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Protecting Economic Stability: The Washington Supreme Court Breathes New Life in the Public-Policy Exception to At-Will Employment for Domestic Violence Victims

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PROTECTING ECONOMIC STABILITY: THE WASHINGTON SUPREME COURT BREATHES NEW LIFE IN THE PUBLIC-POLICY EXCEPTION TO AT-WILL EMPLOYMENT FOR DOMESTIC VIOLENCE VICTIMS

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INTRODUCTION

An employee, whose husband regularly beat her and her five children, informed her supervisor of her experience and requested time off.[1] She used a little over a week of paid leave to move her children to safe housing, consult with police, assist in her husband's criminal prosecution, and work with the county to obtain other support, including transitional housing, counseling and health services, and legal assistance.[2] A month after she returned to work, her employer demoted her and two months later, terminated her employment purportedly for falsifying payroll records.[3] Assuming that the employer actually terminated the employee for taking time off to address the impact of her husband's violence, many courts across this nation would not provide this at-will employee with any remedy against her employer.[4] An October 2008 decision from the Washington Supreme Court, however, may spark a change in how courts address these cases.[5]

In *Danny v. Laidlaw Transit Services*, the Washington Supreme Court explicitly recognized that employment terminations such as

1. Danny v. Laidlaw Transit Servs., Inc., 193 P.3d 128, 130 (Wash. 2008) (en banc).
2. *Id.* at 130-31.
3. *Id.* at 131.
4. *See infra* Parts IV.B-C (discussing states with limited to no recognition of the public-policy exception to at-will employment).
5. Domestic violence is a pattern of physical violence, coercion, threats, intimidation isolation, and emotional, sexual, or economic abuse used to control an intimate partner, child, or other family or household member. JULIE GOLDSCHEID & ROBIN RUNGE, EMPLOYMENT LAW AND DOMESTIC VIOLENCE: A PRACTITIONER'S GUIDE 2 (2009). Consistent with the definitions used by the U.S. Department of Justice, domestic violence is a term that includes both intimate partner violence and violence between other family members. SHANNAN CATALANO, U.S. DEP'T OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE IN THE UNITED STATES, (Dec. 9, 2007), http://bjs.ojp.usdoj.gov/content/pub/pdf/ipvus.pdf. Intimate partner violence occurs between "current or former spouses, boyfriends, or girlfriends, including same-sex relationships." *Id.* Because much of the research on the impact of violence on employment and the workplace is specific to intimate partner violence, the cited statistics focus on this relationship. But certainly, as the *Danny* case illustrates, child abuse and other forms of domestic violence also impact employment. These forms of domestic violence should therefore be included in any workplace protections. *Danny*, 193 P.3d at 130, 135.

this one implicate the state's "clear mandate of public policy of protecting domestic violence survivors and their families and holding abusers accountable."[6] It ultimately applied the state's policy to allow "employees to do what they must to prevent domestic violence, without fear of losing their economic independence."[7] This decision, the first of its kind from a state supreme court,[8] has great potential to influence other state courts to recognize a similar common-law claim and to curb the wrongful discharge of many employees.

This article builds on earlier research advocating for a public-policy exception in this context,[9] particularly in light of the recent Washington Supreme Court decision in *Danny* and the expansion of state employment laws that reflect the growing recognition of the public benefit of providing some economic stability to those experiencing domestic violence.[10] The *Danny* decision provides a blueprint for other states to follow. It does not answer all the thorny questions regarding what employees must prove to establish a wrongful discharge claim and what defenses employers may have,[11] but it clarifies that the state's long-term commitment to addressing this societal issue creates a public policy that applies in the employment arena as well.[12] States should look to the Washington decision and recognize a public policy in this context.

To evaluate the need for and likelihood of other state courts' receptivity to a *Danny*-like policy, this article simultaneously considers three variables: 1) the states' approaches to the public-policy exception, generally; 2) their statutory recognition of the relationship

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6. *Danny*, 193 P.3d at 141.

7. *Id.*

8. Before *Danny*, few courts recognized a similar public policy and other reported decisions on this issue rejected public-policy claims. *See infra* Part III.A (discussing cases leading up to *Danny*, none out of state supreme courts).

9. *See* Sandra S. Park, *Working Towards Freedom from Abuse: Recognizing a "Public Policy" Exception to Employment-At-Will for Domestic Violence Victims*, 59 N.Y.U. ANN. SURV. AM. L. 121, 124 (2003) (arguing that those who are subject to intimate partner abuse and are fired as a result of its effects should be able to invoke the public-policy exception to the employment-at-will rule).

10. Several states have enacted workplace legislation. *See* Deborah A. Widiss, *Domestic Violence and the Workplace: The Explosion of State Legislation and the Need for a Comprehensive Strategy*, 35 FLA. ST. U. L. REV. 669, 698-718 (2008) (discussing laws created to address the workplace effects of domestic violence); *see also infra* Part III.B (discussing state statutes that protect domestic violence victims in the workplace).

11. *See infra* Part III.A.5 (describing *Danny*'s holding as limited to the public-policy element of the wrongful discharge claim). Similarly, this article focuses solely on the recognition of the public policy and does not address employer defenses or other questions this cause of action will raise. Because of the great variability in state approaches to this exception to at-will employment, such an analysis would require another fifty-state survey and thus, goes beyond the scope of this article.

12. *Danny*, 193 P.3d at 138.

between domestic violence and employment, specifically; and 3) the extent to which these statutes either support or preclude a common-law remedy for employees based on the particular statutory remedies provided and the extent of the courts' legislative deference. This analysis suggests that at least four states and the District of Columbia would be quite receptive to a broad public policy supporting the economic stability of employees experiencing domestic violence.[13] Six other states likely would recognize a public policy at least in the context of an employee who has sought judicial protection from the abuse, and at least thirteen more in the context of employees who testified or otherwise assisted with the prosecution of their batterers.[14] In over half of these states, recognition of the public-policy exception is not only likely, but necessary to implement statutory policies intended to assist these employees who otherwise fail to specify a cause of action.[15]

This analysis serves several purposes: to inform employers and employees of their respective rights and responsibilities; to encourage state courts to use their power to expand the common-law protections to reach terminations related to domestic violence; and to further inform the current state and national debate on the need for statutory reform to provide greater, and more consistent, financial stability to these employees.[16] The public-policy exception may currently be the

13. Employees in three additional states (Hawaii, Illinois and Oregon) have strong statutory claims, but such statutes would preclude most common-law wrongful discharge claims. *See infra* Part IV.A.3.c (discussing those states that would be receptive to a *Danny*-like policy).

14. *Id.* (analyzing the likelihood of the states recognizing a form of the public-policy exception for domestic violence victims).

15. *Id.* (explaining why the public-policy exception is critical to implementing the various states' existing statutes).

16. Scholars and corporate leaders have advocated for laws and policies to address this societal issue for some time. *E.g.*, Maria Amelia Calaf, *Breaking the Cycle: Title VII, Domestic Violence, and Workplace Discrimination*, 21 LAW & INEQ. 167, 168 (2003) ("Title VII provides a viable means by which domestic violence victims can challenge unlawful discrimination in the workplace and establishes disparate impact as the best alternative for disputing discriminatory practices."); Jane A. Randel & Kimberly K. Wells, *Corporate Approaches to Reducing Intimate Partner Violence Through Workplace Initiatives*, 3 CLINICS OCCUPATIONAL & ENVTL. MED. 821, 829-32 (2003) (discussing how employers assist and educate employees on ways to reduce domestic violence through workplace programs). Scholars continue to advocate for a more comprehensive and effective employment-law approach. Julie Goldscheid, *Gender Violence & Work: Reckoning with the Boundaries of Sex Discrimination Law*, 18 COLUM. J. GENDER & L. 61, 113-14 (2008) (advocating for an interpretation of Title VII that would require employers to engage in a good-faith negotiation with employees experiencing domestic violence to determine whether any modest workplace accommodation could be made to "promote safety in the workplace and maintain valued employees' economic and physical security."); Marcy L. Karin, *Changing Federal Statutory Proposals to Address Domestic Violence at Work*: *Creating a Societal Response by Making Business Part of the Solution*, 74 BROOK. L. REV. 377, 397-418, 428 (2009) (calling for additions to federal statutory proposals that would address employers' concerns by "transform[ing] the current individual-focused response into a legislative

only route for many employees seeking relief from their employer's conduct. Because the claim is so limited and unpredictable in most states, however, a statutory claim would be preferable. In the meantime, it may be in the judiciary's hands to strengthen the national consensus that employees experiencing violence in their homes should not also be mistreated in the workplace. With *Danny* as their guide, state courts should begin to develop this public policy exception.

I. WHAT'S EMPLOYMENT LAW GOT TO DO WITH IT?

There is growing recognition that domestic violence impacts society well beyond the walls of its victims' homes, often impacting workplaces.[17] The violence may follow the victim-employee to work, as many batterers seek to sabotage employment in an attempt to expand their realm of control and make the victims more dependent.[18] For those employees who attempt to leave abusive relationships, their former partners may seek them out at work because of the predictability of that location.[19] A current victim's productivity may thus suffer because of workplace harassment or stalking, or because of the stress and distraction the abuse at home causes.[20] Victims may

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vehicle that recognizes and respects the roles and responsibilities of a variety of stakeholders"); Widiss, *supra* note 10, at 718 (advocating for reframing the "patchwork of protections" state laws offer to further the "public strategy of combating domestic violence, rather than as protections or benefits for individual victims or individual employers") .

17. In a 2007 survey of over 500 employees working at Fortune 1,500 companies, 26% of the women and 8% of the men self-identified as victims of domestic violence. NAT'L CTR. ON DOMESTIC & SEXUAL VIOLENCE, CORPORATE LEADERS & AMERICA'S WORKFORCE ON DOMESTIC VIOLENCE: SUMMARY OF FINDINGS 16 (Sept. 25, 2007), http://www.ncdsv.org/images/Corporate%20Leaders%20and%20America's%20Workforce%20on%20DV%20Summary_9-25-07.pdf. In another study of 2,373 employees across three midsized organizations (an insurance provider, a university, and a transportation company), 10.3% of the employees had experienced domestic violence in the last twelve months, and between double and triple that amount had experienced such violence in their lifetime. Carol Reeves & Anne O'Leary-Kelly, *The Effects and Costs of Intimate Partner Violence for Work Organizations*, 22 J. INTERPERSONAL VIOLENCE 327, 327, 330, 335-36 (2007). A recent, small-scale study of supervisors in city government and small business settings revealed that over half had encountered domestic violence issues among their employees in the past five years and fifteen percent reported encountering such issues "many times" in the past year. N. Glass et al., Developing a Computer-based Training Intervention for Work Supervisors to Respond to Intimate Partner Violence 11 (unpublished manuscript) (on file with author) (reporting results from fifty-three participants in computer-based training pilot program).

18. Anne O'Leary-Kelly et al., *Coming into the Light: Intimate Partner Violence and Its Effects at Work*, 22 ACAD. MGMT. PERSP. 57, 59 (2008). For example, batterers may interfere with their partners' ability to get to work or use threats that cause them to leave work. GOLDSCHEID & RUNGE, *supra* note 5, at 3.

19. O'Leary-Kelly, *supra* note 18, at 59.

20. T.K. Logan et al., *Partner Stalking and Implications for Women's Employment*,

also miss work in an attempt to address its effects, recovering from or seeking medical assistance for injuries, participating in counseling, finding new housing, developing safety plans with a victim advocate, or obtaining legal advice and attending court proceedings.[21] Many individuals report experiencing trouble at work[22] or losing their jobs because of domestic violence.[23] For businesses, the costs, at least in terms of the victims' productivity losses and health care expenses, has been estimated at $5.8 billion annually.[24]

The workplace impact is not limited to the victims' experiences. Co-workers also suffer consequences, including increased stress and distraction because of their perception of the abuse and an increased workload due to the victims' decreased productivity.[25] Perpetrators may harass or threaten co-workers directly.[26] In extreme cases, though relatively uncommon, perpetrators may even assault co-workers.[27] Like the victims, the perpetrators themselves are often less productive employees.[28]

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22 J. INTERPERSONAL VIOLENCE 268, 285 (2007).

21. Karin, *supra* note 16, at 378, 393.

22. *Id.* at 378 (citing WOMEN'S BUREAU, DEP'T OF LABOR DOMESTIC VIOLENCE: A WORKPLACE ISSUE 1 (1996); Nicole Buonocore Porter, *Victimizing the Abused?: Is Termination the Solution When Domestic Violence Comes to Work?*, 12 MICH. J. GENDER & L. 275, 287 (2006) (internal citation omitted)).

23. Karin, *supra* note 16, at 383 (citing U.S. GEN. ACCOUNTING OFFICE, DOMESTIC VIOLENCE: PREVALENCE AND IMPLICATIONS FOR EMPLOYMENT AMONG WELFARE RECIPIENTS 7-9, 18-19 (1998)).

24. Widiss, *supra* note 10, at 679 (citing NAT'L CTR. FOR INJURY PREVENTION & CONTROL, DEP'T OF HEALTH & HUMAN SERVS., COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES (2003), http://www.cdc.gov/violenceprevention/pdf/IPVBook-a.pdf).

25. CHRISTINE LINDQUIST ET AL., INVENTORY OF WORKPLACE INTERVENTIONS DESIGNED TO PREVENT INTIMATE PARTNER VIOLENCE § 1.1.3 (May 4, 2006), http://www.caepv.org/membercenter/files/Inventory%20of%20Workplace%20Interventions%20Designed%20to%20Prevent%20IPV%20%28May%202006%29.pdf.

26. CHRISTOPHER BLODGETT & JENNIFER STAPLETON, INTIMATE PARTNER VIOLENCE: IT'S A WORKPLACE ISSUE! RESEARCH REPORT 19-20 (2005), http://www.peaceatwork.org/resources/DVImpactonWorkplace-SpokaneStudy-2005.pdf (study out of Spokane, Washington finding that co-workers or supervisors were involved in 20% of the reported workplace incidents).

27. *Id.* at 23-24.

28. Although less work has been done to measure the impact that perpetrators have on their own workplaces, several recent studies support decreased productivity. Emily F. Rothman & Phaedra S. Corso, *Propensity for Intimate Partner Abuse and Workplace Productivity*: *Why Employers Should Care*, 14 VIOLENCE AGAINST WOMEN 1054, 1063 (2008) (finding in a small sample of employees that "male employees with a greater propensity for partner-abusive behavior were less productive than male employees with a lesser propensity for partner abuse"). Two small-scale studies of men in batterer intervention programs found that they often missed work or had difficulty concentrating at work because of the violence. *Id.* at 1055 (citing findings from two 2004 studies in Maine and Massachusetts). Many perpetrators also admit to using company telephones and vehicles to stalk or harass their partners. Emily F. Rothman & Melissa J. Perry, *Intimate Partner Abuse Perpetrated by Employees*, 9 J. OCCUPATIONAL HEALTH PSYCHOL. 238, 244 (2004).

Collectively, employers could substantially impact the lives of those who experience domestic violence and, as a consequence, reduce the frequency and severity of the harm in our society. Not only does employment provide some level of financial independence that may facilitate separation from the abuse,[29] but it also provides a sense of control and psychological reassurance to victims "that they are capable of providing for themselves and their children."[30] Employment provides other non-economic benefits to domestic violence victims, including physical safety and social connectedness.[31] The workplace also can serve as an effective vehicle for disseminating information about available resources, including employee assistance programs and local and national domestic abuse and batterer intervention programs.[32] Employers can train employees to recognize early warning signs of domestic abuse and to intervene if the employee wants protection or other assistance to reduce, or even prevent, future violence.[33]

Many companies recognize the benefits of proactively addressing the impact of domestic violence in the workplace.[34] Notwithstanding the great need for such strategies, and the many resources available to employers who choose to implement them, many employers still have not implemented domestic-violence-specific policies or programs.[35] Instead of supporting their employees, many employers

29. Widiss, *supra* note 10, at 680; *see also* Emily F. Rothman et al., *How Employment Helps Female Victims of Intimate Partner Violence: A Qualitative Study*, 12 J. OCCUPATIONAL HEALTH PSYCHOL. 136, 142 (2007) (discussing why employment is helpful to those struggling with the effects of partner violence and abuse).

30. Rothman et al., *supra* note 29, at 138.

31. *Id.* at 138-40.

32. *See* LINDQUIST, *supra* note 25, § 1.2 (noting the programs employers can implement in order to educate employees and reduce domestic violence).

33. *See id.* § 3.2 (discussing IPV prevention programs at twenty-six companies directed at employees).

34. *See* GOLDSCHEID & RUNGE, *supra* note 5, at 4 (discussing how employers are addressing domestic violence); LINDQUIST, *supra* note 25, § 1.2 (noting employers' reasons for developing IPV prevention programs). For example, the Corporate Alliance to End Partner Violence, founded in 1995 by business leaders who view the workplace as an effective vehicle for combating domestic violence, has dozens of corporate members who "exchange information, collaborate on projects, and use their influence to instigate change." *Our Purpose*, CORPORATE ALLIANCE TO END PARTNER VIOLENCE, http://www.caepv.org /about/ purpose.php (last visited Nov. 9, 2010). Employers who encourage employees to report their experiences can work individually with the employees to meet their specific needs. While some employees may need time off to address the violence, like the employee in the *Danny* case, others may benefit from important, but low-cost, accommodations, such as telephone and voicemail monitoring, a new telephone number, a new work station, security escorts, and shift adjustments. Goldscheid, *supra* note 16, at 120; *see also* LEGAL MOMENTUM, SAFETY PLANNING IN THE WORKPLACE: PROTECTING YOURSELF AND YOUR JOB 1-2 (2001), http://www.legalmomentum .org/assets/pdfs/safety-planning.pdf (discussing how victims of domestic violence can protect themselves and their jobs).

