.H. REV. STAT. § 173-B (2001); N.J. STAT. ANN. §§ 2C:25-17-2C:25-33 (2001); N.M. STAT. §§ 40-13-1-40-13-7 (2001); N.Y. FAM. CT. ACT §§ 812, 821-828, 832-836, 838, 841-847 (2001); N.C. GEN. STAT. § 50B (2001); N.D. CENT. CODE §§ 14-07.1-01-14-07.1-18 (2001); OHIO REV. CODE ANN. § 3113.31 (West Supp. 2002); OKLA. STAT. tit. 22, §§ 60.1 – 60.6 (2001); OR. REV. STAT. §§ 107.700-107.732 (2001); PA. STAT. tit. 23, §§ 6102-6118 (2001); R.I. GEN. LAWS §§ 8-8.1-1- 8-8.1-8 (2001); S.C. CODE §§ 20-4-10-20-4-160 (2001); S.D. CODIFIED LAWS §§ 25-10-1-25-10-42 (Michie 1999 & Supp. 2002); TENN. CODE §§ 36-3-601-36-3-616 (2001); TEX. FAM. CODE §§ 71.001-91.004 (2001); UTAH CODE §§ 30-6-1-30-6-12 (2001); VT. STAT. ANN. tit. 15, §§ 1101-1110 (2001); VA. CODE ANN. §§ 16.1-253.1, 16.1-253.2, 16.1-253.4, 16.1-279.1, 16.1-228 (Michie 2001 & Supp. 2002); WASH. REV. CODE §§ 26.50.010-26.50.903 (2001); W. VA. CODE §§ 48-27-501-48-27-1001 (Michie 2001); WIS. STAT. §§ 813.12-813.128 (2001); WYO. STAT. ANN. §§ 35-21-101-35-21-111 (2001).

victim. Protective orders empower the victim because law enforcement will treat her complaints more seriously and the perpetrator may be deterred by the criminal penalties attached to violating an order.<sup>124</sup> Employees who are fired after asserting their right to a civil protective order can point to the legislation authorizing orders of protection as justifying a departure from employment-at-will. Efforts by employers to thwart the exercise of this right contradict the public interest in encouraging domestic violence victims to access the courts embodied by these statutory provisions.

One potential problem that employees will face is that some state courts have required that the exercise of statutory rights be closely connected to employment.<sup>125</sup> Employers may argue that the statutory right in question—the right to obtain a civil protective order—is not explicitly related to employment, and thus is insufficient to sustain a wrongful discharge claim. Employees could counter that the standard full restraining order prohibits a batterer from entering a petitioner's business or place of employment. Thus, the laws authorizing civil protective orders specifically acknowledge the importance of guaranteeing safety at work, demonstrating the nexus between the assertion of the right and employment. Much will depend on a plaintiff's ability to describe the enormous impact of domestic violence on society and to convince the judge of the importance of policies that combat this type of abuse.

### 3. Crime Victim and Witness Protection Statutes

Several states have enacted bills protecting witnesses and victims from discharge for cooperating with prosecutors or attending court proceedings under subpoena.<sup>126</sup> While some of these statutes explicitly provide a cause of action,<sup>127</sup> most do not. Instead they

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124. See EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 190–93 (James A. Inciardi ed., 2nd ed. 1996).

125. See, e.g., *Downs v. Waremart, Inc.*, 903 P.2d 888, 893 (Or. Ct. App. 1995) (holding that employee's discharge for asserting her right to an attorney during an interrogation by the police does not violate public policy because the right to counsel is not a right primarily and directly related to the employment relationship).

126. Many states explicitly prohibit the discharge of employees who cooperate with prosecutors or attend court hearings under subpoena. See *supra* note 30.

Other states have encouraged district attorneys to intervene with employers on behalf of victims and witnesses so that no adverse action is taken against employees. See *supra* note 31.

127. See, e.g., ALASKA STAT. § 12.61.017(c) (Michie 2000); CONN. GEN. STAT. § 54-85b (2001); HAW. REV. STAT. § 621-10.5 (2001); IOWA CODE § 915.23 (2001);

may impose fines or criminal consequences, or be silent on penalties.<sup>128</sup> When there is no statutory cause of action, a domestic violence victim who is fired after testifying in criminal court or meeting with the district attorney's office could invoke these statutes as proof of the public policy guaranteeing her employment rights.

Domestic violence victims more commonly seek orders of protection in family court, independent of any criminal case or subpoena. In these cases, employees could argue that the public policy underlying the victim and witness protection statutes also shields the right to pursue an order of protection. Victim and witness protection laws were intended to protect the employment rights of those who are necessary to the functioning of the criminal justice system. The policy embodied in these statutory provisions could be extrapolated to cover actions brought in civil court, especially when the underlying conduct—assault, battery, harassment, or stalking, for example—is criminal in nature. Orders of protection obtained in civil or family court, while not technically criminal, are an essen-

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MASS. GEN. LAWS ch. 326, § 185(d) (2001); NEV. REV. STAT. § 50.070 (2001); S.C. CODE ANN. § 41-1-70 (West Supp. 2001).

