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Domestic Violence and the Workplace: The Explosion of State Legislation and the Need for a Comprehensive Strategy

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DOMESTIC VIOLENCE AND THE WORKPLACE: THE EXPLOSION OF STATE LEGISLATION AND THE NEED FOR A COMPREHENSIVE STRATEGY

DEBORAH A. WIDISS*

ABSTRACT

In recent years, domestic violence legislation has migrated out of its traditional locus in family law and criminal law to include a rapidly growing body of employment law. The new laws respond to a relatively simple problem: Economic security is one of the most important factors in whether a victim of domestic violence will be able to separate from an abusive partner, but domestic violence often interferes with victims' ability to maintain jobs, thus causing job loss that further traps victims in abusive relationships. By providing support to victims and empowering employers to take direct legal action against perpetrators of actual or threatened workplace violence, the new legislation helps employers and employees work together to address a shared interest in reducing the effects of domestic violence on the workplace. Thus, addressing domestic violence as an "employment" issue bolsters other strategies for combating domestic violence. Equally important, because the vast majority of victims of domestic violence are women, the new legislation complements traditional employment laws, such as Title VII and the Family and Medical Leave Act, that seek to promote sex equality by addressing a significant, though little recognized, barrier to women's full participation in the workplace.

This Article situates the burgeoning body of new state legislation within developments in domestic violence law and employment law, particularly those relating to accommodation of individual needs within the workplace. It shows that domestic violence legislation modeled on employment law accommodation mandates, such as the Fam-

* Visiting Assistant Professor, Brooklyn Law School. J.D., Yale Law School; B.A., Yale College. I am grateful to Naomi Cahn, Liz Emens, Craig Green, Julie Goldscheid, Minna Kotkin, Tony Kronman, Robin Runge, Liz Schneider, Kate Stith, Nelson Tebbe, Merle Weiner, Noah Zatz, and participants in the Brooklyn Law School Junior Faculty Colloquium for their thoughtful comments and encouragement on earlier drafts. I also thank the *Florida State University Law Review* staff for their careful editing. This project was supported by the Brooklyn Law School Dean's Summer Research Stipend Program, with particular thanks to Dean Joan Wexler. Before beginning to teach, I spent four years as an attorney at Legal Momentum (the new name of NOW Legal Defense and Education Fund), where I spearheaded a national project focusing on employment and housing rights of domestic violence victims. In this capacity, I represented individual victims who had been fired because of the violence against them; worked closely with employers interested in developing domestic violence policies; and drafted legislation introduced at federal and state levels. This Article grows out of my experience working directly with victims, employers, and legislators to address effectively the workplace effects of domestic violence.

ity and Medical Leave Act or the Americans with Disabilities Act, imports provisions in those laws that excuse relatively small or resource-poor employers. By contrast, new laws borrowing from criminal justice, public health, or unemployment insurance models either impose costs on all employers or spread costs among employers. As such, the emerging legislation offers an interesting counterpoint to debates over whether and when it is appropriate to require employers to make workplace modifications or permit employee absences. It shows that reframing the interest at stake as furthering larger public interests seems to dramatically increase legislatures' willingness to require employers to make such accommodations. Building on this finding, the Article further demonstrates that approaching the issue more comprehensively could increase the efficacy of new legislation and it offers several specific recommendations for future reform.

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I. INTRODUCTION

Domestic violence is, as its name suggests, intimately associated with the home. But, perhaps counterintuitively, it often has considerable effects on the workplace and, over the past decade, there has been an extremely rapid growth in laws that can be characterized, broadly speaking, as domestic violence employment laws. Maine first passed legislation amending its unemployment code to address domestic violence in 1996; now, in little more than a decade, more than

two thirds of states have passed laws that explicitly respond to the workplace effects of domestic violence.¹

A true example of the “laboratory of the states,”² the new laws are quite varied and cut across traditional doctrinal boundaries. They include laws that prohibit employment discrimination against victims of domestic violence, provide job-protected leave to permit victims to take steps to address the violence, and make unemployment insurance benefits available to victims who must leave jobs because of the violence. They also include legislative and executive directives to develop model policies and promote best practices for employers in responding to domestic violence as well as laws that empower employers to seek their own civil injunctive relief against perpetrators of workplace violence. In addition to the rapid growth in state legislation, Congress has recently authorized funding for a clearinghouse to collect and disseminate effective business strategies.³ Congress has also held hearings on the issue and considered several bills that would provide substantive protections analogous to those being adopted by various states.⁴

1. See *infra* Part IV (evaluating the substantive contours of the new laws).

2. Cf. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

3. See Violence Against Women Act and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 701 (2005) (authorizing appropriations to create resource center); Consolidated Appropriations Act of 2008, Public L. 110-161, 121 Stat. 1844, 1907 (2007).