35. A recent survey of corporate executives further reveals this disconnect: "Although nearly 2 in 3 corporate executives (63%) say that domestic violence is a major problem in our society and 55% cite its harmful impact on productivity in their companies . . . ," only

either fail to recognize what is impacting their employees' work or choose not to see it because they consider domestic violence a "private" matter.[36] It may be easier to just terminate the employment based on the employee's conduct—for example, frequent absences or late arrivals—and ignore the underlying cause. Employers also may fear the alternative—that if they maintain the employee, they might expose others to harm.[37] While employee productivity and workplace safety may be legitimate employer concerns in certain situations, they are not the rule, and they should not be used reflexively to terminate employment without considering the specific circumstances.[38] Laws and policies should instead encourage employers to work with their employees to preserve their financial stability to the extent possible.

II. THE PUBLIC-POLICY EXCEPTION TO AT-WILL EMPLOYMENT

Although many states have begun to address this issue through specific workplace legislation,[39] many employers who terminate employees for reasons related to domestic violence currently face limited liability because of the doctrine of at-will employment.[40] Not

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13% say that their companies should address domestic violence. CORPORATE LEADERS ON DOMESTIC VIOLENCE, *Workplace Statistics*, (2010), http://www.caepv.org/getinfo/facts_stats.php?factsec=3 (citing CORPORATE ALLIANCE TO END PARTNER VIOLENCE, *supra* note 34) (additional survey results on file with author). According to a 2005 Survey of Workplace Violence Prevention, 29.1% of businesses have policies addressing workplace violence generally, and less than half of those address domestic violence specifically. Only 4% of businesses conduct training on how to respond to issues of domestic violence. Press Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Survey of Workplace Violence, 15, 17 (Oct. 27, 2006), *available at* http://stats.bla.gov/iif/oschwc/osnr0026.pdf. This is consistent with recent research from the employees' perspective; although many victims of domestic abuse report seeking assistance from their supervisors, they also report receiving limited assistance. Glass et al., *supra* note 17, at 5-6. On the other hand, perpetrators report experiencing support for enrollment in batterer treatment programs and receiving time off from work for court dates. *Id.* at 6.

36. Randel & Wells, *supra* note 16, at 834.

37. *See* John E. Matejkovic, *Which Suit Would You Like? The Employer's Dilemma in Dealing with Domestic Violence*, 33 CAP. U. L. REV. 309, 313 (2004) (discussing tort-based claims employers may face); Porter, *supra* note 22, at 279 (discussing a hypothetical where a hospital was afraid of violence spilling over into the workplace if it still employed a domestic violence victim).

38. With respect to workplace safety, the risks are often overstated: "[T]he constant refrain that domestic violence may lead to workplace violence, especially when combined with the widely-held tendency to blame victims for violence, distorts the overall picture and may contribute to the frequency with which victims are fired." Widiss, *supra* note 10, at 686. Even in extreme cases of workplace violence, courts frequently do not find the harm foreseeable and, thus, do not hold the employer liable. Matejkovic, *supra* note 37, at 315-24 (summarizing several case examples).

39. Widiss, *supra* note 10, at 698-716 (summarizing current legislation); *infra* Part III.B.

40. Park, *supra* note 9, at 124-25. All states but Montana recognize at-will employment. *Id*. at 129. While some employer conduct may be prohibited by other statutes, many employees remain without a remedy when abuse leads to negative employment

withstanding the myriad statutory,[41] and common-law exceptions to the at-will presumption,[42] most agree that the general rule continues to reign: employers and employees may terminate the employment relationship at any time for any reason.[43] The most frequently used exception to at-will employment, a wrongful discharge claim that alleges the termination violated public policy,[44] seeks to balance "the employer's interest in operating a business efficiently and profitably, the employee's interest in earning a livelihood, and society's interest in seeing its public policies carried out."[45]

A. Public-Policy Element

States that recognize this exception require the employee to demonstrate a substantial and clearly-defined public policy that the

consequences. Jessie Bode Brown, *The Costs of Domestic Violence in the Employment Arena: A Call for Legal Reform and Community-Based Education Initiatives*, 16 VA. J. SOC. POL'Y & L. 1, 38-43 (2008) (examining proposed and current laws that protect domestic violence victims at work); Goldscheid, *supra* note 16, at 84-104 (explaining that current application of Title VII fails to address the problem); Nina W. Tarr, *Employment and Economic Security for Victims of Domestic Abuse*, 16 S. CAL. REV. L. & SOC. JUST. 371, 391-409 (2007) (summarizing and critiquing laws currently available to domestic violence victims); Widiss, *supra* note 10, at 684-85 ("[V]ictims of domestic violence who disclose their situation[s] to their employers may be fired with relative impunity.").

41. Such statutory limitations include state and federal employment discrimination laws, labor protections, and laws protecting employees who report their employers' criminal behavior. *See* Kenneth R. Swift, *The Public Policy Exception to Employment At-Will: Time to Retire a Noble Warrior?*, 61 MERCER L. REV. 551, 552-65 (2010) (discussing both state and federal statutory exceptions to at-will employment).

42. In addition to the public-policy exception, many states recognize an implied contract and the implied covenant of good faith and fair dealing as exceptions to at-will employment. *See* Mark E. Brossman, Laurie C. Malkin & Rosemarie M. Coppola, *Beyond the Implied Contract: The Public Policy Exception, the Implied Covenant of Good Faith and Fair Dealing, and Other Limitations on an Employer's Discretion in the At-Will Setting*, 651 PLI/LIT. 7, 65-78 (2001) (examining the covenant of good faith and fair dealing in the context of at-will employment).

43. Clyde W. Summers, *Employment At Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 73 (2000) ("The employer's divine right to dismiss at any time, for any reason, and without notice has survived with vigor."). Professor Summers concluded that the common-law exceptions "have been so grudgingly applied by most courts, that they are little more than paper shields against arbitrary employer actions." *Id.* at 77. Others conclude that the general rule continues to "[s]wallow the[e]xceptions." Joseph E. Slater, *The "American Rule" that Swallows the Exceptions*, 11 EMP. RTS. & EMP. POL'Y J. 53 (2007).

44. Charles J. Muhl, *The Employment-At-Will Doctrine: Three Major Exceptions*, 124 MONTHLY LAB. REV. 3, 4 (2001), *available at* http://www.bls.gov/opub/mlr/2001/01/art1full.pdf.

45. Palmateer v. Int'l Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981). In the mid-twentieth century, employment began to shift toward recognizing the "interdependence of individuals, and particularly the dependence of employees on employers and the concomitant power of employers to abuse that power . . . ." Deborah A. Ballam, *Employment-at-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L. J. 653, 657 (2000) (citation omitted). It is out of this recognition that the public-policy exception grew. *Id.* at 659-61.

termination at least implicated, if not directly violated.[46] States articulate the other elements of the claim in various ways. For example, some states require the plaintiff to establish a substantial public policy and that the "discharge was motivated by an unlawful factor contravening that policy."[47] In this case, the burden then shifts to the employer to establish that "the same result would have occurred even in the absence of the unlawful motive."[48] A few jurisdictions, Washington for example, spell out four elements that a plaintiff must establish:

> (1) 'The existence of a clear public policy (the *clarity* element);' (2) 'that discouraging the conduct in which [she] engaged would jeopardize the public policy (the *jeopardy* element);' (3) 'that the public-policy-linked conduct caused the dismissal (the *causation* element);' and (4) [that the employer] . . . must not be able to offer an overriding justification for the dismissal (the *absence of justification* element).'[49]

Others require a showing that a "clear and substantial public policy" exists, "the employee's conduct brought the policy into play," and "the discharge and the conduct bringing the policy into play are causally connected."[50]

Characterized as the "Achilles heel" of a retaliatory discharge claim,[51] the determination of what constitutes a public policy also varies considerably among states.[52] The Illinois Supreme Court explained that matters that may be recognized as retaliatory discharge are those that "strike at the heart of a citizen's social rights, duties, and responsibilities."[53] The Vermont Supreme Court defines public policy as "the community common sense and common conscience, extended and applied throughout the state to matters of public morals, public health, public safety, public welfare, and the like. It is that gen-

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46. Muhl, *supra* note 44, at 4.

47. Page v. Columbia Natural Res., Inc., 480 S.E.2d 817, 828-29 (W.Va. 1996).

48. *Id.* at 829.

49. Danny v. Laidlaw Transit Servs., Inc., 193 P.3d 128, 131 (Wash. 2008) (en banc) (quoting Gardner v. Loomis Armored, Inc., 913 P.2d 377, 382 (Wash. 1996)). The test is attributed to the well-known work of Professor Henry H. Perritt, Jr. Swift, *supra* note 41, at 567. *See* 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) (describing the four-part test).

50. Ryan v. Dan's Food Stores, 972 P.2d 395, 404 (Utah 1998).

51. Palmateer v. Int'l Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981).

52. Often, whether the plaintiff has articulated a cognizable public policy is a question of law for the courts. *E.g.*, Fitzgerald v. Salsbury Chem., Inc., 613 N.W.2d 275, 282 (Iowa 2000) (citation omitted). At least one jurisdiction classifies this element as one of fact for the jury. Cilley v. N.H. Ball Bearings, 514 A.2d 818, 821 (N.H. 1981) (citation omitted).

53. *Palmateer*, 421 N.E.2d at 878-79.

eral and well-settled public opinion relating to man's plain, palpable duty to his fellow men."[54]

All states clarify that the policy implicated by the termination must primarily benefit the public, as opposed to serving the individual's personal interest.[55] States also recognize that the policy must be "sufficiently concrete"[56] and "so widely regarded as to be evident to employers and employees alike."[57] What constitutes a public policy continues to evolve, but many states recognize public-policy violations when employees are terminated for refusing to violate laws, performing public obligations, exercising legal rights or privileges, or reporting employers' criminal activity to public authority.[58] Some of the most common wrongful-discharge claims include terminations for serving on a jury,[59] responding to a subpoena,[60] filing a workers' compensation claim,[61] and refusing to commit an illegal act.[62]

B. Sources of Public Policy

States also turn to different sources for statements of public policy. Some states broadly define the sources to include not only the state's constitution, statutes, and judicial decisions, but also "'the customs and conventions of the people—in their clear consciousness and conviction of what is naturally and inherently just and right . . . .'"[63] Others limit the sources to specific authority, usually

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54. Payne v. Rozendaal, 520 A.2d 586, 588 (Vt. 1986) (quoting Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Kinney, 115 N.E. 505, 507 (Ohio 1916)).

55. LoPresti v. Rutland Reg'l Health Servs., Inc., 865 A.2d 1102, 1112 (Vt. 2004) (citation omitted); *see also* Stevenson v. Superior Court, 941 P.2d 1157, 1170 (Cal. 1997) (policy must "'inure[] to the benefit of the public' rather than serving merely the interests of the individual" (citation omitted)).

56. *LoPresti*, 865 A.2d at 1112 (quoting Rocky Mtn. Hosp. & Med. Serv. v. Mariani, 916 P.2d 519, 525 (Colo. 1996)).

57. Feliciano v. 7-Eleven, Inc., 559 S.E.2d 713, 718 (W.Va. 2001). Before a court may declare the existence of a public policy, it must be "'so thoroughly established as a state of public mind so united and so definite and fixed that its existence is not subject to any substantial doubt.'" Palmer v. Brown, 752 P.2d 685, 687-88 (Kan. 1988) (quoting Noel v. Menninger Found., 267 P.2d 934 (Kan. 1954)).

58. *See, e.g.*, Ryan v. Dan's Food Stores, 972 P.2d 395, 408 (Utah 1998) (citations omitted); Sorensen v. Comm Tek, Inc., 799 P.2d 70, 74 (Idaho 1990) (citations omitted) (discussing circumstances entitling employees to a public-policy exception).

59. *E.g.*, Nees v. Hocks, 536 P.2d 512, 516 (Or. 1975); Reuther v. Fowler & Williams, Inc., 386 A.2d 119, 121 (Pa. 1978).

60. *E.g.*, Ressler v. Humane Soc. of Grand Forks, 480 N.W.2d 429, 432 (N.D. 1992); Ludwick v. This Minute of Carolina, Inc. 337 S.E.2d 213, 216 (S.C. 1985).

61. *E.g.*, Frampton v. Cent. Ind. Gas Co., 297 N.E.2d 425, 428 (Ind. 1973); Firestone Textile Co. Div., Firestone Tire & Rubber Co. v. Meadows, 666 S.W.2d 730, 733-34 (Ky. 1983).

62. *E.g.*, Wagenseller v. Scottsdale Mem'l Hosp., 710 P.2d 1025, 1035 (Ariz. 1985) (refusal to commit indecent exposure); Petermann v. Int'l Bhd. of Teamsters, 344 P.2d 25, 27 (Cal. Ct. App. 1959) (refusal to commit perjury).

63. Payne v. Rozendaal, 520 A.2d 586, 588 (Vt. 1986) (quoting Pittsburgh, Cincinnati,

statutes and constitutions, but recognize that certain terminations might violate the spirit rather than the letter of the laws,[64] or that allowing certain discharges would undermine the policy.[65] The most restrictive view is that public policy may only be legislatively created and that the employer must have terminated the employee for refusing to violate a law[66] or for a reason explicitly prohibited by a statute.[67] In some states, the need for legislative statements of the policy leads to an almost absurd circularity: although the doctrine was judicially-created, states often require a legislative source for the underlying public policy;[68] yet, if the legislature specifically addresses the issue and provides at least some relief, the statutory remedy precludes the common-law claim.[69] Thus, any evaluation of the public-policy exception must at least consider, and may conclude with, relevant legislation.

III. PUBLIC POLICY OF ASSISTING DOMESTIC VIOLENCE VICTIMS

In 2003, Sandra S. Park called for states to recognize a public-policy exception to at-will employment for domestic violence victims, arguing that it would "build[] on the work done by battered women's advocates challenging the notion that domestic violence is a 'private' concern and address[] the obstacles faced by employees who experience domestic violence."[70] To do otherwise, she posited, effectively "contributes to re-victimization perpetrated by society as a whole."[71]

Chic. & St. Louis Ry. Co. v. Kinney, 115 N.E. 505, 507 (Ohio 1916)).

64. Parnar v. Americana Hotels, Inc., 652 P.2d 625, 631 (Haw. 1982) (instructing courts to determine whether the "employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme").

65. Fitzgerald v. Salsbury Chem., Inc., 613 N.W.2d 275, 283 (Iowa 2000).

66. *E.g.*, Mott v. Montgomery Cnty., 882 S.W.2d 635, 637 (Tex. 1994) (citation omitted) (recognizing exception only when discharge violates "the terms of a statute, an employment contract, or result[s] from an employee's refusal to commit an illegal act").

67. *E.g.*, Lawson v. S.C. Dept. of Corr., 532 S.E.2d 259, 260-61 (S.C. 2000) (citations omitted) (explaining that the public-policy exception applies when termination itself violates criminal law or employers require employees to do so).

68. Imes v. City of Asheville, 594 S.E.2d 397, 399-400 (N.C. Ct. App. 2004), *aff'd*, 606 S.E.2d 117 (N.C. 2004) (per curiam).

69. *E.g.*, Van v. Portneuf Med. Ctr., 212 P.3d 982, 991 (Idaho 2009); Kruchowski v. Weyerhaeuser Co., 202 P.3d 144, 150 (Okla. 2008); *Imes*, 594 S.E.2d at 399; Ross v. Stouffer Hotel Co., 879 P.2d 1037, 1047 (Haw. 1994). Other states permit a common-law claim unless a "'statutory remedy fully comprehends and envelops the remedies provided by common law.'" Fleshner v. Pepose Vision Inst., P.C., 304 S.W.3d 81, 95 (Mo. 2010) (en banc) (quoting Dierkes v. Blue Cross & Blue Shield of Mo., 991 S.W.2d 662, 668 (Mo. 1999) (en banc)); Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 899 (Tenn. 1992) ("[W]here a common law right exists, and a statutory remedy is subsequently created, the statutory remedy is cumulative unless expressly stated otherwise.").

70. Park, *supra* note 9, at 124.

71. *Id.* at 141.

This article builds on Park's work in light of the judicial and legislative developments that make the public-policy claim even stronger in some jurisdictions.