In states that do not allow public-policy-based suits, employees may be able to argue that victim and witness protection statutes should be interpreted to explicitly authorize a right of action. While New York has refused to recognize common law wrongful discharge actions, one court concluded that Penal Law § 215.14 was intended to grant a civil remedy to a discharged employee who was fired for appearing as a witness under subpoena, because it was contained within the criminal code. *See Buchwalter v. Dayton Mgmt. Corp.*, 526 N.Y.S.2d 900, 902 (Sup. Ct. 1988).

Colorado has outlined a detailed mechanism for enforcement of its victim protection statute that empowers only the attorney general to bring suit to ensure compliance. COLO. REV. STAT. § 24-4.1-303(17) (2001).

128. *See, e.g.*, ARK. STAT. ANN. § 5-53-112 (2001) (retaliation against a witness, informant, or juror is a misdemeanor); 725 ILL. COMP. STAT. ANN. 5/115-18 (West Supp. 2001) (employer may be held in contempt of court); MD. CODE ANN., CTS. & JUD. PROC. § 9-205(b) (Supp. 2001) (employer may be subject to a fine of up to \$1000); MICH. COMP. LAWS §§ 780.762, 780.790 (1998) (employer may be found guilty of a misdemeanor); MINN. STAT. § 611A.036 (2001) (stating that a court may find the employer guilty of misdemeanor and order the reinstatement of the employee); MO. REV. STAT. § 595.209.1(14) (2001) (silent on penalties); MONT. CODE ANN. § 46-24-205(3) (2001) (silent on penalties); N.Y. PENAL LAW § 215.14 (McKinney 1999) (employer may be found guilty of misdemeanor); OHIO REV. CODE ANN. § 2930.18 (West Supp. 2002) (employer may be held in contempt of court); VT. STAT. ANN. tit. 21, § 499 (2001) (employer may be fined up to \$200); VA. CODE ANN. § 18.2-465.1 (Michie Supp. 2002) (employer may be guilty of a misdemeanor); WIS. STAT. § 103.87 (2000) (employer may be fined up to \$200 and required to reinstate employee); WYO. STAT. ANN. § 1-40-209 (2001) (silent on penalties).

tial component to the enforcement of the laws prohibiting domestic violence; violation of an order of protection often forms the basis for a criminal prosecution. Legislatures created the system of civil restraining orders in order to give victims the option of obtaining governmental protection from violence, independent of the district attorney's office.<sup>129</sup> By granting victims of domestic violence the ability to pursue a court decree ordering the respondent to stay away from the victim, legislatures created a system where victims could, in effect, act both as a complaining witness and prosecutor. This connection between the criminal and civil legal responses to domestic violence justifies equating statutory protections for witnesses and victims in criminal cases and a public policy supporting domestic violence victims who seek restraining orders.

4. Policies in Support of Physical Safety: Prohibitions of Assault and Battery, the Right to Self-Defense and Workplace Safety Laws

All states have outlawed acts of violence. The statutes criminalizing assault and harassment embody the right to live free from physical abuse—a right that must also encapsulate the ability to obtain a remedy. When a domestic violence victim pursues relief in the form of a civil restraining order, she invokes this right and the public interest in redressing the abuse.

In a notable case, the Maryland Court of Appeals held that public policy justified a departure from the employment-at-will rule when the plaintiff was fired for bringing suit against a co-employee for injuries sustained in an assault.<sup>130</sup> The court described the public policy as rooted in prohibitions of assault and battery:

The clear mandate of public policy which [plaintiff's] discharge could be found to have violated was the individual's interest in preserving bodily integrity and personality, reinforced by the state's interest in preventing breaches of the peace . . . . "An assault is any unlawful attempt to cause a harmful or offensive contact with the person of another or to cause an apprehension of such a contact. A battery is its consummation."<sup>131</sup>

This case offers support for the claims of domestic violence victims who are fired after seeking legal remedies for physical abuse, especially if the batterer is a colleague. Like the plaintiff in *Watson*, they would not necessarily have to be pursuing assistance through

129. See BARBARA A. BABCOCK ET AL., *SEX DISCRIMINATION AND THE LAW* 1334 (2d ed. 1996).

130. See, e.g., *Watson v. Peoples Sec. Life Ins. Co.*, 588 A.2d 760, 766–67 (Md. 1991).

131. *Id.* (citations omitted).

the criminal justice system. One potential weakness in this argument is that courts may be reluctant to expand employment rights if the physical violence did not take place at the workplace or involve a work colleague.