4. See Survivors’ Empowerment and Economic Security Act (SEES Act), S. 1136, 110th Cong. (2007); Security and Financial Empowerment Act (SAFE Act), H.R. 2395, 110th Cong. (2007) (each a bill that would provide victims of domestic violence job-protected leave for a variety of domestic violence-related needs, access to unemployment benefits, and protection from employment and insurance discrimination); Unemployment Insurance Modernization Act, S. 1871, 110th Cong. (2007) (bill that would provide incentives to states that provide unemployment insurance benefits to victims of domestic violence); Crime Victims Employment Leave Act, H.R. 5845, 110th Cong. (2008) (bill that would provide job-protected leave to victims to participate in prosecution of domestic violence crimes); *Too Much, Too Long? Domestic Violence in the Workplace: Hearing Before the Subcomm. on Employment and Workplace Safety of the S. Comm. on Health, Educational Labor and Pensions* 110th Cong. (2007), available at http://help.senate.gov/Hearings/2007_04_17/2007_04_17.html. Notwithstanding the Supreme Court’s determination that a federal civil rights remedy for gender-based violence exceeded Congress’ power under the Commerce Clause, see *United States v. Morrison*, 529 U.S. 598 (2000), Congress probably has authority to pass employment-related domestic violence legislation because of such legislation’s nexus to economic activity and thus interstate commerce. Cf. *Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 726-27 (2003) (noting without comment that Congress enacted the Family and Medical Leave Act pursuant to its power under the Commerce Clause, as well as pursuant to its power under Section 5 of the Fourteenth Amendment); *Great Am. Fed. Sav. & Loan Ass’n v. Novotny*, 442 U.S. 366, 395 n.20 (1979) (noting that Title VII was enacted pursuant to the Commerce Clause); *Regents v. Bakke*, 438 U.S. 265, 367 (1978) (opinion of four justices concurring in the judgment in part and dissenting in part) (noting the same).

Surprisingly, this explosion in new laws has been almost invisible in academic commentary addressing domestic violence, as well as that addressing developments in employment law affecting issues of work and family or women's participation in the workplace.⁵ This Article is the first comprehensive evaluation of the dramatic new landscape of legislation focusing on the workplace effects of domestic violence. It shows that the migration of domestic violence legislation beyond its traditional locus in criminal law and family law into employment law signals an important new approach, and potentially very effective strategy, to combat domestic violence.

The converse is equally true: Domestic violence legislation can be an important part of promoting equality for women at work. One in four women is a victim of domestic violence at some point in her life,⁶ and studies find that up to half of victims lose a job because of the violence.⁷ Domestic violence is a significant—but rarely noted—barrier to women's employment. Thus, efforts to address domestic violence (including workplace interventions and more traditional family law, criminal law, or nonlegal support strategies) should be recognized as a complement to employment laws such as Title VII and the Family and Medical Leave Act (FMLA) that seek to promote women's full participation in the workplace.

The body of law that is the focus of this Article addresses a relatively straightforward problem. Economic security is one of the most important factors in whether a victim of domestic violence can separate from an abusive partner. In other words, ensuring that a victim of domestic violence can maintain a steady job can be a primary strategy in addressing domestic violence, as important for many victims as the availability of a bed in a shelter, prosecution of a batterer, or access to civil legal services. Perpetrators of domestic violence, however, often interfere with victims' employment by harassing victims at work or causing them to miss work; victims may also

5. To the extent commentators have addressed the workplace effects of domestic violence, most have focused on employer liability under standard tort law or general sex discrimination laws. See *infra* sources cited in note 39 and note 43. There are a few articles that discuss in greater detail the state legislative developments that are the focus of this Article, see *infra* sources cited in note 93.

6. PATRICIA TJADEN & NANCY THOENNES, U.S. DEPT' OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE 9 (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/181867.pdf>; see also COMMONWEALTH FUND, HEALTH CONCERNS ACROSS A WOMAN'S LIFESPAN: 1998 SURVEY OF WOMEN'S HEALTH 8 (1999) [hereinafter COMMONWEALTH FUND, HEALTH CONCERNS], available at http://www.commonwealthfund.org/us_doc/Healthconcerns_surveyreport.pdf#section=4039 (finding nearly one-third of women reported being subjected to domestic violence by a spouse or boyfriend).

7. HEALTH, EDUC., & HUMAN SERVS. DIV., U.S. GEN. ACCOUNTING OFFICE, DOMESTIC VIOLENCE PREVALENCE AND IMPLICATIONS FOR EMPLOYMENT AMONG WELFARE RECIPIENTS 19 (1998) [hereinafter HEALTH, EDUC., & HUMAN SERVS.], available at <http://www.gao.gov/archive/1999/he99012.pdf>.

need to be absent to go to court, get medical treatment, or move to a safe location. More dramatically, albeit relatively rarely, perpetrators attack victims or their coworkers at work. Often, employers respond to domestic violence by firing the victim; alternatively, victims, not realizing that they could ask for support at work, feel forced to quit. Job loss itself then becomes a contributing factor that helps trap a victim in a violent relationship.

The legislation discussed in this Article seeks to change the status quo by providing a baseline of protections to victims to help them keep their jobs while taking steps to address the violence, encouraging employers to help victims access resources, and empowering employers to take legal action directly against perpetrators of actual or threatened violence, rather than resort to firing the victim. Because this burgeoning body of law has been so little discussed, a primary objective of the Article is to evaluate the substantive contours of emerging legislation. I identify two common challenges faced by legislatures seeking to address the issue. First, lawmakers must determine how to address the perpetrator's role, particularly because traditional models of employment law focus on the relationship between the employer and the victim/employee. Second, and relatedly, lawmakers must determine who should bear costs for absences or workplace modifications that are due to the perpetrator's actions. Various statutes resolve these questions in widely divergent fashions.