A. Judicial Recognition

1. Apessos v. Memorial Press Group

When Park wrote her article, the most recent development was the 2002 unreported decision from the Massachusetts Superior Court, *Apessos v. Memorial Press Group*, which recognized a state policy of protecting victims from physical and emotional violence and protecting their livelihoods.[72] The court described these interests as "primal" and "connected," explaining: "The preservation of a livelihood should serve to reduce domestic dependence and its concomitant vulnerability to abuse. A victim should not have to seek physical safety at the cost of her employment."[73] In denying the employer's motion to dismiss, the court concluded that an employer cannot discharge an employee for missing one day of work to seek judicial protection, assist police, and change her locks.[74] The court found the policy in the state constitution, which provides access to the courts and recourse for her injuries; the state's Abuse Prevention Act, which provides judicial relief for domestic violence victims; and case law, which protects cooperation with law enforcement.[75] The court seemed most persuaded by the statutory mandate that a victim of domestic violence who obtains a temporary protection order, as Ms. Apessos did, appear in court the next business day to file her complaint.[76]

2. Vance v. Dispatch Management Service

Not mentioned in Park's article, but relevant to this issue, is the 2000 decision from the Northern District of Illinois, *Vance v. Dispatch Management Services*, which held that terminating an employee for obtaining a protective order against an ex-domestic partner and current co-worker violates Illinois's public policy.[77] The court explained that "policies affecting the health and safety of citizens will support

72. Apessos v. Memorial Press Group, No. 01-1474-A, 2002 WL 31324115, at *3 (Mass. Dist. Ct. Sept. 30, 2002).
73. *Id.*
74. *Id.* at *1, *3.
75. *Id.* at *3.
76. *Id.*
77. Vance v. Dispatch Mgmt. Servs., 122 F. Supp. 2d 910, 911 (N.D. Ill. 2000).

a retaliatory discharge claim," and that seeking court protection for violence by a current or former domestic partner "would appear to involve the protection of each citizen's health and welfare."[78] The court further concluded that this situation is analogous to the line of cases establishing a violation of public policy for discharging an employee for reporting illegal or improper conduct.[79]

3. Green v. Bryant

Park also considered one other published decision on the issue, a now fifteen-year-old case from the Eastern District of Pennsylvania, which rejected a public-policy exception for a domestic violence victim.[80] *Green v. Bryant* involved an employee who reported to her employer that she had been violently assaulted by her husband and sought medical treatment for her injuries.[81] Her employer not only fired her, but also retroactively terminated her health insurance so that her treatment costs were not covered.[82] The employee alleged that the employer admitted that the discharge was based "solely upon her being the victim of a violent crime."[83]

The employee claimed that her termination violated two policy interests: "protecting an employee's right to privacy and protecting victims of crime or spousal abuse."[84] The court rejected the privacy claim because she volunteered the information about the abuse to her

78. *Id.*

79. *Id.* at 911-12 (citing Howard v. Zack Co., 637 N.E. 2d 1183, 1190 (1994)). In addition to *Apessos* and *Vance*, two other unpublished decisions since Park's article provide at least limited support for a public-policy claim. *See* Greer v. Beck's Pub & Grille, No. 6:03-cv-02070-LRR, *32 (N.D. Iowa, Jan. 4, 2006) (declining to dismiss a public-policy-based claim alleging termination for obtaining a protective order); Pooley v. Union Cnty., No. 01-343-JE, at *38 (D. Or., Mar. 17, 2003) ("[P]articipating in the criminal prosecution of one who commits domestic violence and seeking and modifying restraining orders appears to qualify as an 'employment related right of important public interest.'" (citation omitted)). Both decisions are available through PACER and on file with the author.

80. Green v. Bryant, 887 F. Supp. 798, 801 (E.D. Pa. 1995).

81. *Id.* at 800.

82. *Id.*

83. *Id.* The court presumed, without any reference to the employer's arguments, that the employer may have had concerns about "physical or emotional danger to other employees or patients" if the employee's ex-husband came into the workplace. *Id.* at 800 n.2. Not only does it seem improper for the court to presume the employer's motivations, it should be irrelevant to the public policy element. If a policy interest were established, then the employer could have argued that it had some other justification for the termination. The employer should not be able to assume that the ex-husband presented harm to the workplace and reflexively terminate the victim's employment. *See* Goldscheid, *supra* note 16, at 98 (arguing that firing victims for their spouses' actions "harkens back to coverture, when a husband and wife were treated as one legal person").

84. Green v. Bryant, 887 F. Supp. 798, 801 (E.D. Pa. 1995).

employers.[85] With respect to the policy to protect domestic violence victims, the court held that although Pennsylvania's Protection from Abuse Act "provides certain procedures and protections, they do not thereby create a protected employment class."[86] In other words, the court determined that because Pennsylvania's law did not create any employment rights or privileges, it could not serve as the basis for a public-policy exception to the at-will doctrine. The court acknowledged, however, 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."[87]

4. Imes v. City of Asheville

Just after Park's article, the North Carolina Court of Appeals, in *Imes v. City of Asheville*, rejected a wrongful discharge claim by a male employee who alleged his employer admitted to firing him because he was a victim of domestic violence.[88] The employee, who had worked for the company for over twenty-five years, was fired one month after being hospitalized for gunshot injuries inflicted by his wife.[89] Narrowly defining the public policy that it may recognize, the court determined that the employee's claim failed because the employer's conduct did not violate "any explicit statutory or constitutional provision," and the employer did not encourage the employee "to violate any law that might result in potential harm to the public."[90]

With respect to North Carolina's domestic abuse laws, the court characterized them as providing "various protections for victims of domestic violence," but not establishing them as a "protected class of persons or extend[ing] employment security status to such persons."[91] It contrasted the statutory language with that in the employment discrimination statute, which explicitly announces the "'public policy . . . to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment . . . .'"[92] The court agreed with the employee and the dissent that "domestic violence is a serious social problem," but characterized it as "one of many social

85. *Id.*
86. *Id.*
87. *Id.*
88. Imes v. City of Asheville, 594 S.E.2d 397, 398 (N.C. Ct. App. 2004), *aff'd per curiam*, 606 S.E.2d 117 (N.C. 2004).
89. *Id.*
90. *Id.* at 399.
91. *Id.* (citing N.C. GEN. STAT. § 50B-1 *et seq.* (2003)).
92. *Id.* (quoting N.C. GEN. STAT. § 143-422.2 (2003)).

problems" that North Carolina's laws seek to address, and not one for which the legislature had provided employment protection.[93]

The dissent in *Imes* cautioned against rigidly defining public policy and reminded the court that, "'[t]rue to common law tradition, we allow this still evolving area of the law to mature slowly, deciding each case on the facts before us.'"[94] It looked to North Carolina's Domestic Violence Act, which authorized courts to prohibit abusers from entering the workplace, and its unemployment compensation laws, which provides benefits to those forced to leave or discharged from work, as evidence of the state's "strong public policy aimed not only at supporting victims of domestic violence, but also at preventing the effects of domestic violence from entering the workplace."[95]

5. Danny v. Laidlaw Transit Services

Four years later, the Washington Supreme Court took the approach encouraged by the *Imes* dissent, reviewed the state's relevant laws and policies, and reached a dramatically different conclusion.[96] In *Danny*, after removing the matter to federal district court, the employer moved to dismiss the wrongful discharge claim.[97] To resolve the motion, the federal court certified to the Washington Supreme Court the question of whether the state had "a clear mandate of public policy prohibiting an employer from discharging an at-will employee because she experienced domestic violence and took leave from work to take actions to protect herself, her family, and to hold her abuser accountable."[98] Seeking to remove any questions of fact and to focus on the public policy issue, the Washington Supreme Court instead considered whether the state had "established a clear mandate of public policy of protecting domestic violence survivors and their families and holding their abusers accountable."[99] Thus, the court's conclusion that the state did, in fact, have such a policy did not reach the factual questions of whether this particular discharge *violated* a public policy or whether the employer was *required* to provide time off to this employee.[100]

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93. *Id.*

94. *Imes*, 594 S.E.2d at 401 (Timmons-Goodson, J., dissenting) (quoting Amos v. Oakdale Knitting Co., 416 S.E.2d 166, 169 n.1 (1992)).

95. *Id.* at 402 (citing N.C. GEN. STAT. §§ 50B-3(a), 96-14(1)(f) (2003)). In fact, effective later that same year, the North Carolina legislature enacted a law that prohibits employers from discriminating against employees who take "reasonable time off" to seek court protection from domestic violence. N.C. GEN. STAT. ANN. §§ 50B-5.5, 95-270(a) (West 2010).

96. Danny v. Laidlaw Transit Servs., Inc., 193 P.3d 128, 155 (Wash. 2008) (en banc).

97. *Id.* at 131.

98. *Id.* at 130.

99. *Id.*

100. After the Washington Supreme Court's decision on this certified question, the

In analyzing the public-policy question, the court explained that the employee must demonstrate that the asserted policy is both "'truly public'" and "sufficiently clear."[101] Relying on the legislature's "repeated[] and unequivocal[]" declarations that "domestic violence is an immense problem that impacts entire communities," the court had little difficulty characterizing the policy to prevent domestic violence as public.[102] For the clarity of the policy, the court again relied primarily on the state's legislative enactments in the last thirty years, which it characterized as "clear, concrete actions to encourage domestic violence victims to end abuse, leave their abusers, protect their children, and cooperate with law enforcement and prosecution efforts to hold the abuser accountable."[103] It reinforced this conclusion with references to administrative, constitutional, and judicial expressions of the same policy.[104] It also looked to judicial law as a source of additional relevant policies, including "protecting human life from imminent harm."[105]

The court clarified that the policy need not be one specific to employment, but rather that "an employer may be liable for wrongful discharge if the employer fires an employee for taking actions necessary to protect that policy, regardless of whether the public policy itself addresses the employment context."[106] It explained that the contrary view, urged by the employer and the concurrence/dissent, would essentially conflate the first two elements of the wrongful discharge claim and require the court to evaluate the employer's conduct while determining whether a public policy exists.[107]

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parties ultimately resolved the federal matter through mediation, and the court formally dismissed the action on March 6, 2009. Danny v. First Transit, No. C05-1047RSL, Order of Dismissal (March 6, 2009) (available through PACER and on file with the author).

101. *Danny*, 193 P.3d at 131 (citing Sedlacek v. Hillis, 36 P.3d 1014, 1019 (Wash. 2001)).

102. *Id.* at 135. The court clarified that to be public, the policy must "'concern[] what is right and just'" and "'affect[] the citizens of the State collectively.'" *Id.* at 131 (quoting Dicomes v. Sate, 782 P.2d 1002 (Wash. 1989) (citation omitted)).

103. *Id.* at 134. At the time of the court's decision, Washington had enacted legislation that required employers to grant leave to domestic violence victims. The concurrence/dissent argued that the majority opinion improperly gave retroactive effect to the legislation, which did not exist when the employee was discharged. *Id.* at 142 (Madsen, J., concurring/dissenting). The majority referenced the new legislation as additional support that the state's policy "supports liability for employers who thwart their employees' efforts to protect themselves from domestic violence," though it did not rely on this law for its characterization of the state's policy. *Id.* at 138.

104. *Danny*, 193 P.3d at 135-36.

105. *Id.* at 137 (citing Gardner v. Loomis Armored, Inc., 913 P.2d 377, 383 (1996)).

106. *Id.* at 138 (citing Gardner v. Loomis Armored, Inc., 913 P.2d 377, 383 (1996)).

107. *Id.* at 137. The concurrence/dissent characterized the "threshold issue of law" as "whether a 'clear mandate of public policy' forbids an employer from discharging an employee for a particular reason." *Id.* at 143 (Madsen, J., concurring/dissenting) (citing Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1089 (Wash. 1984)). A separate dissent

Even the concurrence/dissent agreed that "public policy clearly prohibits employers from discharging an employee for obtaining a protection order, filing a complaint against an abuser, cooperating with the investigation and prosecution of the alleged abuser, finding alternative living arrangements, or accessing support services for domestic violence victims."[108] Its primary disagreement with the majority opinion was its view that it essentially prohibited an employer from discharging an employee for *absenteeism* related to these actions.[109]

The majority responded to this critique by explaining that this issue was irrelevant to the public policy analysis, but rather relates to the second element—whether the employer's conduct jeopardized the public policy—and required a fact-intensive inquiry that the district court must resolve.[110] The majority explained that for the plaintiff to satisfy the jeopardy element, she must show that her conduct "'*directly relates* to the public policy, or was *necessary* for the effective enforcement of the public policy.'"[111] In this case, the employee would have to establish that the time off from work "was the *only available adequate* means to prevent domestic violence against herself or her children or to hold her abuser accountable" by introducing evidence of the particular circumstances—including her work schedule, the abuser's schedule, and the availability of necessary services—that justified her missing work.[112] The majority stated that the concurrence/dissent would go to the opposite extreme and decide as a matter of law that time off from work would *never* be necessary.[113] This view, according to the majority, would discourage employees to take even a "morning off work to get a protection order, to give a statement to police, or to move her children out of imminent harm's way," and would, in effect, "directly endanger our community's efforts to end domestic violence."[114]

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concluded that while the legislature has enacted a "web of protections in the domestic violence arena . . . none evinces a clear articulation of public policy that changes the legal relationship between employer and employees." *Id.* at 152 (Johnson, J., dissenting). It also argued that it is precisely because the state has enacted so many statutory protections for victims without addressing the employment context further supports that there is no such "clear mandate of public policy." *Danny*, 193 P.3d at 155.

108. *Id.* at 146 (Madsen, J., concurring/dissenting).

109. *Id.* Echoing the view of earlier of cases on this issue, the court stated, "[t]he public policy tort exception to the at-will doctrine is not a vehicle by which this court may conscript employers to shoulder the burden of a societal problem." *Id.* at 143.

110. *Id.* at 138-39.

111. *Id.* at 139 (quoting Gardner v. Loomis Armored, Inc., 913 P.2d 377, 384 (1996)).

112. *Danny*, 193 P.3d at 139.

113. *Id.*

114. *Id.* at 141. The concurrence/dissent countered that the lead opinion fails to balance the employers' interests with the societal interest involved, and does not explain why employers should bear the burden of accommodating the employees' needs. *Id.* at 148-49.

B. Statutory Support

In these cases, and in fact in all cases that entertain the public-policy question, courts may consider any relevant statutory support for the alleged policy. As part of her analysis of the public-policy exception, Park summarized the many state laws that either directly or indirectly express a policy in favor of protecting those who experience domestic violence from employment consequences.[115] Since her article, the number and type of workplace legislation available to domestic violence victims has only increased.[116] Currently, at least fourteen states specifically protect employees experiencing domestic violence by requiring that at least some employers provide job-protected leave to employees seeking judicial relief from the violence.[117] Nine of these states expand the leave to cover time off to access other services, such as medical care, counseling, safety planning, or relocation assistance.[118] The District of Columbia provides *paid* leave for similar kinds of absences.[119] In addition to job-protected leave, both Illinois and, since January 2010, Oregon law prohibit employment discrimination based on an employee's experience of domestic violence and require employers to provide reasonable accommodations for these employees, which may include a modified schedule, a changed telephone or seating assignment, implementation

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It also does not explain why this exception applies to victims of domestic violence as opposed to all crime victims or any employee who wishes to exercise some legislative right. *Id.* at 149. These determinations, it believes, are matters for the legislature as the policy-making branch of government, and not for the courts. *Id.*

115. Park, *supra* note 9, at 125-26, 146-56.

116. For example, Park identified five domestic-violence-specific leave statutes, *id.* at 146-47; eighteen states that provided unemployment insurance to victims of domestic violence, *id.* at 125; and only one city law that prohibited discrimination against victims of abuse, *id.* at 126. For a current and regularly updated summary of domestic violence-related workplace legislation, see *Employment and Housing Rights for Victims of Domestic Violence*, LEGAL MOMENTUM, http://www.legalmomentum.org/legal-knowledge/publications/employment-and-housing-rights.html (last visited Sept. 1, 2010) (providing links to various state law guides).

117. CAL. LAB. CODE §§ 230, 230.1(a) (Deering 2009); COLO. REV. STAT. ANN. § 24-34-402.7(1)(a) (West 2010); CONN. GEN. STAT. ANN. § 54-85b(a) (West 2010); FLA. STAT. ANN. § 741.313(2)(a) (LexisNexis 2010); HAW. REV. STAT. ANN § 378-72(a) (LexisNexis 2010); 810 ILL. COMP. STAT. ANN. § 180/20(1) (West 2010); IOWA CODE ANN. § 915.23(1) (West 2009); KAN. STAT. ANN. §§ 44-1132(a) (2009); ME. REV. STAT. ANN. tit. 26, § 850(1) (2009); MINN. STAT. ANN. §§ 518B.01(23), 609.748(10) (West 2009); N.M. STAT. ANN. § 50-4A-3 (LexisNexis 2010); N.C. GEN. STAT. ANN. § 50B-5.5(a) (West 2010); OR. REV. STAT. ANN. § 659A.272 (West 2010); WASH. REV. CODE ANN. § 49.76.030 (LexisNexis 2010).

118. CAL. LAB. CODE §§ 230 & 230.1 (Deering 2010); COLO. REV. STAT. § 24-34-402.79(1)(a)(II)-(III) (2010); FLA. STAT. ANN. § 741.313(2)(b)(2)-(4) (LexisNexis 2010); HAW. REV. STAT. ANN. § 378-72(a)(1)-(4) (LexisNexis 2010); 810 ILL. COMP. STAT. ANN. § 180/20(1)(A)-(D) (West 2010); KAN. STAT. ANN. §§ 44-1132(a)(1)-(3) (2009); ME. REV. STAT. ANN. tit. 26, § 850(1)(B)-(C) (2009); OR. REV. STAT. ANN. § 659A.272 (West 2010); WASH. REV. CODE ANN. § 49.76.030 (LexisNexis 2010).

119. D.C. CODE § 32-131.02(4) (LexisNexis 2010).

of safety precautions, or assistance in documenting any abuse that occurs at the workplace.[120] Thirty-four states' statutes seek to protect crime victims and witnesses more generally, and particularly those subpoenaed to attend a judicial proceeding, by providing at least some job-protected leave.[121] Several states also permit employers to seek workplace restraining orders on behalf of their employees who have experienced domestic violence.[122] At least 31 states provide unemployment benefits to employees who voluntarily leave their jobs due to reasons related to documented domestic violence,[123]

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120. 820 ILL. COMP. STAT. ANN. § 180/30(a), (b)(3) (LexisNexis 2010); OR. REV. STAT. ANN. § 659A.290(1)(a),(2) (West 2010).