Domestic violence victims could analogize their need to seek assistance with abuse to the right of self-defense. The Supreme Court of Appeals of West Virginia has held that the right of self-defense gives rise to a public policy exception to the at-will employment doctrine.<sup>132</sup> In *Feliciano v. 7-Eleven*, an employee was fired for interfering with a store robbery. The court concluded that the state's judicial opinions had clearly established a public policy in support of an individual's right to defend him or herself.<sup>133</sup> While other states have rejected the right to self-defense as a public policy justifying departure from employment-at-will, those cases involved plaintiffs who had acted violently in self-defense.<sup>134</sup> Plaintiffs could argue that seeking assistance for domestic violence is akin to the right to self-defense, because both concern securing one's safety. One difficulty with this approach is that the *Feliciano* court limited the use of the right to self-defense to situations of lethal, imminent physical danger.<sup>135</sup> Employees may also need to show that they exercised their right to self-defense at work in order to establish the connection between the asserted public policy and employment.

Domestic violence victims could also point to cases that allowed common law suits when employees were discharged for promoting the safety of third parties. In *Dabbs v. Cardiopulmonary Management Services*, the California Court of Appeals held that an employee could bring a wrongful discharge claim when fired for refusing to continue to work under conditions in a hospital that jeopardized the health of patients.<sup>136</sup> No legislative enactment or judicial opinion had articulated support for the employee's conduct in this situation; yet, the court concluded that dismissal vio-

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132. See *Feliciano v. 7-Eleven, Inc.*, 559 S.E.2d 713, 722-23 (W. Va. 2001).

133. See *id.* at 718-23.

134. See *Bagwell v. Peninsula Reg'l Med. Ctr.*, 665 A.2d 297, 312-13 (Md. Ct. Spec. App. 1995) (declining to conclude that acting violently in self-defense is a clear mandate of public policy, and ultimately dismissing plaintiff's claim because he did not demonstrate that the reason he was fired was because he acted in self-defense); *McLaughlin v. Barclays Am. Corp.*, 382 S.E.2d 836, 838-40 (N.C. Ct. App. 1989) (dismissing claim by employee who was fired after hitting another employee in self-defense); *Scott v. Extracorporeal, Inc.*, 545 A.2d 334, 340-43 (Pa. Super. Ct. 1988) (dismissing claim by employee who was fired for fighting with another employee, although plausibly acting in self-defense).

135. See *Feliciano*, 559 S.E. 713 at 722-23.

136. 188 Cal. App. 3d 1437 (Ct. App. 1987).

lated the public's interest in ensuring safety.<sup>137</sup> The Washington Supreme Court has also ruled that an employee who left his armored car in order to rescue a woman during a bank robbery met the elements for a common law wrongful discharge case.<sup>138</sup> The court noted that the public policy in favor of rescuing others from life-threatening situations, as described by statute and case law, overrode the presumption of at-will employment; to hold otherwise would discourage employees from saving others.<sup>139</sup> In another opinion, the court also concluded that taking preventive measures to ensure safety was protected conduct.<sup>140</sup> Underlying these cases is the notion that employees have a fundamental right to promote physical health and safety; for domestic violence victims, seeking legal assistance is vital to reduce the risks to their lives, as well as the lives of their children.

Domestic violence victims who are fired because they take off time to report acts of abuse to the police or civil court may be able to rely on whistleblower statutes as a source of public policy, especially when the perpetrators are fellow employees. Many states have passed laws prohibiting adverse action against employees who report violations of the law.<sup>141</sup> These statutes often do not limit protection to situations where an employee reports violations by employers; nor do they require an employee to report a business-related violation of law. However, since many of these laws were specifically enacted to encourage employees to report wrongdoing by companies or colleagues, the policy supporting whistleblowers would best bolster the claim of a domestic violence victim who was fired after reporting abuse by a fellow employee.<sup>142</sup>

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137. *See id.* at 1441–44.

138. *Gardner v. Loomis Armored Inc.*, 913 P.2d 377 (Wash. 1996) (en banc).

139. *See id.* at 383–85.

140. *See Ellis v. City of Seattle*, 13 P.3d 1065 (Wash. 2000) (en banc) (holding that employees who refused to disable fire alarms have a cognizable common law wrongful discharge claim).

141. Michigan's Whistleblower's Protection Act is a typical example:

An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state . . . .

MICH. COMP. LAWS § 15.362 (2001).

142. *Cf. Dudewicz v. Norris-Schmid, Inc.*, 503 N.W.2d 645, 650 (Mich. 1993) (holding that the Workers' Protection Act covered a claim by an employee who was fired after filing criminal charges of assault and battery against a co-employee, but that the statutory claim preempted the public policy claim).



Employees could also rely on federal or state law in favor of employee safety as another source of public policy. The General Duty Clause of the Occupational Safety and Health Act of 1970 requires an employer to “furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”<sup>143</sup> Employees have succeeded in wrongful discharge claims when dismissed for reporting violations to the Occupational Safety and Health Administration.<sup>144</sup> An employee could argue that given the statistics demonstrating the dangers domestic violence victims face at work, employers should allow employees to pursue protection in the courts.