In fact, because states have taken so many different approaches to the issue, the domestic violence employment legislation discussed in this Article offers a natural "case study" in which to test the political saliency and practical effects of different frames for employment legislation. Laws providing time off to victims of domestic violence to take steps to address the violence, which I call "domestic violence leave laws," provide the starkest example of this phenomenon. Eleven states have adopted such legislation, using two different "models": the federal FMLA, which only applies to employers with at least fifty employees, and state statutes that protect crime victims from being fired for missing work to participate in the prosecution of the crime, which generally apply to all employers. The coverage of domestic violence leave laws tends to follow the model used. Those that are modeled on the FMLA only apply to large employers. This is true even for laws that authorize just three days leave (compared to the twelve weeks permitted under the FMLA), suggesting that smaller businesses could easily accommodate such absences. The domestic violence leave laws modeled on the crime victim laws, by contrast, typically apply to all employers, no matter how small. In other words, although the substantive intent of the laws is identical—to permit victims to take time off to address domestic violence without losing their jobs—state legislatures' willingness to impose

costs associated with absences on small employers seems to vary dramatically according to the model used.

Thus the emerging domestic violence employment legislation offers an interesting counterpoint to an ongoing conversation among employment discrimination theorists regarding the extent to which the primary federal “accommodation” mandates, the FMLA and the Americans with Disabilities Act (ADA), differ from Title VII’s anti-discrimination provisions and, more generally, when and how costs associated with accommodations for individual needs may legitimately be imposed upon employers.⁸ Domestic violence laws that are modeled on the FMLA and the ADA, typically, like those laws, balance cost of workplace modification against the resources of the individual employer and excuse employers deemed too small or resource-poor. But other new domestic violence employment laws, drawing on criminal law, workplace safety, or public health paradigms, impose costs associated with such accommodations on all employers or consciously spread costs across employers. While it is difficult to know exactly why the legislation is developing in this manner, I suggest that it may be because domestic violence advocates have successfully reframed what once was considered a “private” matter beyond the reach of the law as a public crisis demanding a systemic response. When employment protections are framed in terms of these larger public interests, rather than as “individual” benefits under traditional employment law models, legislatures seem to be more comfortable asking all employers to play a role. The new laws thus offer the possibility to reconsider more generally how employment legislation can address “family” issues and the putative distinction between the “private” sphere of the family and the “public” sphere of work.

The Article further argues that future legislative reform should consciously build on this recognition of larger “public” interests at stake. Although some new laws are primarily concerned with victims’ interests and some with employers’ interests, inadequate attention has been paid to the extent to which the various legislative strategies are interlocking. For example, giving employers the power to seek injunctive relief against the perpetrator of violence will be much more effective at reducing workplace incidents if victims also have a guarantee that they will not be fired for disclosing domestic violence to their employers. A comprehensive package of reforms, which strategically pairs protections, is both more likely to pass and more likely to be effective if passed because it is better able to appropriately balance employee and employer interests. Thus, a comprehensive strategy yields benefits that are greater than the sum of the parts. Additionally, and building on the insights of theorists advocating “struc-

8. See *infra* text accompanying note 89.

tural” reforms in response to what is often termed “second-generation” employment discrimination, I advocate developing new legislative language that can foster collaborative problem solving between employers and employees. Finally, I argue that we need systematically to evaluate the effectiveness of various strategies and consider use of public money to subsidize workplace modifications that go beyond what employers can reasonably bear.

The Article proceeds as follows. Part II summarizes results from a growing body of social science research documenting the significant impact of domestic violence on the workplace. It identifies specific benefits that may be served by addressing domestic violence through workplace legislation and offers suggestions as to why a purely market-based approach is unlikely to be adequate in responding to the problem. Part III places domestic violence workplace legislation in context by briefly discussing recent developments in other areas of domestic violence legislation and in employment law addressing accommodation of individual employees’ needs and women’s roles as workers. Part IV evaluates the new domestic violence legislation. Part V argues that future legislative strategies should more carefully consider the interlocking objectives of employers, employees, and the public.

II. DOMESTIC VIOLENCE AND ITS EFFECTS ON THE WORKPLACE

A. *The Scope of the Problem*

A growing body of social science research documents that it is extremely common for perpetrators of domestic violence to purposefully interfere with victims’ ability to work by harassing them at work, limiting their access to cash or transportation, or sabotaging their childcare arrangements.⁹ Such economic abuse is part of a larger pattern of coercion; it also specifically responds to the self-evident truth that a person who is employed is more likely to be able to escape con-