121. ALA. CODE § 15-23-81 (2010); ALASKA STAT. ANN. § 12.61.017(a) (West 2010); ARIZ. REV. STAT. ANN. § 13-4439(A)(1) (LexisNexis 2010); ARK. CODE ANN. § 16-90-1105 (West 2010); COLO. REV. STAT. ANN. § 24-4.1-303(8) (West 2010); CONN. GEN. STAT. ANN. § 54-85b(a) (West 2010); DEL. CODE ANN. tit. 11, § 9409 (West 2010); FLA. STAT. ANN. § 92.57 (LexisNexis 2010); GA. CODE ANN. § 34-1-3(a) (West 2010); HAW. REV. STAT. ANN. § 621-10.5(a) (LexisNexis 2010); IND. CODE ANN. § 35-44-3-11.1 (West 2010); IOWA CODE ANN. § 915.23(1) (West 2009); KY. REV. STAT. ANN. § 421.500(8) (West 2010); MD. CODE ANN. CRIM. PROC. § 11-102(b) (West 2010); MD. CODE ANN. CTS. & JUD. PROC. § 9-205(a) (West 2010); MASS. GEN. LAWS ANN. ch. 268, § 14B (West 2010); MICH. COMP. LAWS ANN. §§ 780.762(1), 780.790(1) (West 2010); MINN. STAT. ANN. § 611A.036(1)-(3) (West 2009); MISS. CODE ANN. § 99-43-45 (West 2009); MO. ANN. STAT. § 595.209(1)(14) (West 2010); MONT. CODE ANN. § 46-24-205(3) (2009); NEV. REV. STAT. ANN. § 50.070(1) (West 2009); N.H. REV. STAT. ANN. § 275:62(I)-(II) (LexisNexis 2010); N.Y. PENAL LAW § 215.14(1) (McKinney 2010); N.D. CENT. CODE ANN. § 27-09.1-17(1) (West 2009); OHIO REV. CODE ANN. §§ 2930.18, 2945.451 (West 2010); 18 PA. STAT. ANN. § 4957(a) (West 2010); R.I. GEN. LAWS ANN. § 12-28-13(a)-(b) (West 2009); S.C. CODE ANN. § 16-3-1550(A) (2009); TENN. CODE ANN. § 4-4-122(a)-(b) (West 2010); UTAH CODE ANN. § 78B-1-132(1) (West 2010); VT. STAT. ANN. tit. 13, § 5313 (West 2009); VA. CODE ANN. § 18.2-465.1 (West 2010); WIS. STAT. ANN. § 103.87 (West 2009); WYO. STAT. ANN. § 1-40-209(a)-(b) (West 2010).

122. ARIZ. REV. STAT. ANN. § 12-1810(A) (LexisNexis 2010); ARK. CODE ANN. § 11-5-115(a), (c) (West 2010); COLO. REV. STAT. ANN. § 13-14-102(4)(b) (West 2010); GA. CODE ANN. § 34-1-7(b) (West 2010); IND. CODE ANN. § 34-26-6-6 (West 2010); NEV. REV. STAT. ANN. § 33.270 (West 2009); N.C. GEN. STAT. ANN. § 95-264(b) (West 2010); R.I. GEN. LAWS ANN. § 28-52-2(a) (West 2009); TENN. CODE ANN. §§ 20-14-108 (West 2010). For a critique of how these laws impact employee-victims' autonomy and may even cause them harm, see Widiss, *supra* note 10, at 715 (describing how protective orders taken out by the victim's employer could result in more danger to both the employee and other colleagues).

123. ARIZ. REV. STAT. ANN. § 23-771(D) (LexisNexis 2010); ARK. CODE ANN. § 11-10-513 (b)(3)(A) (West 2010); CAL. UNEMP. INS. CODE §§ 1030(a)(5), 1032(d), 1256 (Deering 2010); COLO. REV. STAT. ANN. §§ 8-73-107(1)(g)(II)(B), 108(4)(r)(I) (West 2010); CONN. GEN. STAT. ANN. § 31-236(a)(2)(A)(iv) (West 2010); DEL. CODE ANN. tit. 19, § 3314(1) (West 2010); HAW. REV. STAT. ANN. § 383-7.6 (a)(1) (LexisNexis 2010); 820 ILL. COMP. STAT. ANN. § 405/601(B)(6) (West 2010); IND. CODE ANN. §§ 22-4-15-1(1)(c)(8), 22-4-15-1(1)(e), 5-26.5-2-2 (West 2010); KAN. STAT. ANN. § 44-706(a)(12)(A) (2009); LA. REV. STAT. ANN. §§ 23:1774(B) (2010); ME. REV. STAT. ANN. tit. 26 § 1193(1)(A)(4) (2009); MASS. GEN. LAWS ANN. ch. 151A, §§ 1(g)(½), 14(d)(3), 25(e), 30(c) (West 2010); MINN. STAT. ANN. § 268.095(1)(9) (West 2009); MO. REV. STAT. § 288.501(2)(c) (2010); MONT. CODE ANN. § 39-51-2111(1)(a) (West 2009); NEB. REV. STAT. ANN. § 48-628.01(1) (LexisNexis 2010); N.H. REV. STAT. ANN. § 282-A:32(I)(a)(3) (LexisNexis 2010); N.J. STAT. ANN. § 43:21-5(j) (West 2010); N.M. STAT. ANN. § 51-1-7 A(1)(b) (LexisNexis 2010); N.Y. LAB. LAW § 593(1)(b)(i) (McKinney 2010); N.C. GEN. STAT. ANN. § 96-14(b)(1f) (West 2010); OKLA. STAT. ANN. tit. 40, § 2-210(4)(d) (West 2010); OR. REV. STAT. ANN. § 657.176(12) (West 2010); R.I. GEN.

and some even provide benefits to persons discharged for conduct related to the violence.[124]

Some of the clearest and most comprehensive statements of the public policy interests at stake in these kinds of cases come from the statements of purpose in this emerging legislation. The first of its kind, Illinois's Victims' Economic Security and Safety Act, seeks:

> [T]o promote the State's interest in reducing domestic violence, dating violence, sexual assault and stalking by enabling victims of domestic or sexual violence to maintain the financial independence necessary to leave abusive situations, achieve safety, and minimize the physical and emotional injuries from domestic or sexual violence, and to reduce the devastating economic consequences of domestic or sexual violence to employers and employees . . . .[125]

Washington's statute, effective April 2008, similarly recognizes:

> It is in the public interest to reduce domestic violence, sexual assault, and stalking by enabling victims to maintain the financial independence necessary to leave abusive situations, achieve safety, and minimize physical and emotional injuries, and to reduce the devastating economic consequences of domestic violence, sexual assault, and stalking to employers and employees. Victims of domestic violence, sexual assault, and stalking should be able to recover from and cope with the effects of such violence and participate in criminal and civil justice processes without fear of adverse economic consequences.[126]

These statutes clarify that domestic violence is not just an individual employee's problem, but one that impacts the public and that employers can help address.

LAWS ANN. § 28-44-17.1(a) (West 2009); S.C. CODE ANN. § 41-35-125(A) (2009); S.D. CODIFIED LAWS § 61-6-13.1(6) (2010); TEXAS LAB. CODE ANN. § 207.046(a)(2) (West 2009); VT. STAT. ANN. tit. 21, ch. 16A § 1251 (West 2009); WASH. REV. CODE ANN. §§ 50.20.050(1)(b)(4), 50.20.240(1)(b) (LexisNexis 2010); WIS. STAT. ANN. § 108.04(7)(r)(2)(a) (West 2009); WYO. STAT. ANN. § 27-3-311(a)(i)(c) (West 2010). For a discussion of the development of and rationale behind these laws, see Rebecca Smith, Richard N. McHugh & Robin R. Runge, *Unemployment Insurance and Domestic Violence: Learning from our Experiences*, 1 SEATTLE J. SOC. JUST. 503, 503, 508-10, 515, 518-19 (2002) (noting how victims of domestic violence have used unemployment benefits to secure income during periods of unemployment caused by abuse).

124. ME. REV. STAT. ANN. tit. 26 § 1043(23)(B)(3) (2009); MINN. STAT. ANN. § 268.095(1)(9), (6)(b)(10) (West 2009); MO. REV. STAT. § 288.501(2)(c) (West 2010); MONT. CODE ANN. § 39-51-2111(1)(a) (West 2009); N.J. STAT. ANN. § 43:21-5(j) (West 2010).

125. 820 ILL. COMP. STAT. ANN. 180/15(1) (West 2010). Originally enacted in 2003, this law was recently modified to, among other things, expand its reach to more employers. S.B. 1770, § 5 (2009) (changing employer definition from those with fifty employees to those with fifteen).

126. WASH. REV. CODE ANN. § 49.76.010(1) (LexisNexis 2010).

IV. POTENTIAL FOR STATE RECOGNITION OF DOMESTIC VIOLENCE PUBLIC POLICY

Although several scholars have accurately concluded that the public policy exception currently is an undeveloped, unpredictable, and inadequate remedy for employees terminated because of domestic violence,[127] the recent "explosion" of workplace legislation and the *Danny* decision breathe new life into this claim. While a comprehensive analysis of the public-policy exception is nearly impossible because of the great variability in state approaches,[128] general coverage of the doctrine leaves too many questions unanswered. Thus, this article attempts to strike a balance between the two extremes by conducting a nationwide analysis, but limiting the scope to focus on only one source of public policy, state legislation, and specifically, only state abuse prevention acts and state employment laws related to crime victims or to employees experiencing domestic violence.[129] It further narrows the scope to only the state abuse prevention acts and employment laws related to crime victims in general, or to employees who have experienced domestic violence, specifically.[130] In nearly every state, there are other sources of policy that should be explored. Indeed, even without considering Washington's new workplace protections, the Washington Supreme Court recognized that the states' myriad laws addressing this societal issue convey a strong public policy that should impact employment decisions.[131] But workplace

127. For example, Professor Tarr reviewed Park's work and concluded that the exception is "not reliable enough or inclusive enough to ensure the economic security of domestic violence victims" and that, even if it were effective, it does not require employers to accommodate employees or address discrimination short of termination. Tarr, *supra* note 40, at 402. Similarly, Professor Widiss references Park's work and several unpublished decisions on the public-policy exception and concludes that "many courts would hold that is perfectly legal for an employer to fire at will a victim of domestic violence based on the abuse against her." Widiss, *supra* note 10, at 684-85.

128. PAUL H. TOBIAS, LITIGATING WRONGFUL DISCHARGE CLAIMS § 5.1, n.2 (West 2009) ("The extremely wide variety of factual variations that courts have addressed, and the lack of consistency in their analytical methods, make impossible any systematic and exhaustive classification of the decisions on a nationwide basis.").

129. All states that recognize the exception, recognize state legislation as a valid source of public policy. The more restrictive view requires state statute or constitution as source of public policy. *Id.* § 5.4. Some state legislatures have explicitly restricted the public-policy exceptions to those they create. *E.g.*, ARIZ. REV. STAT. ANN. § 23-1501(3)(b) (LexisNexis 2010).

130. In particular, this article's analysis is limited to those state laws summarized above. *See supra* Part III.B (summarizing the relevant legislation, including unemployment insurance, leave laws, and workplace restraining orders).

131. In addition to Washington's abuse prevention act and its very recently enacted employment-specific protections for victims of domestic violence, the court looked to state laws relating to police response, confidentiality, funding for legal services, new crimes and penalties for perpetrators' interference, and child abuse prevention; the executive order

legislation seems to hold the greatest promise for supporting this common-law claim.

State legislation is just one of the three variables in this national analysis. The main organizing variable considered is the states' receptivity to the common-law exception, which I have used to group the states into three categories: those that generally recognize the claim, but with varying definitions of "public policy"; those with limited recognition of the claim; and those that have not recognized the exception. The final variable is the extent to which any workplace legislation either buttresses or precludes the courts from recognizing a common-law remedy. In some states, the common-law remedy is necessary to implement certain legislation and in others, where the statutory remedy is clear, the courts may defer to the legislature and refuse to adopt any different or additional common-law remedy.[132]

The foregoing analysis thus considers these three variables in various ways to address each state's likelihood of recognizing a public policy in support of promoting financial stability for victims of domestic violence. Just like the *Danny* decision, this analysis does not go beyond the public-policy element, however. Assuming employees can successfully establish this element, they will still face the state-specific burdens of establishing the other elements of the claim, and employers may have lawful justification for their decisions.[133]

A. General Acceptance

The majority of states recognize a public-policy exception with sufficient flexibility to apply in this context.[134] Nonetheless, all of these states view the exception as extremely limited,[135] and require the policy to be exceedingly clear and sufficiently public.[136] More-

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that state agencies assist employees experiencing domestic violence, including providing unpaid leave; the state constitution's support for crime-victim cooperation; and the judicial opinions that express an interest in preventing domestic violence, encouraging citizen cooperation with police, and protecting human life. Danny v. Laidlaw Transit Servs., Inc., 193 P.3d 128, 132-38 (Wash. 2008) (en banc). In addition to these laws, Park identified as possible bases for a wrongful discharge claim: "statutes and policies supporting the right to physical safety; policies guaranteeing individuals' right to go to court; and federal and state anti-discrimination statutes." Park, *supra* note 9, at 145-46 (omitting numerals).

132. *See infra* note 152 and accompanying text (providing an example of state statutes limiting common-law remedy).

133. *See supra* Part III.A.5 (summarizing *Danny*) and Part II.A (listing the other elements in certain states' claims).

134. *See infra* Part IV.D (summarizing the more than thirty states that recognize the exception in some way).

135. *E.g.*, Weaver v. Harpster, 975 A.2d 555, 562-63 (Pa. 2009) (citing Clay v. Advanced Computer Applications, 559 A.2d 917, 918 (Pa. 1989)).

136. *E.g.*, Ryan v. Dan's Food Stores, Inc., 972 P.2d 395, 405-06 (Utah 1998).

over, in some of the states, a legislatively-created remedy may limit a common-law claim.[137] Thus, further analysis of each state is required to determine their relative receptivity to the exception in the context of employees experiencing domestic violence.

1. Previous Judicial Recognition

Within this larger group of states that generally recognize the exception are the four states whose laws have been interpreted to support a public-policy exception for terminations related to domestic violence before the *Danny* decision: Massachusetts, Iowa, Illinois, and Oregon.[138] Because these decisions, either unreported or from a federal court, are not binding precedent in these states,[139] the state courts' future receptivity to such claims warrants some attention. Based on their common-law exceptions and relevant statutes, Massachusetts and Iowa courts most likely would recognize future claims, at least those involving employees who sought judicial relief from their abuse or who cooperated in the criminal prosecution of the abusers.[140] Illinois and Oregon's subsequently enacted workplace legislation, on the other hand, probably precludes most future common-law claims.[141]

Both Massachusetts and Iowa recognize a common-law claim broad enough to include terminations related to domestic violence. Specifically, Iowa's exception is not limited to terminations explicitly prohibited by a statute, but rather any termination that undermines a statute's underlying policy.[142] Massachusetts recognizes the exception when an employee is "terminated for asserting a legally guaranteed right . . . doing what the law requires . . . refusing to do what the law forbids . . ." and cooperating with law enforcement.[143]

These two states' statutes also generally support a policy in favor of assisting victims of domestic violence. The abuse prevention acts in Iowa and Massachusetts specifically authorize courts to restrain

137. *E.g.*, Burnham v. Karl & Gelb, 745 A.2d 178, 181 (Conn. 2000) (determining that the statute precluded wrongful discharge claim).

138. *See supra* Parts III.A.1-2 (summarizing the judicial decisions supporting this public policy).

139. 20 AM.JUR.2D COURTS § 148 (2010); 21 C.J.S. COURTS § 234 (2010).

140. *See supra* Parts III.A.1-2 (explaining the Iowa and Massachusetts decisions, both of which involved employees who sought judicial relief and assisted with the criminal prosecution of their abusive partners).

141. *See infra* Part IV.A.3.c (analyzing states with domestic-violence-specific workplace legislation).

142. Fitzgerald v. Salsbury Chem., Inc., 613 N.W.2d 275, 283 (Iowa 2000) (stating that the exception is not limited to express statutory prohibitions, but rather, extends to any termination that would undermine policy).

143. Wright v. Shriners Hosp., 589 N.E.2d 1241, 1244 (Mass. 1992).

offenders from the victim's place of work,[144] and Massachusetts provides unemployment benefits to employees forced to leave their work due to domestic violence.[145] Iowa and Massachusetts also provide some protection for employees who participate in judicial proceedings.[146] Thus, both states seem ripe for further development of the exception to at-will employment for terminations that undermine their states' fairly clear policies encouraging a stable income for crime victims and those who experience domestic violence. The previous decisions and the statutes, however, may limit the claim to employees who seek judicial relief or assist with a criminal prosecution.

2. Broad Public Policy Definitions

In two additional states, New Hampshire and Vermont, the public-policy definitions and the relevant statutory language combine to provide strong support for this common-law claim. Both states define "pubic policy" broadly. Vermont recognizes policies that come not only from the constitution, a statute, or a judicial decision, but also from "the customs and conventions of the people—in their clear consciousness and conviction of what is naturally and inherently just and right."[147] New Hampshire's policies similarly need not be explicit in any statute, nor "strong and clear."[148] Employees must establish that they were discharged for "performing an act that public policy would

144. IOWA CODE ANN. § 236.5(1)(b)(3) (West 2009); MASS. GEN. LAWS ANN. ch. 209A, §§ 1, 3(c) (West 2010). After violation of an order, the court may require the defendant to wear a GPS and include plaintiff's place of employment in a geographic exclusion zone. *Id.* § 7.