#### 5. Open Courts Provisions

Many states have adopted open courts provisions in their constitutions.<sup>145</sup> These provisions provide that all individuals may bring their claims to court, have a judicial hearing, and be granted the appropriate remedy. Domestic violence victims who are fired for obtaining a civil restraining order could invoke the open courts policy as the basis for a common law wrongful discharge claim.

One court has ruled that an open courts clause could support a common law wrongful discharge claim. In *Groce v. Foster*, the Oklahoma Supreme Court departed from the employment-at-will rule when an employee was fired after refusing to withdraw a negligence suit against a customer for an injury suffered while working with the customer.<sup>146</sup> The court ruled that the discharge impermis-

143. 29 U.S.C. § 654(a)(1) (2002).

144. See *Skillsky v. Lucky Stores, Inc.*, 893 F.2d 1088, 1092–94 (9th Cir. 1990) (allowing the wrongful discharge claim of an employee who was fired because he filed an OSHA complaint against a former employer); *Kulch v. Structural Fibers, Inc.*, 677 N.E.2d 308, 320–22 (Ohio 1997).

145. See ALA. CONST. art. I, § 13; ARIZ. CONST. art. 2, § 11; ARK. CONST. art. II, § 13; COLO. CONST. art. II, § 6; CONN. CONST. art. I, § 10; DEL. CONST. art. I, § 9; FLA. CONST. art. I, § 21; IDAHO CONST. art. I, § 18; ILL. CONST. art. I, § 12; IND. CONST. art. I, § 12; KAN. CONST., BILL OF RIGHTS § 18; KY. CONST., BILL OF RIGHTS § 14; LA. CONST. art. I, § 22; ME. CONST. art. I, § 19; MD. CONST. art. 19; MASS. CONST. pt. 1, art. XI; MINN. CONST. art. I, § 8; MISS. CONST. art. III, § 24; MO. CONST. art. I, § 14; MONT. CONST. art. II, § 16; NEB. CONST. art. I, § 13; N.H. CONST. pt. I, art. 14; N.C. CONST. art. I, § 18; N.D. CONST. art. I, § 9; OHIO CONST. art. I, § 16; OKLA. CONST. art. II, § 6; OR. CONST. art. I, § 10; PA. CONST. art. I, § 11; R.I. CONST. art. I, § 5; S.C. CONST. art. I, § 9; S.D. CONST. art. VI, § 20; TENN. CONST. art. I, § 17; TEX. CONST. art. I, § 13; UTAH CONST. art. I, § 11; VT. CONST. ch. I, art. 4, ch. II, § 28; W.VA. CONST. art. III, § 17; WIS. CONST. art. I, § 9; WYO. CONST. art. I, § 8.

146. 880 P.2d 902 (Okla. 1994).

sibly interfered with the open-access-to-courts provision in the state constitution, which created a right to sue any responsible party to redress the injury.<sup>147</sup> While *Groce* acknowledged that other state jurisdictions had declined to find that a constitutional open courts clause creates a private wrongful discharge claim or guarantees redress for every wrong,<sup>148</sup> it noted that an employer must not be able to force an employee to choose between keeping a job or pressing a statutorily-protected claim. “That which the law prohibits the employer from exacting *contractually* may not be secured with impunity *through naked intimidation*.”<sup>149</sup> The majority noted that the public policy used to bolster the plaintiff’s claim came from a number of sources, including the open courts constitutional clause, the statute permitting suits against non-employers for workplace injuries, and the workers’ compensation regime, which bars employers from forcing employees to give up their right to redress for workplace injuries. Similarly, a court could conclude that coercing an employee to choose between her job and her right to obtain a restraining order violates the public policies embodied in open courts provisions, statutory provisions providing for civil protective orders, and criminal laws against domestic violence.

While *Groce* offers some hope to domestic violence victims, the opinion was narrowly written to address a situation where an employee was injured on the job and sought to sue a party other than the employer. The dissent in *Groce* highlights the obstacles that a domestic violence victim would face in trying to base a wrongful discharge claim on a state constitutional open courts provision. The dissenting judges noted:

[T]he “open courts” provision does not create an affirmative right to be exercised by citizens such as the right to own property or the right to bear arms. Rather, it is a constitutional mandate addressed to and placed upon the courts of Oklahoma to open their doors to any person with a legally cognizable claim.<sup>150</sup>

Other state courts have similarly held that a constitutional open courts provision cannot support a wrongful discharge claim unless the employee was discharged for filing a legal claim against

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147. “The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation . . . .” OKLA. CONST. art. II, § 6.

148. See *Groce*, 880 P.2d at 905 n.17.

149. *Id.* at 906 (italics in original).

150. *Id.* at 909 (Simms, J., dissenting).

his employer.<sup>151</sup> Thus, open courts clauses may be most useful to employees who are fired for pursuing legal redress for abuse perpetrated by a co-employee, because these plaintiffs could establish a nexus between invoking the open courts policy and employment.