9. See, e.g., HEALTH, EDUC., & HUMAN SERVS., *supra* note 7 (finding between 35 and 56 percent of employed battered women surveyed were harassed at work by their abusive partners); CHRISTOPHER BLODGETT & JENNIFER STAPLETON, WASH. STATE UNIV. & SPOKANE COUNTY DOMESTIC VIOLENCE CONSORTIUM, INTIMATE PARTNER VIOLENCE: IT’S A WORKPLACE ISSUE! 20 (2005) (finding 51 percent of employed female intimate partner violence victims and 35 percent of employed male victims report some level of work disruption); JODY RAPHAEL & RICHARD M. TOLMAN, TRAPPED IN POVERTY, TRAPPED BY ABUSE: NEW EVIDENCE DOCUMENTING THE RELATIONSHIP BETWEEN DOMESTIC VIOLENCE AND WELFARE (1997) (discussing typical forms of harassment); Jennifer E. Swanberg & T.K. Logan, *Domestic Violence and Employment: A Qualitative Study*, 10 J. OCCUPATIONAL HEALTH PSYCH. 3 (2005) (citing Jacquelynn Lynn, *Close to Home*, ENTREPRENEUR, Oct. 1998, at 92 (finding 70 percent of employed victims say their abusers have harassed them at work)); Judith McFarlane et al., *Indicators of Intimate Partner Violence in Women’s Employment*, 48 AM. ASSOC. OCCUPATIONAL HEALTH NURSES J. 217 (May 2000) (finding 51 percent of victims reported being bothered at work by the abuser in person and 63 percent reported being bothered at work by the abuser over the telephone).

trol and achieve independence from her abuser.¹⁰ The effects of such abuse are considerable because domestic violence itself is so prevalent. The Department of Justice, for example, has found that, on average, 960,000 Americans are physically abused by a current or former spouse or boyfriend or girlfriend each year.¹¹ Although both men and women can be perpetrators of domestic violence and domestic violence occurs in same-sex relationships, the overwhelming majority of perpetrators of domestic violence are men and the overwhelming majority of victims are women.¹² And domestic violence is widespread: One in four women reports being physically assaulted, raped, or stalked by an intimate partner at some point during her life.¹³

Batterers can be extremely creative and dogged in their efforts to disrupt victims' employment. My former clients' stories are illustrative. For example, one of my clients, a social worker, was fired after her ex-husband called her employer and a city agency that had a large contract with her employer and falsely accused her of using drugs. Although she offered to take—and then passed—a drug test, her employer fired her because the employer believed the allegations could jeopardize their funding and because her ex-husband repeatedly called the workplace. (Significantly, this occurred after my client

10. Domestic violence is typically described as a pattern of coercive control that includes emotional abuse, financial abuse, sexual abuse, and threats in addition to physical violence. *See, e.g.*, NAT'L CTR. ON DOMESTIC & SEXUAL VIOLENCE, POWER AND CONTROL WHEEL, available at <http://www.ncdsv.org/images/PowerControlwheelINOSHADING.pdf>.

11. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, VIOLENCE BY INTIMATES: ANALYSIS OF DATA ON CRIMES BY CURRENT OR FORMER SPOUSES, BOYFRIENDS, AND GIRLFRIENDS (1998), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/vi.pdf>.

12. *See, e.g.*, CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE, 1993-2001 1 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf> (finding 85 percent of victims are female and 15 percent of victims are male). Accordingly, in this Article I typically refer to victims as female and perpetrators as male. All of the specific domestic violence statutes discussed, however, are gender neutral and protect both male and female victims. Additionally, following common parlance, I refer to individuals who are experiencing domestic violence as "victims" and individuals who in the past have experienced such violence as "survivors." I note, however, that even while subject to ongoing violence, many victims show considerable fortitude in taking steps to protect themselves and provide for their families and are, in that sense, already "survivors." *See generally, e.g.*, ELIZABETH M. SCHNEIDER ET AL., DOMESTIC VIOLENCE AND THE LAW: THEORY AND PRACTICE 39-40, 66-68 (2d ed. 2008) (discussing extent to which battered women are also survivors).

13. TJADEN & THOENNES, *supra* note 6, at 9; COMMONWEALTH FUND, HEALTH CONCERNS, *supra* note 6, at 8. This Article focuses on the effects of domestic violence on the workplace and the emerging body of law that seeks to mitigate these effects. There is a growing recognition that sexual assault and stalking may have similar effects—indeed, often perpetrators of domestic violence also sexually assault and/or stalk their victims—and increasingly, legislation in this area refers to all three crimes. *See, e.g.*, 820 ILL. COMP. STAT. §§ 180/10(5), 180/20, 180/30 (2006) (providing employment leave and prohibiting discrimination against victims of "[d]omestic or sexual violence," defined as including "domestic violence, sexual assault, or stalking"). In general, the arguments I make here regarding domestic violence legislation would equally apply to (at least nonstranger) sexual assault and stalking.

had left her husband; he began harassing her at work when he no longer knew where she lived.) Another client, who worked as a maid at a hotel, refused to take calls from her ex-boyfriend; she was fired because he then began calling the front desk of the hotel several dozen times an hour.

Domestic violence also frequently causes absences from work. Victims often need to miss work to go to court, meet with the police, obtain medical treatment, relocate to a new home, or secure an existing home. These absences may be necessary because certain services are only open during regular business hours.¹⁴ Additionally, because abusers typically keep very close control over their partners and would notice any unexplained delay in returning from work, for some victims, it is only during hours that they are expected to be at work that they can safely begin to take steps to plan for a separation. Domestic violence frequently causes mental health conditions, including post-traumatic stress disorder, depression, and anxiety disorders, that also may cause victims to miss work. Likewise, victims frequently miss work due to incapacitating physical injuries or visible bruising, such as a black eye, which make them ashamed to go out in public.¹⁵

Studies estimate that victims of intimate partner violence in the United States lose eight million days of paid work each year, the equivalent of over 32,000 full-time jobs.¹⁶ On average, the experience of domestic violence reduces a woman's annual work hours by 137 hours, almost four full-time weeks.¹⁷ Additionally, it is common for victims to lose their jobs due to absences, workplace disruptions, performance problems—or simple prejudice against victims. According to a 1998 report of the U.S. General Accounting Office, between 24 and 52 percent of domestic violence victims in three studies reported that they lost a job due, at least in part, to domestic violence.¹⁸ Given its prevalence, domestic violence is a significant barrier to women's

14. Of course, emergency medical treatment is available twenty-four hours a day. Likewise, most jurisdictions have the ability to handle an initial request for a temporary restraining order outside of standard business hours. Follow-up appointments for medical treatment or subsequent court proceedings, however, are usually scheduled during standard business hours.