145. MASS. GEN. LAWS ANN. ch. 151A, §§ 1, 14, 25, 30 (West 2010).

146. IOWA CODE ANN. § 915.23 (West 2009) (protecting an employee who testifies in a criminal or Domestic Abuse Act proceeding); MASS. GEN. LAWS ANN. ch. 268, § 14B (LexisNexis 2010) (protecting crime victim attending a criminal proceeding). Iowa's statute may actually preclude some common-law claims, however, because it provides a remedy for aggrieved employees. IOWA CODE ANN. § 915.23 (West 2009) (allowing actual damages, court costs, and attorney fees and injunctive relief, including reinstatement). Iowa courts may thus view the statute, not the wrongful termination claim, as controlling. *See* Vaughn v. Ag Processing, Inc., 459 N.W.2d 627, 638 (Iowa 1990) (denying claim based on religious discrimination as preempted by Iowa Civil Rights Act).

147. Payne v. Rozendaal, 520 A.2d 586, 588-89 (Vt. 1986) (quoting Pittsburgh, Cincinnati, Chi. & St. Louis Ry. v. Kinney, 115 N.E. 505, 507 (Ohio 1916)). In *Payne*, the Vermont Supreme Court recognized a wrongful termination claim alleging age discrimination before such allegations were statutorily recognized. The court described age discrimination as "so contrary to our society's concern for providing equity and justice that there is a clear and compelling public policy against it." *Id.* at 589.

148. Cloutier v. Great Atl. & Pac. Tea Co., 436 A.2d 1140, 1145 (N.H. 1981). New Hampshire also defers to the jury to determine what constitutes a "public policy" sufficient for this claim. *Id.*; Cilley v. N.H. Ball Bearings, 514 A.2d 818, 821 (N.H. 1981) (citation omitted).

encourage, or refusing to do something that public policy would condemn" and that the employer was motivated by "bad faith, malice, or retaliation."[149]

While neither state requires statutory support, both have similar statutes that evince some support for a policy of protecting employees experiencing domestic violence. New Hampshire's abuse prevention act explicitly allows courts to restrain defendants from entering the plaintiff's place of work.[150] Both states' unemployment compensation laws provide benefits to employees who left their employment for reasons related to intimate violence, with Vermont's specifically requiring employees to establish that they "pursued reasonable alternatives."[151] To allow employers to simply terminate an employee's employment once violence became known to the employer would undermine this statutory scheme, the underlying purpose of which is to provide financial assistance to these employees.[152] In addition, both states provide some employment protection for crime victims, generally. New Hampshire prohibits employers with twenty-five or more employees from terminating their employment for missing work to attend "legal or investigative proceedings associated with the prosecution of the crime."[153] Vermont prohibits employers from discharging or disciplining a crime victim for honoring a subpoena to testify.[154] The public-policy exception would assist in implementing these statutes, as neither provides a specific remedy for the affected employees.[155]

3. Domestic Violence-Specific Workplace Legislation

The analysis of at least eight states and the District of Columbia's receptivity to this claim turns on their relatively new workplace legislation, which either bolsters or precludes the common-law claim depending on the extent of the legislative remedy provided and the extent of the legislative remedy and of the court's deference to that remedy.

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149. Porter v. Manchester, 849 A.2d 103, 114 (N.H. 2004) (quoting *Cloutier*, 436 A.2d at 1143).

150. N.H. REV. STAT. ANN. §§ 173-B:4(I)(a)(6) & 173-B:5(I)(a)(3) (LexisNexis 2010).

151. N.H. REV. STAT. ANN. § 282-A:32(I)(a)(3) (LexisNexis 2010); VT. STAT. ANN. tit. 21, ch. 16A § 1253 (West 2010).

152. *See* Smith et al., *supra* note 123, at 503 (explaining the purpose of providing financial assistance to employees who are victims of domestic violence).

153. N.H. REV. STAT. ANN. § 275:62 (LexisNexis 2010).

154. VT. STAT. ANN. tit. 13, § 5313 (West 2009).

155. New Hampshire's law penalizes employers who violate employees' leave rights, but does not provide employees with any specific cause of action. N.H. REV. STAT. ANN. § 275:65 (LexisNexis 2010).

a. Broad Workplace Legislation Strengthens Common-Law Claim

In at least three jurisdictions—California, Kansas, and the District of Columbia—the workplace legislation provides strong support for common-law recognition of a relatively broad claim. These three jurisdictions vary significantly in their acceptance of the public-policy exception, with California having one of the most established and liberal exceptions,[156] and Kansas and D.C.'s exceptions being more limited.[157] These three jurisdictions' strong and explicit workplace protections for employees experiencing domestic violence make them quite similar in their potential receptivity to additional common-law protection.

All three jurisdictions' statutes not only provide job-protected leave to employees who turn to the civil or criminal justice system,[158] but also to those who turn to other resources in response to the violence, including medical or mental-health care, safety planning, and other assistance from domestic violence programs.[159] Specifically, D.C.'s Accrued Sick and Safe Leave Act of 2008[160] provides all employees *paid* sick leave for these specific reasons and those others that "enhance the physical, psychological, or economic health or safety" of themselves, a family member, or a co-worker if they or their family members have experienced intimate violence.[161] In Kansas, all employers have been required since 2006 to provide up to eight

156. California was the first state to recognize the public-policy exception, and it has since applied it in several contexts. *See* TOBIAS, *supra* note 128, app. 5A (stating that California courts have since "issued dozens of opinions concerning the scope and application" of the exception).

157. Kansas courts have not yet applied the common-law exception beyond the context of retaliation for whistle-blowing or filing a workers' compensation claim. Palmer v. Brown, 752 P.2d 685, 689 (Kan. 1988). The D.C. courts so far have applied the exception only to discharges for refusing to violate the law. Vreven v. Am. Ass'n of Retired Persons, 604 F. Supp. 2d 9, 14 (D.D.C. 2009) (quoting Carl v. Children's Hosp., 702 A.2d 159, 163 (D.C. 1997) (Terry, J., concurring)). D.C. courts recognize a claim by employees who act "in furtherance of a public policy 'solidly based on a statute or regulation . . . .'" *Id.* Kansas courts do not insist on specific legislation, *see* Murphy v. Topeka-Shawnee Dept. of Labor Servs., 630 P.2d 186, 192 (Kan. 1981) (noting the legislature's failure to create a cause of action does not defeat the public policy), but they do require the policy to be "'so thoroughly established as a state of public mind so united and so definite and fixed that is existence is not subject to any substantial doubt.'" *Palmer*, 752 P.2d at 687 (Kan. 1988) (quoting Noel v. Menninger Found., 267 P.2d 934, 941 (Kan. 1954)).

158. CAL. LAB. CODE § 230(b), (c) (Deering 2009); D.C. CODE § 32-131.02(b)(4)(E) (LexisNexis 2010); KAN. STAT. ANN. § 44-1132(a)(1), (a)(4) (2010).

159. CAL. LAB. CODE § 230.1 (Deering 2009); D.C. CODE § 32-131.02(b)(4) (LexisNexis 2010); KAN. STAT. ANN. § 44-1132(a) (West 2009).

160. D.C. CODE §§ 32-131.01-131.1.16 (LexisNexis 2010).

161. D.C. CODE § 32-131.02(b)(4) (LexisNexis 2010). The amount of the required leave, which accrues by the hours worked, depends on the size of the employer. *Id.* § 32-131.02(a).

days of job-protected leave.[162] California's 2003 law provides up to three days leave to those employees working for employers with twenty-five or more employees.[163]

Not only do these statutes provide strong support for a public policy to protect employees experiencing domestic violence, the common-law remedy they support may play a critical role in their implementation. Neither the D.C. nor the Kansas legislation specifies the cause of action or relief available to employees harmed by employer violations.[164] A wrongful discharge claim thus provides the basis for relief to these employees. While California's law creates an administrative complaint process and remedy for employees harmed by their employers' conduct, these employees could still pursue a wrongful discharge claim through the courts unless the court were to determine that the statute created a right that did not exist at common law or that the legislative intent was to supplant the common law.[165]

b. More Limited Workplace Legislation Supports Claim

Two additional states, New Mexico and Arizona, have leave legislation that should provide a strong basis for common-law protection of at least those employees who seek judicial protection from domestic violence. Effective July 2009, New Mexico's leave legislation, aptly entitled the Promoting Financial Independence for Victims of Domestic Abuse Act, specifically requires employers to provide up to fourteen days of intermittent leave to employees to seek an order for protection or to meet with law enforcement or otherwise assist in a criminal prosecution.[166] It also prohibits any retaliation against employees who exercise their leave rights.[167] Like California's statute, New Mexico's

162. KAN. STAT. ANN. §§ 44-1131-33 (West 2009).

163. CAL. LAB. CODE § 230.1 (Deering 2009).

164. The D.C. law prohibits employers from discriminating against employees who request leave and assesses fines against the employers. D.C. CODE §§ 32-131.08-131.12 (LexisNexis 2010). It also directs the Department of Employment Services to administer the law, and authorizes the Mayor to issue rules to implement the statute, §§ 32-131.10-131.13 (LexisNexis 2010), but the statute itself does not specify an employee cause of action. Similarly, the Kansas legislature clarified in 2008 that the Department of Labor shall enforce these statutes, but did not itself specify the remedy or procedure. KAN. STAT. ANN. § 44-1133 (West 2009). Kansas courts require a detailed analysis of the adequacy of any statutory relief before precluding a common-law claim. *See* Flenker v. Willamette Indus., 967 P.2d 295, 298 (Kan. 1998) (following the interpretation in Polson v. Davis, 895 F.2d 705 (10th Cir. 1990)).

165. *See* Rojo v. Kliger, 801 P.2d 373, 381, 388 (Cal. 1990) (allowing a claim alleging discrimination because of public interest in a "workplace free from the pernicious influence of sexism").

166. N.M. STAT. ANN. §§ 50-4A-1, -2 (LexisNexis 2010).

167. *Id.* §§ 50-4A-2(B), -3.

law provides for administrative enforcement, but also clarifies that its remedies supplement rather than replace any common law relief.[168] New Mexico courts have recognized a wrongful discharge claim when an employee is fired for performing "an act that public policy [has authorized or] would encourage."[169] The exception seeks to encourage job security, generally.[170] New Mexico's courts should use this claim to enforce the clear policy stated in the new legislation.

Arizona's leave legislation is more limited, and while its common-law doctrine will not increase the statutory scope, it is again necessary to enforce the leave rights. The Arizona law mandates employers with fifty or more employees to provide job-protected leave to crime victims and employees who seek judicial protection for themselves or their family members and prohibits the discharge of or refusal to hire employees who exercise these leave rights.[171] The statute does not, however, provide any particular remedy to harmed employees. While Arizona legislation has limited the public policy exception to those expressed in state statutes, it has also explicitly recognized that it applies to terminations for exercising these particular leave rights.[172] In other words, the Arizona legislature has essentially instructed the courts to apply the public-policy exception to terminating employees for exercising their rights. Employees working for smaller employers, however, would not have a wrongful discharge claim because, as the statute clarifies, "[a]ll definitions and restrictions contained in the statute also apply to any civil action based on a violation of the public policy arising out of the statute."[173]

c. Workplace Legislation Precludes Common-Law Claims

Four other states—Hawaii, Illinois, Oregon, and Connecticut—have enacted workplace protection for domestic violence victims, but because of those states' common-law exceptions and the particular

168. *Id.* §§ 50-4A-7, -8.

169. Vigil v. Arzola, 699 P.2d 613, 619 (N.M. Ct. App. 1983), *rev'd in part on other grounds*, 687 P.2d 1038 (N.M. 1984), *overruled on other grounds by* Chavez v. Manville Prods. Corp., 777 P.2d 371 (N.M. 1989).

170. *Id.* at 618.

171. ARIZ. REV. STAT. ANN. § 13-4439 (LexisNexis 2010).

172. *Id.* §§ 23-1501(3)(b), (3)(c)(x). Prior to this legislation, Arizona courts had recognized a broader common-law exception for "firing for bad cause" or for one that is "against public policy articulated in constitutional, statutory, or decisional law." Murcott v. Best W. Int'l, Inc., 9 P.3d 1088, 1095-96 (Ariz. Ct. App. 2000) (citing Wagenseller v. Scottsdale Mem. Hosp., 710 P.2d 1025, 1036 (1985)).

173. ARIZ. REV. STAT. ANN. §§ 23-1501(3)(b), 13.4439(A) (2010); *see also* Taylor v. Graham Cnty. Chamber of Commerce, 33 P.3d 518, 524-25 (Ariz. Ct. App. 2001) (noting there is no public-policy claim for alleged discrimination by an employer with fewer than fifteen employees).

statutes, the legislatively-created protection will likely preclude most, if not all, common-law causes of action by employees experiencing intimate violence. In particular, the comprehensive laws in Hawaii, Illinois, and Oregon provide broad leave rights in terms of the number of employees covered, the amount of leave provided, and the reasons for which leave is permitted.[174] In addition, Illinois and, effective January 2010, Oregon law prohibit discrimination against employees experiencing domestic violence and require employers to reasonably accommodate their workplace needs.[175] All three of these states' laws also provide specific relief to employees.[176] And while at least Hawaii's and Illinois's common-law exceptions are relatively liberal,[177] their courts defer in interpreting these legislative remedies.[178]

Oregon law on this point is slightly more complicated. Oregon recognizes a public-policy exception for terminations for either fulfilling a societal obligation or pursuing private statutory rights "related to

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174. All Hawaiian employers must provide job-protected leave for employees needing medical treatment, victim services, counseling, time to relocate, or legal assistance. HAW. REV. STAT. ANN. § 378-72 (LexisNexis 2010). Employers with fifty or more employees must provide up to thirty days, while smaller employers must provide up to five. *Id.* Illinois's law, as recently amended, requires employers that have between fifteen and forty-nine employees to provide up to eight weeks of leave and those with over fifty employees to provide up to twelve weeks. 820 ILL. COMP. STAT. ANN. § 180/20(a)(2) (LexisNexis 2010). The leave may be used to seek medical attention or recover from injuries, obtain assistance from a victim services organization, attend counseling, participate in safety planning, or seek legal assistance. *Id.* §§ 180/20(a)(1)(A)-(E). Since 2007, Oregon law has required employers with six or more employees to provide "reasonable leave" to seek medical or legal assistance, victim services, or safe housing. OR. REV. STAT. ANN. §§ 659A.270, 659A.272 (West 2010).

175. 820 ILL. COMP. STAT. ANN. § 180/30(a) (LexisNexis 2010). Imitating the language of the Americans with Disabilities Act, 42 U.S.C. § 12101 (2009), Illinois's law affirmatively requires employers to accommodate qualified employees who have experienced domestic violence unless such accommodations would "impose an undue hardship on the . . . employer." 820 ILL. COMP. STAT. ANN. § 180/30(b). Employers are to consider accommodations such as:

> [A]djustment to a job structure, workplace facility, or work requirement, including a transfer, reassignment, or modified schedule, leave, a changed telephone number or seating assignment, installation of a lock, or implementation of a safety procedure, or assistance in documenting domestic or sexual violence that occurs at the workplace or in work-related settings. . . .

Id. § 180/30(b)(3). Similarly, Oregon law recently added antidiscrimination and reasonable-accommodation provisions to its employment laws addressing victims of domestic violence. OR. REV. STAT. ANN. § 659A.290 (West 2010).

176. Both Hawaii and Oregon law provide a civil action to enforce the rights. HAW. REV. STAT. ANN. § 378-72(j) (LexisNexis 2010); OR. REV. STAT. ANN. § 659A.885 *amended by* 2010 Or. Laws 1st Sp. Sess. Ch. 102 (S.B. 1045). Illinois's statute creates an administrative enforcement procedure. 820 ILL. COMP. STAT. ANN. § 180/35 (LexisNexis 2010).

177. TOBIAS, *supra* note 128, app. 5A (characterizing Hawaii's exception as "markedly liberal" and listing many bases and factual scenarios for application of Illinois's exception).

178. Ross v. Stouffer Hotel Co. (Hawaii), 879 P.2d 1037, 1047 (Haw. 1994) (finding a discrimination claim preempted by statutes that provide a remedy); Dykstra v. Crestwood Bank, 454 N.E.2d 51, 53-54 (Ill. App. Ct. 1983) (holding that administrative remedies under the Illinois Human Rights Act preclude common law remedies).

[a plaintiff's] role as an employe [sic] and . . . of important public interest,"[179] but only when no other statutory remedy is available.[180] Employees terminated for seeking judicial relief from abuse or participating in criminal proceedings would likely still have a common-law claim because, as Oregon recognized, it is an "employment related right of important public interest," and no other remedy exists.[181] Employees who allege that their employment was terminated because they pursued their statutory rights under Oregon's workplace legislation (by, for example, seeking a workplace accommodation or a reasonable leave) likely will not have a wrongful discharge claim in addition to any statutory claim.[182] Employees alleging discrimination on the basis of their experience with domestic violence would likely only have the statutory claim.[183]

Connecticut's workplace legislation does not provide leave, but it prohibits discharges for obtaining court protection from domestic violence or for participating in or attending any criminal proceeding.[184] The statute also provides a civil action for damages for aggrieved employees.[185] Thus, as Connecticut's case law demonstrates, a wrongful-discharge claim would not succeed in this particular context because it only applies when no other relief is available.[186] Based on the statute's underlying policy and Connecticut's unemployment compensation law, which provides relief to employees who "make reasonable efforts to preserve the employment,"[187] Connecticut's public-policy exception may be broad enough to protect against terminations simply based on victim status or for seeking other kinds of non-judicial assistance, such as counseling or medical care.