All of the public policies discussed thus far—protecting the employment rights of domestic violence victims, promoting the rights of domestic violence victims, crime victims, and witnesses, supporting the right to physical safety, and guaranteeing the right to go to court—would best serve claims brought by domestic violence victims who were fired for asserting their legal rights. The last public policy—prohibition of sex discrimination—would provide the basis for a suit brought by employees who are fired because of their status as domestic violence victims.

#### 6. Prohibitions on Sex Discrimination

Employees report that they have been fired once an employer finds out that they experience domestic violence.<sup>152</sup> Stereotypes that domestic violence victims are weak, stupid, or crazy may influence how employers view employees who reveal that they experience abuse. Employees can argue that laws prohibiting sex discrimination express a public policy barring discrimination against domestic violence victims, because this discrimination is rooted in sexist stereotyping of abuse victims, the vast majority of whom are women. This strategy is most useful for plaintiffs whose claims are not technically cognizable under either Title VII or state anti-discrimination laws and thus need to plead a common law cause of action.<sup>153</sup>

Several courts have held that federal and state anti-discrimination constitutional and statutory provisions may support a claim of

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151. *See, e.g.*, *Boykins v. Hous. Auth. of Louisville*, 842 S.W.2d 527, 530 (Ky. 1992) (holding that there was no employment-related nexus between public policy stated in “open-courts” provision of state constitution and employee’s discharge); *McCloskey v. Eagleton*, 789 S.W.2d 518, 520 (Mo. Ct. App. 1990) (holding that a lawyer can be discharged for filing a suit on his own behalf without prior approval by his law firm, since Missouri Constitution’s open courts provision does not create rights but only guarantees access to the courts).

152. *See supra* notes 12–13.

153. Many employees cannot bring claims under Title VII of the federal Civil Rights Act, 42 U.S.C. §§ 2000e–2000e-17 (2002), because their employers have fewer than fifteen employees, *see* 42 U.S.C. § 2000e(b) (2002). *See, e.g.*, *Kerrigan v. Magnum Entm’t, Inc.*, 804 F. Supp. 733, 734 (D. Md. 1992); *Bailey v. Scott-Gallagher Inc.*, 480 S.E.2d 502, 503 n.1 (Va. 1997).

wrongful discharge contrary to public policy.<sup>154</sup> The California Supreme Court held that article I, section 8 of the state constitution<sup>155</sup> “reflects a fundamental *public policy* against discrimination in employment” that can be invoked in a wrongful discharge claim against a private employer, even though the constitutional provision itself may only apply to state action.<sup>156</sup> It further noted:

The public policy against sex discrimination and sexual harassment in employment, moreover, is plainly one that “inures to the benefit of the public at large rather than to a particular employer or employee.” No extensive discussion is needed to establish the fundamental *public* interest in a workplace free from the pernicious influence of sexism. So long as it exists, we are *all* demeaned.<sup>157</sup>

The court rejected the defendant’s argument that public policy-based “claims should be limited to situations where the employer coerces an employee to commit an act that violates public policy” or prevents an employee from exercising a fundamental right.<sup>158</sup> Wrongful discharge claims can be based solely on sex discrimination.<sup>159</sup> In *Little v. Windermere Relocation, Inc.*, the United States Court of Appeals for the Ninth Circuit held that a plaintiff could proceed with a wrongful discharge claim when she was fired for reporting that a customer had raped her.<sup>160</sup> The court found that the Washington Law Against Discrimination<sup>161</sup> was a clearly articulated public policy condemning sex discrimination at the work-

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154. See, e.g., *Kerrigan*, 804 F. Supp. at 735–37 (holding that Md. ANN. CODE art. 49B, which prohibits discrimination in employment, gives rise to a public policy exception); *Rojo v. Kliger*, 801 P.2d 373, 388 (Cal. 1990) (finding that employees who were sexually harassed could bring a claim of wrongful discharge in violation of public policy); *Bailey*, 480 S.E.2d at 505 (recognizing common law cause of action based on violation of policy contained in Virginia Human Rights Act when employee alleged that she experienced discrimination because she had given birth); *Roberts v. Dudley*, 993 P.2d 901, 907 (Wash. 2000) (en banc) (finding that state anti-discrimination laws support departure from employment-at-will).

155. “A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin.” CAL. CONST. art. I, § 8.

156. *Rojo*, 801 P.2d at 389.

157. *Id.* at 389 (citations omitted) (italics in original).

158. *Id.* The court noted that the plaintiffs could have satisfied either of these tests in any case, since they alleged that they were dismissed for refusing sexual advances and for asserting their right to be free from sexual assault and harassment. *Id.*

159. *Id.*

160. 265 F.3d 903, 913 (9th Cir. 2001).

161. See WASH. REV. CODE § 49.60.180 (2002).

place, and dismissal of the plaintiff may have violated this policy.<sup>162</sup> This precedent establishes that prohibitions of sex discrimination embody an enforceable public policy. Drawing on the reasoning in these cases, courts should likewise conclude that when an employee is fired because of her status as a domestic violence victim, the public policy against sex discrimination gives rise to a common law wrongful discharge suit.