15. See, e.g., McFarlane et al., *supra* note 9 (finding 58 percent of victims reported missing work because of the abuse and that 47 percent were specifically prevented from working by the abuser). Typical means of preventing work included leaving the victim without transportation, keeping her trapped at home, causing injuries that prevented her from working, and simply ordering her not to work. See *id.*

16. NAT'L CTR. FOR INJURY PREVENTION & CONTROL, DEP'T OF HEALTH & HUMAN SERVS., COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 1 (2003), available at http://www.cdc.gov/ncipc/pub-res/ipv_cost/IPVBook-Final-Feb18.pdf.

17. Richard Tolman & Hui-Chen Wang, *Domestic Violence and Women's Employment: Fixed Effects Models of Three Waves of Women's Employment Study Data*, 36 AM. J. COMM. PSYCH. 147, 153 (2005).

18. U.S. GEN. ACCOUNTING OFFICE, *supra* note 7, at 19.

employment. Some experts believe that “more women leave the work-force permanently because of domestic violence than leave to raise children.”¹⁹

The loss of employment can be particularly devastating for victims of domestic violence. As the Georgia Coalition Against Domestic Violence puts it:

Economic insecurity is one of the biggest obstacles to safety for domestic violence victims and their families. The inability to survive financially without the abuser—due to loss of income, a place to live, childcare, and other money and resources—is the reason that survivors most often give for why they have to return to their abusers.²⁰

Victims who lack independent income and do not return to abusers often end up homeless. In the U.S. Conference of Mayors annual survey of mayors of large cities, many identify domestic violence as one of the primary causes of homelessness in their cities.²¹ A survey of homeless parents confirmed this reality; 57 percent of those who had lived with a spouse or partner left their last home because of domestic violence.²² To save victims from the unconscionable choice of returning to an abusive partner or becoming homeless, domestic violence service providers increasingly see helping victims obtain economic security as an essential part of their mandate.²³

In addition to the obvious toll that domestic violence places on victims and their families, it also places significant costs on busi-

19. DAWN BRADLEY BERRY, *THE DOMESTIC VIOLENCE SOURCEBOOK 9* (3d ed. 2000).

20. Georgia Coalition Against Domestic Violence, *What We Do: Economic Justice Project*, http://www.gcadv.org/html/what/economic_justice.html (last visited June 23, 2008); see also Washington State Coalition Against Domestic Violence, *Economic Justice Project*, <http://www.wscadv.org/projects/EJP/index.htm> (last visited June 23, 2008) (“Lack of income is one of the most commonly given reasons that battered women stay with or return to an abusive partner.”). Increasingly commentators are also focusing on the significance of economic independence for victims. See, e.g., Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009 (2000) (arguing that priority in domestic violence reform should be given policies or laws that improve women’s access to material resources).

21. U.S. CONFERENCE OF MAYORS, *HUNGER AND HOMELESSNESS SURVEY: A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA’S CITIES, A 24-CITY SURVEY, DECEMBER 2005*, at 64 (2005), available at <http://www.usmayors.org/uscm/hungersurvey/2005/HH2005FINAL.pdf> (half of the cities surveyed in 2005 identified domestic violence as a primary cause of homelessness).

22. HOMES FOR THE HOMELESS & INST. FOR CHILDREN & POVERTY, *TEN CITIES: A SNAPSHOT OF FAMILY HOMELESSNESS ACROSS AMERICA, 1997-1998*, at 13 (1998), available at http://www.eric.ed.gov/ERICFullText/ERICFullTextStorage_01/00000197/8016/115d.pdf

23. Strategies include providing job training or financial literacy education, small grants to facilitate work, and advocacy to improve the way in which the welfare system handles victims of domestic violence, as well as advocacy for employment protections such as those discussed in this Article.

nesses.²⁴ The Centers for Disease Control and Prevention (CDC) recently found that domestic violence can be estimated to cost employers \$5.8 billion in productivity losses and health care costs.²⁵ Other reports have found the costs to employers to be as high as \$31 billion annually.²⁶ (Significantly, while most studies focus on the cost borne by employers of *victims* of domestic violence, a few studies have also demonstrated that perpetrators of domestic violence place significant costs on their own employers through tardiness and absences and use of work equipment to stalk or harass their partners.²⁷) Perhaps most dramatically, domestic violence also sometimes spills over into incidents of workplace violence.²⁸

The business world is beginning to recognize the impacts of domestic violence. In a survey, 66 percent of senior executives and 75 percent of human resources directors indicated that they believed addressing domestic violence in the workplace would decrease its

24. In considering such figures, it is important to remember that the ultimate cause of the costs associated with domestic violence is not the victim—it is the perpetrator. As will be discussed further *infra*, one of the challenges faced by the new legislation is whether the employer may be reasonably asked to bear these costs; other options include placing the costs on the victim (that is, permitting employers to fire a victim rather than incur such costs) or spreading them more generally across employers or the general tax base. I am assuming, for purposes of this discussion, that one party can be determined to be the perpetrator. Although it is not uncommon for both members of an abusive relationship to commit physical violence, typically one party can be determined to be the primary aggressor.