4. Victim/Witness Employment Protection

Another category of states that generally recognize the public-policy exception are those that legislatively protect the employment

179. Holien v. Sears, Roebuck & Co., 689 P.2d 1292, 1297 (Or. 1984) (en banc), *superseded by statute*, The Civil Rights Act of 1964, 78 Stat. 241 (codified as amended at 42 U.S.C. § 1981a(b)(3) (2010)).

180. *Id.* at 1296 ("Because no other remedy existed for the wrongfully discharged employee, we allowed the employee to recover compensatory damages in tort.").

181. Pooley v. Union Cnty., No. 01-343-JE, at *38 (D. Or. Mar. 17, 2003).

182. United States *ex rel.* Chartraw v. Cascade Healthcare Cmty., Inc., 2009 U.S. Dist. LEXIS 17542, at *12 (D. Or. Mar. 5, 2009) ("[P]laintiff's wrongful discharge claim based on retaliation cannot go forward because the statutory remedies under Title VII address the concerns raised by the Oregon Supreme Court in *Holien*.").

183. *Cf.* Cross v. Eastlund, 796 P.2d 1214, 1216 (Or. Ct. App. 1990) (finding no cause of action for discharge motivated by pregnancy discrimination).

184. CONN. GEN. STAT. ANN. § 54-85b(a) (West 2010).

185. *Id.* § 54-85b(c).

186. Burnham v. Karl & Gelb, P.C., 745 A.2d 178, 182 (Conn. 2000).

187. CONN. GEN. STAT. ANN. § 31-236(a)(2)(A)(iv) (West 2010).

of crime victims or witnesses. Many states' statutes provide such protection to victims or witnesses who participate in a criminal proceeding or otherwise assist in the prosecution.[188] Other states' laws protect employees subpoenaed or otherwise required to participate in any judicial proceeding.[189]

a. Support for a Common-Law Claim

For nine of these states, which also recognize the common-law claim and have limited other employment-specific statutes, the crime-victim or witness-protection programs provide the strongest evidence of legislative support for a state policy against discharging victims of domestic violence. These states are: Arkansas, Delaware, Maryland, Michigan, Missouri, Nevada, Ohio, Utah, and Virginia.

All nine of these states recognize the common-law exception without significant limitation.[190] Arkansas and Utah have explicitly

188. ALA. CODE § 15-23-81 (2010); ALASKA STAT. ANN. § 12.61.017 (West 2010); ARIZ. REV. STAT. ANN. § 13-4439 (LexisNexis 2010) (for employers with fifty or more employees); ARK. CODE ANN. § 16-90-1105 (West 2010); COLO. REV. STAT. ANN. § 24-4.1-303(8) (West 2010); CONN. GEN. STAT. ANN. § 54-85b (West 2010); DEL. CODE ANN. tit. 11, § 9409 (West 2010); FLA. STAT. ANN. § 92.57 (LexisNexis 2010); IND. CODE ANN. § 35-44-3-11.1 (West 2010); IOWA CODE ANN. § 915.23(1) (West 2009) (covering civil and criminal proceedings); MD. CODE ANN. CRIM. PROC. § 11-102 (West 2010); MASS. GEN. ANN. ch. 268, § 14B (LexisNexis 2010); MICH. COMP. LAWS ANN. §§ 780.762, 780.790 (West 2010); MINN. STAT. ANN. § 611A.036 (West 2009); MISS. CODE ANN. § 99-43-45 (West 2009); MO. ANN. STAT. § 595.209(1)(14) (West 2010); MONT. CODE ANN. § 46-24-205(3) (West 2009); N.H. REV. STAT. ANN. § 275:62 (LexisNexis 2010) (twenty-five or more employees); N.Y. PENAL LAW § 215.14 (McKinney 2010); OHIO REV. CODE ANN. § 2930.18 (West 2010); 18 PA. CONS. STAT. § 4957 (West 2010); R.I. GEN. LAWS ANN. § 12-28-13 (West 2009) (fifty or more employees); S.C. CODE ANN. § 16-3-1550(A) (West 2009); TENN. CODE ANN. § 4-4-122 (West 2010) (state employees only); VT. STAT. ANN. tit. 13, § 5313 (West 2009); WYO. STAT. ANN. § 1-40-209 (West 2010).

189. GA. CODE ANN. § 34-1-3(a) (West 2010); HAW. REV. STAT. ANN. § 621-10.5(a) (LexisNexis 2010); NEV. REV. STAT. ANN. § 50.070 (West 2009); N.D. CENT. CODE ANN. § 27-09.1-17(1) (West 2009); UTAH CODE ANN. § 78B-1-132(1) (West 2010); VA. CODE ANN. § 18.2-465.1 (West 2010); WIS. STAT. ANN. § 103.87 (West 2009) ("proceeding pertaining to a crime").

190. Arkansas recognizes the common-law exception to the at-will doctrine to protect employees terminated for exercising statutory rights or performing statutory duties, or whose discharge violates "some other well established public policy." Webb v. HCA Health Servs. of Midwest, Inc., 780 S.W.2d 571, 573 (Ark. 1989). Delaware recognized the public-policy tort more recently, characterizing it as "an important weapon to advance Delaware's avowed policy to assure civilized conduct in the workplace." Schuster v. Derocili, 775 A.2d 1029, 1039 (Del. 2001), *superseded by statute*, DEL. CODE ANN. tit. § 19 712(b) (2005). *See also* Kessler v. Equity Mgmt., Inc., 572 A.2d 1144, 1150-51 (Md. Ct. Spec. App. 1990) (finding that an employee who refused to violate another's constitutional right to privacy was wrongfully discharged); Garavaglia v. Centra, Inc., 536 N.W.2d 805, 808 (Mich. Ct. App. 1995) (applying the common-law exception to terminations that violate an employee's statutory rights or for an employee's refusal to violate the law); Fleshner v. Pepose Vision Inst., 304 S.W.3d 81, 96 (Mo. 2010) (en banc) (holding that the common-law exception

recognized its applicability to terminations of employees who report or gather evidence regarding crimes.[191] Maryland has also recognized a wrongful discharge claim by an employee who was fired for suing a co-worker for assault and battery, stating that employees have an "interest in preserving bodily integrity and personality . . . ."[192] Delaware first recognized its public-policy exception in the context of alleged sexual harassment in the workplace, explaining that while the behavior is a personal assault, it is also "a systemic social problem" and that "[p]reventing it is of immense social value, and [that] combating it promotes the public policy of this State."[193]

What makes these nine states most similar with respect to their likelihood of recognizing a wrongful discharge claim in the domestic violence context is their statutory protection for employees who are crime victims or witnesses who testify at a legal proceeding. Arkansas and Michigan limit their employment protection to crime victims attending criminal proceedings.[194] Several states' statutes are written more broadly to protect any employee who participates in a criminal proceeding, whether as the victim or a witness, either to protect the victim's interest or in response to a subpoena.[195] Three states further broaden the scope of the protection to include employees

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applies to terminations that violate policies "reflected by" law); Collins v. Rizkana, 652 N.E.2d 653, 660 (Ohio 1995) (recognizing a "clear public policy to justify an exception to the employment-at-will doctrine"); Touchard v. La-Z-Boy Inc., 148 P.3d 945, 948-49 (Utah 2006) (recognizing a common-law exception for exercising workers' compensation rights); Lawrence Chrysler Plymouth Corp. v. Brooks, 465 S.E.2d 806, 808-09 (Va. 1996) (emphasizing that a statute need not provide a private right to sue for an at-will employee to pursue a wrongful-discharge claim when the employer violates the statute). Nevada recognizes a claim "when an employer dismisses an employee in retaliation for the employee's doing of acts which are consistent with or supportive of sound public policy and the common good." D'Angelo v. Gardner, 819 P.2d 206, 216 (Nev. 1991). The doctrine may be limited somewhat by a 1995 case that cited Wisconsin law for the proposition that employees cannot assert simply that they were discharged for actions consistent with public policy; rather, the employees must show that their employers directed them to violate public policy. Bigelow v. Bullard, 901 P.2d 630, 634 (Nev. 1995). It is unclear whether this also reflects Nevada law or just Wisconsin law.

191. Sterling Drug, Inc. v. Oxford, 743 S.W.2d 380, 385-86 (Ark. 1988); Ryan v. Dan's Food Stores, Inc., 972 P.2d 395, 408 (Utah 1998).

192. Watson v. Peoples Security Life Ins. Co., 588 A.2d 760, 767 (Md. 1991).

193. Schuster v. Derocili, 775 A.2d 1029, 1039 (Del. 2001).

194. ARK. CODE ANN. § 16-90-1105 (West 2010) (protecting the employee when attendance is "reasonably necessary to protect the interests of the victim"); MICH. COMP. LAWS ANN. §§ 780.762, 780.790 (West 2010) (criminalizing terminating the employment of crime victims who testify in response to a subpoena or a prosecutor's request).

195. DEL. CODE ANN. tit. 11, § 9409 (West 2010); OHIO REV. CODE ANN. §§ 2930.18 (crime victim), 2945.451 (pursuant to subpoena) (West 2010); MO. ANN. STAT. § 595.209(1)(14) (West 2010) (honoring a subpoena to testify at, attend, or participate in the preparation of a criminal proceeding).

required to attend any judicial proceeding,[196] and Nevada law protects the employment of any witness who testifies in court.[197] While all of these statutes may imply a correlative right to miss work to attend such proceedings, several make the employees' right to take time off explicit.[198]

All of these statutes reflect a public policy that is generally supportive of crime victims' and witnesses' rights. To effectively enforce these provisions, the states must recognize a wrongful-discharge claim because all but the Nevada and Utah statutes fail to provide any civil statutory relief for the employee.[199] Even those states, like Michigan, that generally view statutory relief as exclusive,[200] may recognize common-law claims because whereas statutes criminalize the employer's behavior, they do not provide any statutory relief to the employee. Although Utah's statute provides a civil action with available damages, reinstatement, and attorneys' fees, it also specifies that such relief is "in addition to any other remedy . . . ."[201] The statutory claim is thus cumulative, not exclusive. Nevada's statute similarly

196. Maryland law prohibits employers from discharging a crime victim for taking time off to attend a criminal proceeding, MD. CODE ANN. CRIM. PROC. § 11-102(b) (West 2010), and from discharging any employee for taking time off in response to a subpoena to attend any proceeding. MD. CODE ANN. CTS. & JUD. PROC. § 9-205(a)(1) (West 2010). Both Utah and Virginia prohibit employers from discharging employees who attend any judicial proceeding in response to a subpoena. UTAH CODE ANN. § 78B-1-132 (West 2010); VA. CODE ANN. § 18.2-465.1 (West 2010).

197. NEV. REV. STAT. ANN. § 50.070(1) (West 2010).

198. MD. CODE ANN. CTS. & JUD. PROC. § 9-205 (West 2010); MO. ANN. STAT. § 595.209 (1)(14) (West 2010) (prohibiting employers from requiring employees to use vacation time, personal time, or sick leave to attend proceedings); VA. CODE ANN. § 18.2-465.1 (West 2010) (specifying that an employee need not "use sick leave or vacation time" for necessary time off). Ohio law clarifies that employers need not pay employees for any time off to attend proceedings, which is some support for employers being required to allow employees to take at least unpaid leave. OHIO REV. CODE ANN. § 2930.18 (West 2010).

199. ARK. CODE ANN. § 16-90-1105 (West 2010); DEL. CODE ANN. tit. 11, § 9409 (West 2010); MD. CODE ANN. CRIM. PROC. § 11-102 (West 2010); MD. CODE ANN. CTS. & JUD. PROC. § 9-205 (West 2010); MICH. COMP. LAWS ANN. §§ 780.762, 780.790 (West 2010) (criminalizing employer behavior); MO. ANN. STAT. § 595.209 (West 2010); OHIO REV. CODE ANN. § 2930.18 (West 2010); VA. CODE ANN. § 18.2-465.1 (West 2010) (criminalizing employer violation).

200. *See* Dudewicz v. Norris-Schmid, Inc., 503 N.W.2d 645, 649 (Mich. 1993) ("Admittedly, a strictly literal interpretation of the statute without an analysis of legislative intent arguably could lead to an interpretation that would bar discharge of an employee for reporting a crime by anyone under any circumstances."), *overruled in part by* Brown v. Mayor of Detroit, 734 N.W.2d 514, 595 n.2 (Mich. 2007). Similarly, under Missouri law, statutory relief does not preclude a common-law claim unless it "'fully comprehends and envelops the remedies provided by common law.'" Fleshner v. Pepose Vision Inst., 304 S.W.3d 81, 95 (Mo. 2010) (en banc) (quoting Dierkes v. Blue Cross & Blue Shield of Mo., 991 S.W.2d 662, 668 (Mo. 1999)).

201. UTAH CODE ANN. § 78B-1-132 (West 2010).

provides civil remedies,[202] but Nevada courts may still recognize a tort claim that provides additional relief to the employee.[203]

Crimes between intimates or family members are not always handled in a criminal proceeding, or for that matter in any judicial proceeding. So to expand the protection to all employees experiencing domestic violence, the courts in these states would have to recognize their statutes as expressing a policy of protecting crime victims from employment consequences or at least protecting them from analogous participation in a civil protective order proceeding. To bolster such a claim, most of these states have at least one other statute that supports a policy of protecting the economic stability of victims of domestic violence.[204] Nearly all of the states' abuse-prevention acts explicitly permit courts to restrain offenders from the petitioner's place of employment.[205] Maryland's law further specifies that the court may order that the petitioner be provided use of a shared vehicle if necessary for continued employment.[206] Arkansas, Delaware, and Missouri laws provide unemployment compensation to those who have left their employment due to intimate violence.[207] Arkansas's law also encourages employees to make "reasonable efforts to preserve" their employment before leaving,[208] which provides additional support for a state policy disfavoring employers simply terminating employment due to the abuse. Further, Arkansas and Nevada law permit employers to seek restraining orders on behalf of their employees who are experiencing violence.[209]

b. Crime-Victim Protections Preclude Common-Law Claims

The statutory employment-protection of crime victims or witnesses in three other states—Alaska, Pennsylvania, and Wisconsin—will most likely preclude any common-law discharge claim on these

202. NEV. REV. STAT. ANN. § 50.070(2) (West 2009).

203. *See* D'Angelo v. Gardner, 819 P.2d 216, 217-18 (Nev. 1991) (holding that a plaintiff is entitled to pursue a tort claim where statutory relief is limited to, for example, reinstatement and back wages).

204. For example, Virginia's only other relevant laws of the type discussed here are its general abuse prevention statutes. VA. CODE ANN. §§ 16.1-253.1, 279.1 (West 2010).

205. ARK. CODE ANN. § 9-15-205(a)(2) (West 2010); MD. CODE ANN. FAM. LAW §§ 4-505(a)(2)(v), 4-506(d)(5) (West 2010); MICH. COMP. LAWS ANN. § 600.2950(1)(g) (West 2010); NEV. REV. STAT. ANN. § 33.030(1)(c) (West 2009); OHIO REV. CODE ANN. § 3113.31(E)(1)(g) (West 2010); UTAH CODE ANN. § 78B-7-106(2)(c) (West 2010).

206. MD. CODE ANN. FAM. LAW § 4-506(d)(10) (West 2010).

207. ARK. CODE ANN. § 11-10-513(b)(3)(A) (West 2010); DEL. CODE ANN. tit. 19, § 3314 (West 2010); MO. ANN. STAT. § 288.501(2)(c) (West 2010) (providing compensation either for quitting due to the violence or if discharged for conduct related to experiencing intimate violence).

208. ARK. CODE ANN. § 11-10-513(b) (West 2010).

209. *Id.* § 11-5-115(a)(3); NEV. REV. STAT. ANN. § 33.250 (West 2009).

bases. Specifically, Alaska's statute prohibits employers from penalizing crime victims for attending a court proceeding in response to a subpoena or a prosecutor's request.[210] Wisconsin law prohibits employers from discharging employees who are "subpoenaed to testify in an action or proceeding pertaining to a crime."[211] Pennsylvania law also prohibits employers from terminating employees who attend court as crime victims or witnesses.[212] All of these statutes explicitly acknowledge that employees may miss work to attend these proceedings. Whereas the Alaska and Pennsylvania statutes specify that employers need not compensate employees for the time spent away from work,[213] the Wisconsin statute expressly prohibits employers from reducing pay for time lost in responding to the subpoena.[214] All of the statutes also provide employees with a civil remedy for employer violations.[215] Based on their deference to legislative remedies, the courts in these states likely would be reluctant to apply the common-law exception in this specific context.[216]

With respect to other domestic-violence related terminations, although all of these states recognize an exception broad enough to support a wrongful-discharge claim, they have only limited statutory support for this specific policy. When defining public policy, Alaska and Wisconsin courts do not limit it to those activities that "violate the letter" of a law,[217] but rather seek to protect against employer actions that are contrary to the policy reflected in the statutes.[218] Pennsylvania seems to recognize the cause of action, generally,[219] but at least the Pennsylvania federal district court has rejected its

210. ALASKA STAT. ANN. § 12.61.017(a) (West 2010).

211. WIS. STAT. ANN. § 103.87 (West 2009).

212. 18 PA. CONS. STAT. ANN. § 4957(a) (West 2010).

213. ALASKA STAT. ANN. § 12.61.017(a)(3) (West 2010); 18 PA. CONS. STAT. ANN. § 4957(a) (West 2010).

214. WIS. STAT. ANN. § 103.87 (West 2009).

215. ALASKA STAT. ANN. § 12.61.017(c) (West 2010) (actual and punitive damages); 18 PA. CONS. STAT. ANN. § 4957(c) (West 2010) (lost wages and benefits, and attorneys' fees); WIS. STAT. ANN. § 103.87 (West 2009) (reinstatement and back pay).