This section has argued that the public policy exception to employment-at-will supports wrongful discharge claims brought by domestic violence victims, because of the public interest in combating domestic violence and in guaranteeing the right of domestic violence victims to live free from abuse and discrimination. Depending on the facts of a particular employee's dismissal, she could invoke any of the provisions discussed above as demonstrating a clear public policy condemning her discharge. Part III.C will discuss five possible weaknesses and drawbacks of the strategy for domestic violence victims: 1) difficulties of proving one's case; 2) preemption of common law claims; 3) limited damages awards; 4) inapplicability to non-discharge contexts; and 5) potential for reinforcing stereotypes of domestic violence victims.

*C. The Limitations of Wrongful Discharge Claims in Violation of Public Policy for Domestic Violence Victims*

1. Difficulties of Proof

State courts have allocated the burdens of proof in different ways,<sup>163</sup> some of which make it difficult for an employee to succeed in her case. The Utah Supreme Court has adopted a burden-shifting system: first, an employee need only show that the conduct was a cause of the discharge; second, the employer must then articulate a legitimate reason for the discharge; and third, if evidence of a legitimate reason is produced, the employee must then prove that

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162. *See Little*, 265 F.3d at 916.

163. Some state courts have required that a preponderance of the evidence must prove that the employee was discharged in violation of public policy. *See, e.g., Adams v. George W. Cochran & Co. Inc.*, 597 A.2d 28, 34 (D.C. Ct. App. 1991) (holding that an employee must prove by a preponderance that his refusal to violate the law was the sole reason for discharge); *Allum v. Valley Bank of Nev.*, 970 P.2d 1062, 1066 (Nev. 1998); *Chavez v. Manville Prods. Corp.*, 777 P.2d 371, 377-78 (N.M. 1989). Another court required the plaintiff to prove that the discharge was motivated by a reason violating public policy by a preponderance of the evidence, but that the evidence must be clear and convincing in nature. *See, Ortega v. IBP, Inc.*, 874 P.2d 1188, 1198 (Kan. 1994) (finding that evidence is clear if it is "certain, unambiguous, and plain to the understanding" and convincing if it is "reasonable and persuasive enough to cause the trier of facts to believe it").

engaging in the protected conduct was a “substantial factor.”<sup>164</sup> The highest court in West Virginia has imposed a lighter burden on the employee by holding that once the employee has established the existence of a policy and that the discharge was motivated by an unlawful factor, then the employer must prove that the same result would have occurred in the absence of the illegal motive.<sup>165</sup>

Courts have taken differing stances on whether the employee needs to prove that the prohibited reason is the sole motive for discharge. Many have held that employees need not make this showing, so long as the prohibited motive played a significant role in the discharge.<sup>166</sup> Other courts have required that the prohibited motive was the “determining” reason,<sup>167</sup> a slightly more demanding standard. Some state courts have adopted a very stringent standard, by requiring that the employee’s prima facie case establish an *exclusive* causal relationship between the discharge and the public policy violation<sup>168</sup> or demonstrate but-for causation.<sup>169</sup> Domestic violence victims would face a high hurdle in states that require exclusive causality, since employers may be able to point to a number of facially legitimate reasons for the discharge.

Employers have several defenses against wrongful discharge claims based on public policy available to them, two of which may be particularly successful in cases involving discharge for reasons related to domestic violence. They could argue that the public policy-protected conduct was an insignificant factor in the dismissal or that they were motivated by a sound business reason, by pointing to the additional time taken off by these employees, danger posed by the perpetrator of violence to the workplace, or poor work performance. Plaintiffs could respond by demonstrating that they had satisfactory evaluations, alleging that the employer failed to take any safety measures, and comparing their work records to the amount of leave taken by other employees.

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164. Ryan v. Dan’s Food Stores, Inc., 972 P.2d 395, 405 (Utah 1998).

165. Page v. Columbia Natural Res. Inc., 480 S.E.2d 817, 829, n.11 (W. Va. 1996) (stating that direct evidence of employer’s retaliatory motive is not required under mixed motive theory).