25. NAT'L CTR. FOR INJURY PREVENTION & CONTROL, *supra* note 16, at 2; *see also* Carol Reeves & Anne M. O'Leary-Kelly, *The Effects and Costs of Intimate Partner Violence for Work Organizations*, 22 J. INTERPERSONAL VIOLENCE 327, 328 (2007) (noting that the CDC figures probably understate the total costs because they fail to include costs associated with turnover).

26. *See, e.g.*, Joan Zorza, *Women Battering: High Costs and the State of the Law*, 28 CLEARINGHOUSE REV. 383, 385 (1994).

27. *See* ELLEN RIDLEY, ME. DEPT OF LABOR & FAMILY CRISIS SERVS., *IMPACT OF DOMESTIC OFFENDERS ON OCCUPATIONAL SAFETY AND HEALTH: A PILOT STUDY* (2004) (reporting survey of batterers, in which 78 percent reported using their own company's resources in connection with the abuse or 42 percent reported being late to work because of their abuse of their partners).

28. It is actually relatively uncommon for domestic violence to cause violence at the workplace. *See infra* note 50 and accompanying text. Nonetheless, it is a recognized risk factor for workplace violence, and occupational health researchers categorize workplace violence stemming from domestic violence as one of four primary "types" of workplace violence (along with violence that results from criminal actions, such as robberies, directed toward the business; violence from customers or clients at a workplace; and violence from disgruntled employees or former employees). *See* NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, DEPT OF HEALTH & HUMAN SERVS., *WORKPLACE VIOLENCE PREVENTION STRATEGIES AND RESEARCH NEEDS*, 4-5 (2006). Experts on workplace safety increasingly discuss the need to address domestic violence as part of a more general strategy to reduce the risk of violence at workplaces. *See, e.g.*, MARK BRAVERMAN, *PREVENTING WORKPLACE VIOLENCE: A GUIDE FOR EMPLOYERS AND PRACTITIONERS* 84-90 (1999); MICHELE A. PALUDI ET AL., *UNDERSTANDING WORKPLACE VIOLENCE: A GUIDE FOR MANAGERS AND EMPLOYEES* 73-86 (2006); Bonnie S. Fisher & Corinne Peek-Asa, *Domestic Violence and the Workplace: Do We Know Too Much of Nothing?*, in *WORKPLACE VIOLENCE: ISSUES, TRENDS, STRATEGIES* 97-120 (Vaughan Bowie et al. eds., 2005).

negative effects.²⁹ Even more strikingly, 94 percent of corporate security and safety directors at companies nationwide ranked domestic violence as a high security concern.³⁰ Although human resources and security personnel are among those most likely to be asked to handle domestic violence situations as part of their jobs, domestic violence's effects on the workplace are felt far more broadly. In fact, 44 percent of all employed adults reported having personally experienced the effects of domestic violence (either against themselves or a coworker) in their workplaces.³¹ Employees identify domestic violence as important a workplace issue as terrorism, job insecurity, and employee theft.³²

B. Benefits of Addressing Domestic Violence as a Workplace Issue

The data detailed above suggests three general benefits that can be realized by addressing domestic violence as a workplace issue.

First, economic independence is an essential factor in permitting victims of domestic violence to end abusive relationships. Job loss undermines efforts to secure the safety of victims by increasing the likelihood that they will return to abusers or else (especially given the limits of other forms of public assistance) lack resources to provide for themselves and their families. Thus, maintaining employment (or, in the absence of employment, receiving access to some other independent source of income) can be understood as a primary tool in addressing domestic violence. Additionally, legislation or other strategies to combat job loss of victims does not just manage collateral effects of domestic violence. Rather, it offers the possibility of serving as a primary strategy in reducing the occurrence or continuation of the violence and fits well with a growing emphasis in domestic violence policy towards focusing on material resources available to victims.³³ Equally important, because the vast majority of victims of domestic violence are women, effectively managing domestic violence can play a central role in facilitating women's full participation in the workplace.

Second, batterers often purposefully isolate their victims from friends and family as part of a larger pattern of abuse. The work-

29. PARTNERSHIP FOR PREVENTION, DOMESTIC VIOLENCE AND THE WORKPLACE STUDY 3 (2002).

30. Joseph A. Kinney, *Domestic Violence Moves into Workplace*, WORKPLACE VIOLENCE & BEHAV. LETTER (Nat'l Safe Workplace Inst., Charlotte, N.C.) Nov. 1994, at 3.

31. CORPORATE ALLIANCE TO END PARTNER VIOLENCE, NATIONAL BENCHMARK TELEPHONE SURVEY ON DOMESTIC VIOLENCE IN THE WORKPLACE 1 (2005), available at <http://www.ncdsv.org/images/CAEPVSurvey.WorkPlace.pdf>.