216. Reust v. Alaska Petroleum Contractors, Inc., 127 P.3d 807, 813 n.13 (Alaska 2005) (expressing reluctance to recognize a wrongful-discharge cause of action when an individual can pursue a remedy under the Alaska Human Rights Act); Weaver v. Harpster, 975 A.2d 555, 569-70 (Pa. 2009) (rejecting an employee's wrongful-discharge claim for sexual discrimination by an employer who employed fewer employees than the statutory requirement); Repetti v. Sysco Corp., 730 N.W.2d 189, 192 (Wis. Ct. App. 2007) ("[W]here the legislature has created a statutory remedy for a wrongful discharge, that remedy is exclusive.") (citing Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 842 n.17 (Wis. 1983) (finding that the legislative remedy is exclusive)).

217. *Reust*, 127 P.3d at 813.

218. Wandry v. Bull's Eye Credit Union, 384 N.W.2d 325, 329 (Wis. 1986).

219. *See* Reuther v. Fowler & Williams, Inc., 386 A.2d 119, 121 (Pa. 1978) (holding that there exists a cause of action where an employee is discharged for performing jury duty).

application to terminations for being a victim of intimate violence.[220] The other statutory support for such claims in these states includes Alaska's and Pennsylvania's laws specifically permitting courts to restrain offenders from a petitioner's place of employment[221] and Wisconsin's unemployment compensation law, which provides benefits to employees who leave their work because of intimate violence.[222]

5. Limited Workplace Legislation

In at least seven states—Idaho, Kentucky, Nebraska, New Jersey, Oklahoma, Tennessee, and West Virginia—while there is nothing that prevents the courts from adopting a domestic violence public-policy exception, it is unlikely that they will: these states do not have any employment-specific statutes related to domestic violence.

All of these states do recognize a public-policy exception to varying degrees. Relatively speaking, Idaho,[223] Nebraska,[224] New Jersey,[225] Oklahoma,[226] and West Virginia's recognition of the doctrine is somewhat broad,[227] whereas Kentucky and Tennessee limit their exceptions

220. Green v. Bryant, 887 F. Supp. 798, 800 (E.D. Pa. 1995). The court did acknowledge that the exception might apply if an employee were terminated for seeking an order for protection. *Id.* at 801. The growing recognition of societal impact of domestic violence in the last fifteen years may affect the decision's ongoing viability.

221. ALASKA STAT. ANN. § 18.66.100(c)(4) (West 2010); 23 PA. CONS. STAT. ANN. § 6108(a)(6) (West 2010).

222. WIS. STAT. ANN. § 108.04(7)(s)(2)(a) (West 2009).

223. Idaho recognizes the exception generally and has specifically acknowledged policies that favor refusing to commit perjury and complying with jury duty. Crea v. FMC Corp., 16 P.3d 272, 275 (Idaho 2000) (emphasizing that public policy favors the disclosure and investigation of criminal activity); Sorensen v. Comm Tek, Inc., 799 P.2d 70, 74 (Idaho 1990) (noting that the exception "protect[s] employees who refuse to commit unlawful acts, who perform important public obligations, or who exercise certain legal rights or privileges").

224. Nebraska's supreme court recently clarified that its public-policy exception includes not only specific statutory prohibitions, but also those terminations that effectively circumvent the employee's substantive rights. Wendeln v. Beatrice Manor, Inc., 712 N.W.2d 226, 238-39 (Neb. 2006).

225. In New Jersey, employees can "be secure in knowing that their jobs are safe if they exercise their rights in accordance with a clear mandate of public policy." Pierce v. Ortho Pharm. Corp., 417 A.2d 505, 512 (N.J. 1980).

226. Kruchowski v. Weyerhaeuser Co., 202 P.3d 144, 149-51 (Okla. 2008) (summarizing various instances in which a claim has been pursued successfully, including when an employee alleges age discrimination not remedied by state or federal law).

227. West Virginia courts use the same four elements that the Sixth Circuit considers. Feliciano v. 7-Eleven, Inc., 559 S.E.2d 713, 723 (W. Va. 2001). The West Virginia Supreme Court has specifically applied the exception to an employee discharged for giving truthful testimony, explaining that "the unobstructed search for truth in legal proceedings[] is a high purpose deserving profound respect . . . ." Page v. Columbia Natural Res., Inc., 480 S.E.2d 817, 826 (W. Va. 1996).

to those contained in a "'well-established legislative enactment'"[228] or "evidenced by an unambiguous statutory provision."[229]

Beyond their general intimate abuse prevention acts,[230] however, these states have limited legislative statements of relevant public policy. Idaho, New Jersey, and West Virginia's abuse prevention laws specifically authorize courts to include the petitioner's place of employment in their protective orders.[231] New Jersey and West Virginia's laws also begin with strong statements of purpose that acknowledge domestic violence as a significant societal issue that warrants an effective response.[232] Kentucky's, New Jersey's, and Oklahoma's laws provide some assistance to crime victims who need to miss work to attend criminal proceedings, but they do not specifically prohibit employers from terminating the employees' employment.[233] New Jersey's and Oklahoma's unemployment compensation laws provide that employees cannot be denied benefits if forced to leave work to escape the abuse.[234] Nebraska's law requires employees to make "all reasonable efforts to preserve the employment" before leaving work to escape abuse.[235] This may provide some limited policy support for not terminating these employees for simply being a victim, or for taking some time

228. Ne. Health Mgmt., Inc. v. Cotton, 56 S.W.3d 440, 446-47 (Ky. Ct. App. 2001) (citing Grzyb v. Evans, 700 S.W.2d 399, 402 (Ky. 1985)).

229. Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 898-99 (Tenn. 1992) (holding that statutory remedies are not the exclusive remedy for wrongful discharge of an employee performing jury duty).

230. IDAHO CODE ANN. §§ 39-6301-6317 (West 2010); KY. REV. STAT. ANN. §§ 403.715-785 (West 2009); NEB. REV. STAT. ANN. §§ 42-901-931 (2010); N.J. STAT. ANN. §§ 2C:25-17-26.1 (West 2010); OKLA. STAT. ANN. tit. 22, §§ 60-60.6 (West 2010); TENN. CODE ANN. §§ 36-3-601-625 (West 2010); W. VA. CODE §§ 48-27-101-1105 (2010).

231. IDAHO CODE ANN. § 39-6306(1)(i) (West 2010); N.J. STAT. ANN.§ 2C:25-29(b)(6) (West 2010); W. VA. CODE ANN. § 48-27-503(7) (West 2010).

232. New Jersey's abuse prevention act recognizes violence between intimates as "a serious crime against society" and seeks to assure victims that it will provide them with "maximum protection from abuse . . . ." N.J. STAT. ANN. § 2C:25-18 (West 2010). West Virginia's law states that intimate "violence is a major health and law-enforcement problem . . . with enormous costs . . . in both dollars and human lives," and that the law is intended to provide victims with a "speedy remedy to discourage violence . . . ." W. VA. CODE ANN. § 48-27-101(a)(3),(b)(2) (West 2010).

233. Crime victims in Kentucky may request assistance from law enforcement and state attorneys in "informing employers that the need for victim or witness cooperation in the prosecution of the case may necessitate absence of that victim or witness from work." KY. REV. STAT. ANN. § 421.500(8) (West 2009). New Jersey law requires prosecutors to notify employers if a crime victim or witness needs to miss work to assist with a prosecution, but does not mandate that employers do anything specific with that information. N.J. STAT. ANN. § 52:4B-44(b)(13) (West 2010). Crime victims in Oklahoma have a right to "employer intercession services" that seek "to minimize the loss of pay and other benefits . . . resulting from court appearances." OKLA. STAT. ANN. tit. 19, § 215.33(8) (West 2010).

234. N.J. STAT. ANN. § 43:21-5(j) (West 2010); OKLA. STAT. ANN. tit. 40, § 2-210(4)(d) (West 2010).

235. NEB. REV. STAT. ANN. § 48-628.01(1)(a) (LexisNexis 2010).

off to seek judicial or other protection from the violence. Tennessee's only workplace-specific law is one that permits employers to seek workplace restraining orders on behalf of their employees.[236]

B. Limited Recognition of the Public-Policy Exception

Litigants in several other states would face greater obstacles in asserting a wrongful discharge claim because the states' recognition of the public-policy exception is so limited. While those states' courts recognize the public-policy exception, they limit it to such a degree that most discharges related to domestic violence would probably not qualify. Specifically, six states have recognized the exception only when an employee is terminated for refusing to violate a law or for reporting a violation of law (Minnesota, Mississippi, and Texas),[237] for filing a workers' compensation claim (Wyoming),[238] or both (Indiana and South Dakota).[239] North and South Carolina law is similarly constrained, as their courts seem to recognize the exception only when employers violate an express statutory provision or require their employees to violate the law.[240] Colorado's exception applies only when employers require employees to violate a law or prohibit employees from "exercising an important job-related right or privilege . . . ."[241] North Dakota has recognized the exception in only two contexts: retaliation for filing a workers' compensation claim,[242] and testifying pursuant to a subpoena.[243] Both of which have now been codified,[244] and thus will likely control going forward.[245]

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236. TENN. CODE ANN. § 20-14-102 (West 2010).

237. Nelson v. Productive Alts., Inc., 715 N.W.2d 452, 455-56 (Minn. 2006); McArn v. Allied Bruce-Terminix Co., 626 So.2d 603, 607 (Miss. 1993); Mott v. Montgomery Cnty., 882 S.W.2d 635, 639 (Tex. Ct. App. 1994) (limiting the exception to an employee's refusal to violate criminal statutes only).

238. Griess v. Consol. Freightways, Corp., 776 P.2d 752, 754 (Wyo. 1989).

239. Montgomery v. Bd. of Trs. of Purdue Univ., 849 N.E.2d 1120, 1128 (Ind. 2006); Tiede v. CorTrust Bank, N.A., 748 N.W.2d 748, 751-52 (S.D. 2008).

240. Considine v. Compass Grp. USA, 551 S.E.2d 179, 184 (N.C. Ct. App. 2001); Lawson v. S.C. Dept. of Corr., 532 S.E.2d 259, 260-61 (S.C. 2000) (applying the exception when termination itself violates criminal law, or when employers require employees to do so). The North Carolina Court of Appeals cites *Considine* in rejecting a domestic-violence-exception claim brought by an employee fired after his wife shot him. Imes v. City of Asheville, 594 S.E.2d 397, 398-400 (N.C. Ct. App. 2004), *aff'd*, 606 S.E.2d 117 (N.C. 2004) (per curium).

241. Martin Marietta Corp. v. Lorenz, 823 P.2d 100, 109 (Colo. 1992) (en banc).

242. Krein v. Marian Manor Nursing Home, 415 N.W.2d 793, 795 (N.D. 1987).

243. Ressler v. Humane Soc'y of Grand Forks, 480 N.W.2d 429, 432 (N.D. 1992).

244. N.D. CENT. CODE ANN. § 27-09.1-17 (West 2009) (prohibiting discharge of employees who serve as witnesses or jurors in any proceeding); *Id.* § 34-01-20.

245. Vandall v. Trinity Hosps., 676 N.W.2d 88, 92 (N.D. 2004) ("[S]tatutory enactments take precedence over and govern conflicting common law doctrines.").

The abuse prevention acts in six of these ten states permit the court to restrain parties from going close to the victims' workplace.[246] Six of these states' unemployment compensation laws provide benefits to those who separate from employment to protect themselves from family violence.[247] Three of the states permit employers to seek workplace restraining orders on behalf of their employees.[248] These kinds of laws, while certainly some evidence of a public policy to assist victims in maintaining some economic stability, are probably not, even when combined, adequate to invoke the limited exception these states recognize for most wrongful discharge claims.[249]

Employees in Minnesota and North Carolina will likely have viable claims, however, if their employers discharge them for seeking judicial protection from domestic violence. Since 2004, thus not in effect for the *Imes* plaintiff,[250] North Carolina has prohibited employers from discriminating against employees who take "reasonable time off" to seek court protection,[251] and Minnesota has had a nearly identical law since 2005.[252] Because of this explicit statutory language,

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246. IND. CODE ANN. § 34-26-5-9(b)(4) (West 2010); MINN. STAT. ANN. § 518B.01, subd. 6(9) (West 2009); MISS. CODE ANN. § 93-21-15(1)(a)(ii) (West 2009); N.C. GEN. STAT. ANN. § 50B-3(a)(9)(b) (West 2010); S.C. CODE ANN. § 20-4-60(A)(2) (2009); TEX. FAM. CODE ANN. § 85.022(b)(3) (West 2009).

247. COLO. REV. STAT. ANN. §§ 8-73-107(1)(g)(II), -108(4)(r)(I) (West 2010); IND. CODE ANN. §§ 22-4-15-1(1)(c)(8), 22-4-15-1(1)(e), 22-4-15-2(e) & 5-26.5-2-2(1)(A)(i) (West 2010); MINN. STAT. ANN. § 268.095 1(9), 2(10) (West 2009); N.C. GEN. STAT. ANN. § 96-14(1)(f) (West 2010); S.D. CODIFIED LAWS § 61-6-13.1(6) (2010); TEX. LAB. CODE ANN. § 207.046(a)(2) (West 2009); WYO. STAT. ANN. § 27-3-311 (West 2010). Minnesota provides benefits to persons who quit because of domestic abuse and to those who were "discharged as a result of conduct that was the result of the applicant or [an] immediate family member being a victim of domestic abuse." MINN. STAT. ANN. § 268.095 1(9), 2(10) (West 2009).

248. COLO. REV. STAT. ANN. § 13-14-102(4)(b) (West 2010); IND. CODE ANN. § 34-26-6-6 (West 2010); N.C. GEN. STAT. ANN. § 95-264(b) (West 2010).

249. South Dakota law has the somewhat unique requirement that employees make every effort to maintain their employment. S.D. CODIFIED LAWS § 61-6-13.1(6)(c) (2010). Employers should not be permitted to sabotage these efforts by simply terminating employees' employment, but South Dakota's exception does not appear broad enough to remedy this behavior as it does not technically violate any law. *See* Tiede v. CorTrust, 748 N.W.2d 748, 751-52 (S.D. 2008) (noting that while South Dakota has recognized a public-policy exception, the court has also stated that a contract action for wrongful discharge may be a more appropriate remedy).

250. Imes v. City of Asheville, 594 S.E.2d 397, 398 (N.C. Ct. App. 2004) *aff'd*, 606 S.E.2d 117 (N.C. 2004) (per curium). *See supra* Part III.A.4 (summarizing this North Carolina Court of Appeals decision).

251. *See* N.C. GEN. STAT. ANN. §§ 50B-5.5(a), 95-270(a) (West 2010) (including provisions prohibiting employment discrimination for taking reasonable time off to pursue relief).

252. MINN. STAT. ANN. § 518B.01 23(a) (civil order for protection); § 609.748, subd. 10(a) (criminal restraining order) (West 2009). Minnesota law also requires employers to provide all crime victims similar leave to attend or prepare for criminal proceedings. *Id.* § 611A.036 subd. 1. It specifically provides a remedy, but characterizes it as

the common-law exceptions in both Minnesota and North Carolina may very well serve to implement these statutory policies by providing consequences for employer violations.[253]

Whether Colorado courts would apply the public-policy exception to terminations for seeking judicial relief is more complicated. Since 2002, Colorado law has required employers with more than fifty employees to provide up to three days off to not only seek judicial protection, but also to seek other assistance, including medical care or counseling and safety planning.[254] This statute would probably control any claim that an employer terminated someone for seeking this type of time off, however, because the statute itself provides relief and Colorado recognizes statutory preclusion of common-law claims.[255]

Other Colorado laws provide fairly strong evidence of a public policy of promoting victims' employment stability that could support wrongful discharge claims in other scenarios. Colorado's abuse prevention act recognizes the "paramount importance" of protective orders because they "promote safety, reduce violence, and prevent serious harm and death."[256] The statute also defines domestic violence to include not only physical abuse or threats of harm, but also other types of control, including financial, that "make a victim more likely to return to an abuser due to fear of retaliation or inability to meet basic needs . . . ."[257] Colorado law also authorizes employers to seek workplace restraining orders[258] and provides unemployment compensation to employees who leave work to protect themselves or a family member.[259] Perhaps these statutes provide at least enough support of a public-policy violation for employees terminated for experiencing domestic violence or seeking court relief, but not taking any time off.

When the violence leads to criminal charges, Colorado employees as well as those in Indiana, Mississippi, and South Carolina would likely have a wrongful termination claim if their employers discharged them for missing work to participate in criminal proceedings. Mississippi law requires crime victims to attend and assist in

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supplementing "any remedies otherwise provided by law . . . ." *Id.* § 611A.036 6.

253. The North Carolina law explicitly states that it does not limit the ability of employees to "pursue any other civil or criminal remedy provided by law." N.C. GEN. STAT. ANN. § 95-271 (West 2010). Employers who violate Minnesota's laws may face misdemeanor charges and will be required to reinstate the employee and pay back wages. MINN. STAT. ANN. §§ 518B.01, subd. 23(b), 609.748, subd. 10(b) (West 2009). But nothing in the statute prohibits additional, common-law relief.

254. COLO. REV. STAT. ANN. § 24-34-402.7(1)(a), (b) (West 2010).

255. *See* Gamble v. Levitz Furniture Co., 759 P.2d 761, 766 (Colo. App. 1988).

256. COLO. REV. STAT. ANN. § 13-14-102(1)(a) (West 2010).

257. *Id.* § 13-14-102(1)(b)(I).

258. *Id.* § 13-14-102(4)(b).