166. See, e.g., White v. Am. Airlines, Inc., 915 F.2d 1414, 1420 (10th Cir. 1990).

167. See, e.g., Smith v. Smithway Motor Xpress, Inc., 464 N.W.2d 682, 686 (Iowa 1990).

168. See, e.g., Lynch v. Blanke Baer & Bowey Krimko, Inc., 901 S.W.2d 147, 152 (Mo. Ct. App. 1995).

169. See, e.g., Texas Dep’t of Human Servs. v. Hinds, 904 S.W.2d 629, 633 (Tex. 1995).

## 2. Preemption of Common Law Claims

Many state courts have questioned the viability of wrongful discharge claims based on violations of public policy when they find that plaintiffs have a remedy under other statutes.<sup>170</sup> Others have taken a more liberal approach to preemption and allowed suits to go forward when the injury underlying the common law wrongful discharge claim could give rise to a statutory claim.<sup>171</sup> Plaintiffs may also be able to avoid preemption by invoking public policies embodied in statutes that do not provide remedies. For example, the highest court of Maryland held that an employee could bring a wrongful discharge claim when she was fired after being sexually harassed, because public policies independent of the employment discrimination laws—such as the statutes criminalizing prostitution—were violated.<sup>172</sup> Preemption poses a particular problem to plaintiffs who are domestic violence victims if the courts interpret their claims as covered by anti-discrimination or workplace safety statutes.<sup>173</sup> When these statutes do not expressly preempt common law remedies or when the legislative history indicates an intent to

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170. For example, Colorado courts have held that OSHA and anti-discrimination laws provide exclusive remedies. *See* *Smith v. Colo. Interstate Gas Co.*, 777 F. Supp. 854, 857–58 (D. Colo. 1991); *Corbin v. Sinclair Mktg. Inc.*, 684 P.2d 265, 267 (Colo. Ct. App. 1984). Other states have prohibited common law claims when an employee can seek a remedy under anti-discrimination laws. *See, e.g.*, *Howard v. Daiichiya-Love's Bakery, Inc.*, 714 F. Supp. 1108, 1112–13 (D. Haw. 1989) (ADEA); *Lapinad v. Pac. Oldsmobile-GMC, Inc.*, 679 F. Supp. 991, 993–94 (D. Haw. 1988) (Title VII); *Makovi v. Sherwin-Williams Co.*, 561 A.2d 179, 190 (Md. 1989) (finding no wrongful discharge claim when plaintiff was fired for being pregnant, because she could vindicate her rights under Title VII and state law); *Doss v. Jamco, Inc.*, 492 S.E.2d 441 (Va. 1997) (concluding that remedies under the Virginia Human Rights Act supplanted wrongful discharge claims based on the public policy against gender discrimination).

171. *See, e.g.*, *Wenners v. Great State Beverages, Inc.*, 663 A.2d 623 (N.H. 1995) (finding that federal bankruptcy code, which prohibits discharge because an employee has filed for bankruptcy, does not preempt the common law wrongful discharge claim, as the federal law does not evince intent to supersede the common law cause of action, does not specify the means to enforce a wrongful discharge claim, and is complemented by the common law claim); *Collins v. Rizkana*, 652 N.E.2d 653, 660–61 (Ohio 1995) (holding that an employee's wrongful discharge claim based on alleged sexual harassment and sex discrimination may proceed, because statutory remedies do not preempt common law remedies).

Some courts have permitted plaintiffs to choose either a common law or statutory remedy. *See, e.g.*, *Lally v. Copygraphics*, 413 A.2d 960, 969 (N.J. App. Div. 1980), *aff'd*, 428 A.2d 1317 (N.J. 1981).

172. *See Insignia Residential Corp. v. Ashton*, 755 A.2d 1080, 1085–87 (Md. 2000).

173. *See supra* note 170.

supplement the common law, plaintiffs may be able to proceed with their wrongful discharge claims.<sup>174</sup>

### 3. Limited Damages

Depending on whether their claims are framed as arising in tort or contract, limitations on recovery may discourage domestic violence victims from filing suit. State courts have usually treated wrongful discharge claims as tort actions, although some states have characterized the suits as breach of contract cases.<sup>175</sup> In the states that frame these claims as sounding in contract,<sup>176</sup> the employee is generally entitled only to back wages, usually subject to the duty to mitigate. It may be difficult for employees to procure representation when recovery is limited to their former salary.

When framed as a tort claim, courts have ruled that the goal is to discourage employer conduct and so a full range of remedies is available, including compensatory damages for lost wages, health insurance, retirement payments, and other financial benefits, plus damages for emotional distress suffered by the employee.<sup>177</sup> Plaintiffs may receive damages for emotional distress when the suffering is severe and the employer's conduct has been extreme, outrageous, and intentional.<sup>178</sup> Courts have limited or barred punitive damages when the case presented a matter of first impression and employers did not have notice of their potential liability.<sup>179</sup>

174. *See, e.g.,* Rojo v. Kliger, 801 P.2d 373 (Cal. 1990) (holding that the Fair Employment and Housing Act did not preempt common law cause of action, and plaintiffs need not exhaust administrative remedies); Helmick v. Cincinnati Word Processing, Inc., 543 N.E.2d 1212, 1215–16 (Ohio 1989) (concluding that the state employment discrimination statute supplemented common law claims).