32. *Id.*

33. *Cf. Coker, supra* note 20 (arguing that priority in domestic violence reform should be given to policies or laws that improve women's access to material resources).

place can be an effective means of reaching victims of domestic violence because it is a place where a batterer has considerably less control. The support of coworkers and supervisors can be extremely important for victims struggling to end an abusive relationship. Indeed, sociologists have increasingly observed that, for all workers, the workplace is gradually replacing other spaces as a principal site for employees' social lives and a primary source of community.³⁴ This is particularly true for victims of domestic violence. Thus, workplaces can be an ideal forum for helping victims know about domestic violence services that may be available in their communities. Providing information for referrals to personnel in human resources departments and Employee Assistance Plans, or simply hanging a poster on a bulletin board or in a bathroom, can be an ideal way to help a victim realize that support is available.³⁵ In this respect, raising awareness of domestic violence in the workplace increases the likelihood that victims will access other domestic violence support services.

Third, as is evident from the studies on the economic effects of domestic violence, both victims and their employers bear significant costs associated with domestic violence. Although employers may "blame" victims for these costs, it may be more accurate to recharacterize both individual victims and their employers as "victims" of the perpetrator. Effectively addressing domestic violence can reduce the costs that both bear. Moreover, because employers do have an economic interest in the issue, as well as a concern for the wellbeing of their employees, they can become a powerful force in effectively addressing domestic violence. The challenge is to address employers' legitimate interest in decreasing productivity losses and the threat of workplace violence associated with domestic violence using means other than firing the victim. Additionally, since neither the employer nor the employee is the true cause of the costs, the question of who should bear them, or whether they can be spread more generally, becomes an important one in legislative responses.

C. Limitations of a Purely Market-Based Approach

Suggesting, as I do above, that businesses are bearing costs associated with domestic violence and that they are well positioned to support their employees in addressing domestic violence raises the

34. ARLIE RUSSELL HOCHSCHILD, *THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK* 40 (1997) ("The social life that once might have surrounded her at home she now found at work. The sense of being part of a lively, larger, ongoing community—that, too, was at work.")

35. *See, e.g.*, Ellen Simon, *Employers Step Up Domestic Violence Help*, ABCNEWS.COM, Aug. 28, 2007, <http://abcnews.go.com/Business/wireStory?id=3533367> (collecting stories of companies that have assisted individual victims and helped them access resources).

obvious question of why legal regulation is necessary at all. Won't the private marketplace just take care of the problem?

The short answer is simply that, as an empirical matter, it does not. A study conducted in 2005 by the Bureau of Labor Services found that roughly 15 percent of businesses have a workplace violence policy that addresses domestic violence and only 4 percent of businesses provide training on such policies.³⁶ It is not common for companies to explicitly offer support to employees who are victims of domestic violence.³⁷ Significantly, businesses often focus on domestic violence only *after* experiencing significant workplace violence related to domestic violence.³⁸

Nonetheless, as discussed at the end of this Section, increasingly businesses are tackling the problem. While such voluntary actions are clearly desirable and (as discussed in Part V) should help inform legislative responses, there are several reasons why legal reform is nonetheless necessary. First, the status quo legal structure (absent the specific legislative developments discussed in Part IV) offers some disincentives to employers and employees effectively sharing knowledge and working together to address domestic violence. Second, studies suggest that managers in businesses underestimate the likelihood that they are employing victims of domestic violence and overestimate the likelihood that employing victims will lead to violence in the workplace. These misperceptions, combined with society's ongoing discomfort with domestic violence generally, distort any cost-benefit analysis on which a purely-market based solution would rest. Third, there are reforms that legislatures may feel are appropriate as part of the public's commitment to ending domestic violence

36. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, SURVEY OF WORKPLACE VIOLENCE PREVENTION, 2005 tbls. 10 & 11 (2006) [hereinafter BLS REPORT], available at <http://stats.bls.gov/iif/oshwc/osnr0026.pdf> (showing that 29.1 percent of businesses have policies addressing workplace violence generally and that, of those, a little under half (44.7 percent) address domestic violence as a cause of workplace violence); *id.* at tbl. 12 (showing 4 percent of businesses conduct training on domestic violence).

37. It is relatively common for businesses (especially large businesses) to offer general counseling or assistance through an Employee Assistance Program or referrals to community programs. Employees, however, often are unaware of such supports. See Corporate Leaders and America's Workforce on Domestic Violence, CEO and Employee Survey 2007 [hereinafter CAEPV 2007 Survey] (unpublished study, on file with author) (noting that 72 percent of CEOs indicated that their companies offered domestic violence or counseling to their employees but only 48 percent of employees knew about the services).

38. See CHRISTINE LINDQUIST ET AL., RESEARCH TRIANGLE INST., INVENTORY OF WORKPLACE INTERVENTIONS DESIGNED TO PREVENT INTIMATE PARTNER VIOLENCE § 3.2.1, at 3-4 (2006) [hereinafter CDC INVENTORY], available at [http://www.caepv.org/membercenter/files/Inventory%20of%20Workplace%20Interventions%20Designed%20to%20Prevent%20IPV%20\(May%202006\).pdf](http://www.caepv.org/membercenter/files/Inventory%20of%20Workplace%20Interventions%20Designed%20to%20Prevent%20IPV%20(May%202006).pdf) (suggesting incidents of workplace violence were the primary factor identified by companies as leading to developing a program on domestic violence). By contrast, one company indicated it became interested in the issue because of a state initiative suggesting employers could play a role in addressing intimate partner violence. *Id.* § 3.2.1, at 3-5.

that go beyond what businesses—even with full understanding of the costs and benefits—would choose to do. I address each proposition in turn.