259. *Id.* §§ 8-73-107(1)(g)(II), -108(4)(r)(I).

the preparation of any criminal proceedings and prohibits employers from terminating their employment or even threatening to do so for such activity.[260] Colorado, Indiana, South Carolina, and Wyoming laws similarly prohibit employers from taking an adverse employment action against employees who miss work to respond to a subpoena as a victim or witness.[261] Because none of these statutes explicitly provides relief to employees, courts in Colorado, Indiana, Mississippi, and South Carolina could use their limited exception to fulfill this clearly stated public policy. Wyoming courts, which have yet to recognize an exception beyond the workers' compensation arena, would have to expand its doctrine to do so.

C. No Recognition of the Exception

The final category of states includes those that either have not applied the public-policy exception or have explicitly rejected it. These seven states obviously have the least likelihood of recognizing an exception in the domestic violence context. Neither Georgia nor Maine have applied the exception, but their supreme courts have acknowledged the possibility that a future discharge may warrant its application.[262] These two states thus have some, albeit limited, receptivity to a claim. In Maine, although the courts would not likely recognize a common-law claim, there would be a good-faith basis in law for asserting one, at least in certain circumstances.[263] Georgia

260. MISS. CODE ANN. § 99-43-45 (West 2009).

261. COLO. REV. STAT. ANN. § 24-4.1-303(8) (West 2010); IND. CODE ANN. § 35-44-3-11.1 (West 2010); S.C. CODE ANN. § 16-3-1550(A) (2009); Wyo. Stat. Ann. § 1-40-209(a) (West 2010).

262. *See* Reilly v. Alcan Aluminum Corp., 528 S.E.2d 238, 239-40 (Ga. 2000) (acknowledging that a public-policy exception, while disfavored, may be judicially created); Larrabee v. Penobscot Frozen Foods, Inc., 486 A.2d 97, 100 (Me. 1984) (stating "we do not rule out the possible recognition of such a cause of action . . . ").

263. Maine's statutory recognition of the need to assist employees experiencing domestic violence is relatively strong. Its abuse definition includes removing someone from the workplace, and court orders may include enjoining the defendant from the victim's workplace. ME. REV. STAT. ANN. tit. 19-A, §§ 4002(1)(D)(1), 4006(5)(D)(2), 4007(1)(C)(2) (2009). Maine also mandates that all employers provide job-protected leave to employees who have experienced intimate violence and are seeking legal, medical, or other necessary assistance. ME. REV. STAT. ANN. tit. 26, § 850(1) (2009). The leave statute does not provide a private right of action, but empowers the Department of Labor to assess civil penalties on employers who violate the law. *Id.* § 850(3). Maine's unemployment compensation laws also provide benefits to employees who voluntarily separate from their employment for reasons related to the violence and for those who are terminated for "misconduct" if their actions were necessary to protect themselves or their family members from violence. *Id.* §§ 1193(1)(A)(4), 1043(23)(B)(3). In addition to providing some assistance to employees experiencing domestic violence, these statutes provide a strong statement of Maine's public policy of providing some financial stability to victims and discouraging employers from

employees, on the other hand, would have an extremely weak common-law claim both because of the court's legislative deference[264] and the state's limited statutory statements reflecting support for such a policy.[265] Five other states do not recognize the public-policy exception to at-will employment: Alabama,[266] Florida,[267] Louisiana,[268] New York,[269] and Rhode Island.[270] Employees experiencing domestic violence in these states are not without any statutory rights,[271] but the courts have so far deferred to the legislature for any expansion.[272]

D. Summary

Courts in at least four states (New Hampshire, Vermont, California, and Kansas) and the District of Columbia would be fairly receptive to a broad, *Danny*-like policy in favor of supporting employment stability for victims of domestic violence.[273] In these jurisdictions, employees who could prove that they were terminated because of their status as domestic violence victims or for taking reasonable time off

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unnecessarily interfering with these rights.

264. *Reilly*, 528 S.E.2d at 240 ("[J]udicially created exceptions are not favored.").

265. Georgia law prohibits employers from taking any adverse action against employees who participate in judicial proceedings and provides employees a cause of action against employers who violate it. GA. CODE ANN. § 34-1-3(a),(b) (West 2010). Georgia employers may also seek a workplace restraining order on behalf of their employees. *Id.* § 34-1-7(b).

266. Wright v. Dothan Chrysler Plymouth Dodge, Inc., 658 So. 2d 428, 431 (Ala. 1995).

267. Smith v. Piezo Tech. & Prof'l Adm'rs, 427 So.2d 182, 184 (Fla. 1983).

268. Tolliver v. Concordia Waterworks Dist. No. 1, 735 So.2d 680, 682 (La. Ct. App. 1999).

269. Murphy v. Am. Home Prods. Corp., 448 N.E.2d 86, 89-90 (N.Y. 1983).

270. Pacheco v. Raytheon Co., 623 A.2d 464, 465 (R.I. 1993).

271. *See, e.g.*, FLA. STAT. ANN. § 741.313(2) (LexisNexis 2010) (requiring limited workplace leave for domestic violence victims working for large employers); LA. REV. STAT. ANN. § 23 (2010) (unemployment benefits) R.I. GEN. LAWS ANN. § 12-28-13(a) (West 2009) (mandating leave for crime victims); *id.* § 28-52-2 (allowing workplace restraining orders). Employees in New York City have great protection under the city administrative code, which prohibits workplace discrimination against domestic violence victims and requires employers to reasonably accommodate their workplace needs. N.Y.C. CODE § 8-107.1(2) (2009).

272. As the New York court explained,

> The Legislature has infinitely greater resources and procedural means to discern the public will, to examine the variety of pertinent considerations, to elicit the views of the various segments of the community that would be directly affected and in any event critically interested, and to investigate and anticipate the impact of imposition of such liability.

Murphy, 448 N.E.2d at 89-90; s*ee also* Wright v. Dothan Chrysler Plymouth Dodge, Inc., 658 So.2d 428, 431 (declining to create a public-policy exception); Pacheco, 623 A.2d at 465 ("It is not the role of the courts to create rights for persons whom the Legislature has not chosen to protect.").

273. *See supra* Part IV.A (predicting the likelihood of states adopting a public-policy exception).

to seek judicial or other assistance related to the violence would have a strong likelihood of success in establishing a public policy.[274] Employees in three more states (Hawaii, Illinois, and Oregon) have similar protection from employment decisions based on their experience of domestic violence, but it is statutorily provided, rather than based on common law.[275]

The largest number of states would be most receptive to a claim by an employee terminated for seeking official, court-related relief from the violence. Six states (Iowa, Massachusetts,[276] New Mexico, Arizona,[277] Minnesota, and North Carolina[278]) would be receptive to a common-law claim at least by an employee who turned to either the civil or criminal systems for assistance. Connecticut and Colorado protect these same employees statutorily.[279] Thirteen other states (Arkansas, Colorado, Delaware, Indiana, Maryland, Michigan, Mississippi, Missouri, Nevada, Ohio, South Carolina, Utah, and Virginia) would likely recognize a public-policy exception for employees terminated for testifying or otherwise assisting with the criminal prosecution of their batterers.[280] Three states (Alaska, Pennsylvania, and Wisconsin) provide this relief statutorily.[281]

V. THE COURTS' ROLE IN EXPANDING EMPLOYMENT PROTECTION FOR DOMESTIC VIOLENCE VICTIMS

A. Common-Law Remedy Alone Is Insufficient

As others have argued, and further supported by this analysis, use of the common-law exception to at-will employment is a limited and imperfect solution to the problems that employers and employees

274. This article's analysis is limited to the public-policy element. However, employees may face other obstacles in pursuing a wrongful discharge claim. For example, the employer in *Danny* could have prevailed at trial if it established that the employee was, in fact, terminated for falsifying payroll records, that her time off to address the domestic violence was not necessary to protect her or her children, or that it had some other overriding justification for the termination. Danny v. Laidlaw Transit Servs., Inc., 193 P.3d 128, 139 (Wash. 2008) (en banc).

275. *See supra* Part IV.A.3.c (explaining these three states' protections).

276. *See supra* Part IV.A.1 (discussing the two states' potential receptivity to a common-law claim).

277. *See supra* Part IV.A.3.b. (noting Arizona's recognition would only apply to employers with fifty or more employees, however, as statutorily defined).

278. *See supra* Part IV.B (explaining these states' limited recognition of the exception).

279. *See supra* Parts IV.A.3.c, IV.B (describing statutory protections).

280. *See supra* Parts IV.A.4.a, IV.B (discussing these states' potential receptivity to a public-policy exception).

281. *See supra* Part IV.B (describing these states' statutory relief).

face when domestic violence impacts the workplace.[282] Because of varying state approaches to the doctrine and legislative statements of public policy, employees in more than half of the states are not likely to receive any common-law relief for terminations related to their experiences of domestic violence. In those states in which the courts may be receptive to a wrongful discharge claim, employees cannot yet rely on any concrete protections, and litigation would likely be expensive and unpredictable. Even in Washington, where the exception to at-will employment has been recognized, the application is undeveloped and may remain so because Washington employees can now turn to clearer, legislative protections.

Development of the common-law doctrine could also lead to bad, or at least imperfect, policy. It is most likely that courts would be willing to recognize a policy interest when employees are terminated for seeking judicial relief from violence because of the statutory support for this policy in many states and because the policy exception would be more consistent with other exceptions that states already recognize. While civil protective orders are effective mechanisms in many domestic violence situations, seeking such relief may actually trigger more severe violence or risk of harm to some individuals and their children and should not be the only basis upon which employees can protect their jobs.[283] Relying solely on crime-victim statutes for protection of employment is problematic for similar reasons and because not all domestic violence fits within the incident-based definitions under which our criminal justice system is organized.[284] Moreover, some victims who could seek refuge from law enforcement and criminal prosecution choose not to for many reasons, including previous bad experiences with law enforcement and fear of increased violence if arrest and prosecution ultimately fails.[285]

For these reasons and more, it may be preferable for all states to adopt comprehensive workplace protections or for Congress to address this issue.[286] Progress is ongoing, as several states have now

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282. For example, Professor Tarr reviewed Park's work and concluded that the "remedy is not reliable enough or inclusive enough to ensure the economic security of domestic violence victims," and that, even if it were effective, it does not require employers to accommodate employees or address discrimination short of termination. Tarr, *supra* note 40, at 402.

283. *See id.*, at 388-89 (explaining the problem of courts and legislatures essentially requiring an order for protection as a baseline for other remedies or assistance).

284. Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 971-74 (2004).

285. Leigh Goodmark, *Law Is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 16 (2004).

286. *See* Goldscheid, *supra* note 16, at 118-19 (proposing application of Title VII to

enacted such legislation and many continue to advocate for federal legislation, but the work is slow-going and imperfect as well. To date, the overwhelming majority of states do not provide adequate statutory protections for employees experiencing domestic violence,[287] and federal legislation, though introduced each session since 2001, has yet to pass.[288] Legislative change presents its own challenges, and is further complicated by competing interests. As Professor Cottone explained in the context of discussing modifications to the at-will employment doctrine more generally, it is difficult to organize the range of workers who need the protection (from low paid, hourly workers to managers and executives), and even effective organization will likely face strong and well-funded opposition.[289] In his view, any resulting legislation would be full of compromise which would "probably drain any potency of the proposed statute."[290]

B. Common-Law Remedy Is Essential to Effective Reform

Common-law recognition of a public-policy exception for terminations related to domestic violence thus provides an appropriate and necessary complement to the ongoing legislative reform. It is entirely fitting for courts to further develop this common-law doctrine. As the Eighth Circuit has explained:

> [T]he Legislature is not the only source of [public] policy. In common-law jurisdictions the courts too have been sources of law, always subject to legislative correction, and with progressively less freedom as legislation occupies a given field. It is the courts, to give one example, that originated the whole doctrine that certain kinds of businesses—common carriers and innkeepers—must serve the public without discrimination or preference. In this sense, then, courts make law, and they have done so for centuries.[291]

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workplace domestic violence issues); Karin, *supra* note 16, at 379 (urging federal law); Widiss, *supra* note 10, at 718 (advocating for state legislative reform).

287. *See supra* Part I.B (discussing the inadequacy of existing protections).

288. Proposed in 2001, the Victims' Economic Security and Safety Act would have required employers to reasonably accommodate employees experiencing domestic violence. Brown, *supra* note 40, at 16; Karin, *supra* note 16, at 397-99 (discussing the Survivors' Empowerment and Economic Security Act, and the Security and Financial Empowerment Act, introduced in 2007).

289. Edwin Robert Cottone, *Employee Protection from Unjust Discharge: A Proposal for Judicial Reversal of the Terminable-At-Will Doctrine*, 42 SANTA CLARA L. REV. 1260, 1279 (2002).

290. *Id.*

291. Lucas v. Brown & Root, Inc., 736 F.2d 1202, 1205 (8th Cir. 1984); *see also*, Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith,* 93 HARV. L. REV. 1816, 1838 (1980) ("Courts themselves created the at will rule; it is therefore entirely appropriate that they now take the lead in modifying it.").

Courts have both the power and the expertise to provide a common-law remedy when confronted with the appropriate case.[292] The Washington Supreme Court's decision in *Danny* makes it even more likely that other states might recognize the public-policy exception in this context, as courts often look to other jurisdictions for support in developing this doctrine.[293]

In over half of the states identified as receptive to a wrongful discharge claim in this context, recognition of the doctrine is not only appropriate, but also necessary to implement the clear statutory policies that otherwise fail to provide employees with a cause of action.[294] The courts' recognition, even if limited to those employees who seek judicial relief or assist in criminal prosecutions, will also begin to provide clarity to this cause of action and may lead to further development of the exception in the domestic violence context. For example, if courts are willing to recognize that employees who seek orders for protection should have some employment protection, the logical extension of such a policy would be to prevent employers from status-based terminations. In other words, employers should not be able to circumvent the policy of encouraging employees to seek protective orders by firing them as soon as the employer learns or suspects that an employee is experiencing domestic violence. Similarly, in states like Connecticut, where employees have statutory protection from terminations for seeking judicial relief,[295] the courts could recognize a wrongful discharge claim in the context of an employee seeking relief for seeking reasonable time off to seek non-judicial assistance, such as safe housing or medical attention.

Finally, and perhaps most importantly, judicial recognition of this cause of action may actually support and inspire additional domestic violence workplace legislation. Many of the now-established public-policy exceptions have evolved into statutory protections. For example, after the Oregon Supreme Court recognized an exception to at-will

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292. *See, e.g.*, Pierce v. Ortho Pharm. Corp., 417 A.2d 505, 511 (N.J. 1980) (recognizing "the capacity of the common law to develop and adapt to current needs" (citing Jersey Shore Med. Ctr.-Fitkin Hosp. v. Baum, 417 A.2d 1003, 1009 (1980))); Nees v. Hocks, 536 P.2d 512, 514 (Or. 1975) ("This court has not felt unduly restricted by the boundaries of pre-existing common-law remedies. We have not hesitated to create or recognize new torts when confronted with conduct causing injuries which we feel should be compensable.").

293. *See, e.g.*,; *Pierce*, 417 A.2d at 509-10; Collins v. Rizkana, 652 N.E.2d 653, 657 (Ohio 1995); *Nees*, 536 P.2d at 515 (discussing the emerging trend of the exception in other jurisdictions).

294. As noted in the above discussion, many state laws prohibit employer behavior, but do not specify the employee's remedy. *See, e.g.*, KAN. STAT. ANN. § 44-1132 (West 2009) (mandating employers to allow leave, but not specifying consequences for failure to do so); VT. STAT. ANN. tit. 13, § 5313 (West 2009) (prohibiting terminations for honoring subpoenas).

295. *See supra* Part I.A.3.c (noting Connecticut's statutory protections).

employment for an employee terminated for serving on a jury,[296] its legislature codified the rule, and many jurisdictions later followed.[297] The whistle-blower exception, which protects employees who disclose their employers' illegal activities, similarly began as a common-law doctrine,[298] and now many state and federal statutes have codified the protection.[299] So while more comprehensive and predictable legislation may be the ultimate goal to address the impact that domestic violence has on victims' financial stability, the courts could play an important role in the evolution of such legislation.

CONCLUSION

Over the last thirty years, state and federal laws have evolved to address domestic violence on several fronts. State laws, particularly those that recognize the impact that domestic violence has in the workplace, reflect a growing consensus that domestic violence warrants a multi-faceted public response. Reviewing its own domestic violence laws, the Washington Supreme Court declared that its state has "a clear mandate of public policy of protecting domestic violence survivors and their families and holding [their] abusers accountable."[300] In light of this precedent and the many state laws that reflect a similar policy, particularly the emerging workplace legislation, many other states may be poised to recognize a public-policy exception to at-will employment for terminations related to domestic violence. Development of this common-law claim could play a critical role in influencing individual employers' responses to their employees, as well as in developing more comprehensive and predictable workplace legislation.

296. *Nees*, 536 P.2d at 516.

297. CAL. LAB. CODE § 230(a) (West 2003); N.Y. JUD. LAW § 519 (McKinney 2003); Swift, *supra* note 41, at 559 nn. 42 & 43 (citing OR. REV. STAT. § 10.090(1) (2003); TEX. CIV. PRAC. & REM. CODE ANN. § 122.001-003 (West 2005 & Supp. 2008)).

298. *Id.* at 561-64 (citing Phipps v. Clark Oil & Ref. Co., 408 N.W.2d 569 (Minn. 1987)).

299. *Id.* at 564-65 & nn. 68-75.

300. Danny v. Laidlaw Transit Servs., Inc., 193 P.3d 128, 141 (Wash. 2008) (en banc).