175. In New Jersey, the Supreme Court held that the cause of action may arise in contract or tort or both. *See* Pierce v. Ortho Pharm. Corp., 417 A.2d 505, 512 (N.J. 1980). A contract action would be based on a breach of an implied contract that “an employer would not discharge an employee for refusing to perform an act that violates a clear mandate of public policy,” while a tort action would be based on an employer's duty not to discharge for a policy-prohibited reason. *Id.*

176. *See, e.g.,* Sterling Drug, Inc. v. Oxford, 743 S.W.2d 380, 385 (Ark. 1988); Hummer v. Evans, 923 P.2d 981, 987 (Idaho 1996); Monge v. Beebe Rubber Co. 316 A.2d 549, 552 (N.H. 1974); Mason County Bd. of Educ. v. State Superintendent of Schs., 295 S.E.2d 719, 723 (W. Va. 1982); Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 841 (Wis. 1983).

177. *See, e.g.,* Tameny v. Atl. Richfield Co., 610 P.2d 1330, 1334–37 (Cal. 1980); Adams v. George W. Cochran & Co., 597 A.2d 28, 34 (D.C. Ct. App. 1991).

178. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 130, at 1029 (5th ed. 1984).

179. *See, e.g.,* Kelsay v. Motorola, Inc., 384 N.E.2d 353, 360 (Ill. 1978); Nees v. Hocks, 536 P.2d 512, 516–17 (Or. 1975).



## 4. Non-Discharge Contexts

Common law public policy claims have primarily been upheld in the discharge context. Courts have reasoned that this approach minimizes judicial intrusion into employer autonomy while also placing limits on extreme forms of employer retaliation.<sup>180</sup> However, employers often discriminate against victims of domestic violence when making other employment decisions, such as promotions and hiring.<sup>181</sup> Thus, the public policy exception outlined in this paper would only begin to address the barriers to employment faced by domestic violence victims.

## 5. Gender Stereotyping in Wrongful Discharge Precedent

Outside of the legal and practical difficulties in bringing a successful wrongful discharge claim, the sexism and gender stereotyping that exist in wrongful discharge precedent could misconstrue these claims as seeking additional protection for the weaker sex. For example, although Georgia courts have generally refused public policy-based claims, one court allowed a plaintiff to present her claim that she was fired after reporting sexual advances by a supervisor.<sup>182</sup> The court said: "It is our belief that a virtuous female is entitled to a different type of protection,"<sup>183</sup> suggesting that the law must intervene in order to protect the chastity of female employees. The holding assumes that women are a special, vulnerable class whose sexuality must be preserved for their spouses.

180. See, e.g., *Williams v. Dub Ross Co.*, 895 P.2d 1344, 1346–47 (Okla. Ct. App. 1995) (finding that public policy exception to at-will employment does not apply outside of the termination context to plaintiffs who alleged that they were not hired because of their interracial marriage).

181. For example, Bernice Hampton was involved in a thirty-day internship at a hospital that had the potential for leading to a full-time job. On the twenty-ninth day, her partner beat her severely, causing swelling and bruises. Her supervisor followed her around that day and the hospital did not offer her a position. See RAPHAEL, *supra* note 4, at 31.

Patti Davis informed her co-workers she had a history of domestic violence with her ex-husband. She believes that this revelation hampered her professional advancement:

I could never convince myself that my co-workers didn't think of me as someone who couldn't handle the job and the responsibility. I got defined by being a victim. Although I had responsibility, I never got promoted or a salary increase over the years. I think it hurt me to be so open about it on the job. Yet I thought it was important not to be ashamed of my situation.

*Id.* at 71.

182. See *Wiley v. Ga. Power Co.*, 213 S.E.2d 550 (Ga. App. Ct. 1975), *overruled on other grounds by* *Ga. Power Co. v. Busbin*, 250 S.E.2d 442 (Ga. 1978).

183. *Id.* at 554.

This type of sexist reasoning could again be employed by judges and undermine the claims brought by domestic violence victims. The goal of these suits is to allow employees to work and pursue help for domestic violence issues free of the fear of discharge. These claims demand recognition of the discrimination domestic violence victims face and should not be framed as pleading for protection because of women's weakness or subordinate roles as intimate partners of men.

Advocates should keep the limitations discussed above in mind as they craft their claims. While these issues may pose significant problems, the public policy exception will be the only legal basis for many domestic violence victims to vindicate their employment rights.

#### IV. CONCLUSION

Wrongful discharge claims offer one strategy for employees who are fired for a reason directly stemming from their experience of domestic violence. The public policy exception to the at-will employment rule arose in order to guarantee that the public interest could not be thwarted by the threat of losing one's job. Given the flexibility in the public policy doctrine and the numerous public policies that support domestic violence victims, courts should recognize a public policy exception when a domestic violence victim is fired based on her status as a victim or for asserting her legal rights.

Over the last few decades, American society has come to realize that domestic violence is a problem that needs to be addressed by the community as a whole, rather than ignored as a personal issue between two people. The development of measures specifically protecting domestic violence victims—from shelters to civil restraining orders—has accompanied this growing awareness. By recognizing a common law cause of action in these cases, courts will play their role as guardians of the public policy to end domestic violence.