Under traditional tort law principles, employers may be held responsible for failing to address potential workplace violence. Generally speaking, a plaintiff needs to establish that there were warnings signs of the violence, that the company knew or should have known about these signs, and that the company could have, but failed, to take steps to minimize or prevent the violence. There have been several cases arising out of violence at work related to domestic violence; a few have yielded several million dollar judgments or settlements to persons injured when employers failed to take reasonable precautions.³⁹ However, in far more cases, courts find that an employer cannot be held responsible for criminal acts of a third party, generally on the grounds that the violence was not foreseeable.⁴⁰ This arguably creates the perverse incentive for employers to try to close their eyes to potential (but not necessarily evident) risks, actually increasing the threat to the victim and her coworkers. In fact, when asked what barriers they believe their company would face if it sought to implement an explicit domestic violence workplace policy, many CEOs cite concern with “legal ramifications of becoming involved” as a primary obstacle.⁴¹

At the same time, absent specific employment protections, victims of domestic violence who disclose their situation to their employers may be fired with relative impunity. That is, the general rule of at-will employment permits most employees to be fired at any time for any reason or no reason so long as they are not fired for a reason specifically prohibited (such as race, sex, national origin, etc.). Advocates

39. Other commentators have reviewed this body of law and recent decisions in some detail. See John E. Matejkovic, *Which Suit Would You Like? The Employer's Dilemma in Dealing with Domestic Violence*, 33 CAP. U. L. REV. 309 (2004); Stephanie L. Perin, *Employers May Have to Pay When Domestic Violence Goes to Work*, 18 REV. LITIG. 365 (1999); Nicole Buonocore Porter, *Victimizing the Abused?: Is Termination the Solution When Domestic Violence Comes to Work?*, 12 MICH. J. GENDER & L. 275 (2006); Jennifer M. Gaines, Comment, *Employer Liability for Domestic Violence in the Workplace: Are Employers Walking a Tightrope without a Safety Net?*, 31 TEX. TECH L. REV. 139 (2000); see also SCHNEIDER ET AL., DOMESTIC VIOLENCE AND THE LAW, *supra* note 12, 788-97 (discussing potential liability for injuries from domestic violence that occurs at work under both workers' compensation and tort frameworks); Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 SMU L. REV. 55, 86-89 (2006) (discussing relatively limited employer tort liability for rape and sexual assault).

40. See, e.g., Matejkovic, *supra* note 39, at 313 (collecting cases). In cases where the abuser works for the same employer as the victim, by contrast, courts are much more likely to hold the company responsible, generally under a negligent hiring, negligent retention, or failure to warn theory. See *id.*

41. See CAEPV 2007 Survey, *supra* note 37, at 7; see also *infra* note 51 (describing other barriers often identified).

for battered women have had some luck arguing that terminating a victim of domestic violence because of the violence against her violates sex discrimination laws.⁴² But, as other commentators have also concluded, such claims are often hard to make out under existing law, either because the absence of a male comparator makes it difficult to prove a disparate treatment claim or because it may be difficult to establish that a single termination was pursuant to a “policy or practice” sufficient to make out a disparate impact claim.⁴³ A few courts have also held that firing a victim because of violence against her may state a tort claim for termination in violation of public policy.⁴⁴ Nonetheless, many courts would hold that it is perfectly legal

42. There are a handful of cases in which victims who have been fired have won favorable decisions on sex discrimination claims (at least in pretrial motions). These have proceeded under a variety of theories: A showing that a policy of penalizing victims has a disparate impact on women, *see* *Pooley v. Union County*, No. 01-343-JE (D. Or. Mar. 17, 2003) (unpublished decision, on file with author); *Thoma v. LeJ's Bad Penny Bar and Café*, No. CR200600641 (Wis. Dep't of Workforce Dev., Equal Rights Div.) (filed Feb. 21, 2006) (probable cause determination) (as an attorney at Legal Momentum, I was counsel on this case), a showing that, in a situation where both a male abuser and a female victim worked for the same employer, the abuser was treated more favorably, *Rohde v. K.O. Steel Castings, Inc.*, 649 F.2d 317 (5th Cir. 1981), and a showing that assaults or harassment related to the workplace constituted sexual harassment and that the employer failed to respond adequately, *Fuller v. City of Oakland*, 47 F.3d 1522 (9th Cir. 1995). Similar theories have been used to claim that evictions of victims of domestic violence may violate the Fair Housing Act. *See, e.g., Bouley v. Young-Sabourin*, 394 F. Supp. 2d 675 (D. Vt. 2005). The *Bouley* case also relied on a theory that adverse actions against victims of domestic violence based on discriminatory sex-stereotypes violated the Fair Housing Act, *see id.*, a theory that could be likewise successful in the employment context. *Cf. Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (finding employment decision based in part on sex-based stereotypes could state a discrimination claim under Title VII).

43. Julie Goldscheid offers one of the most nuanced assessments of the viability of Title VII to address employment discrimination against victims of domestic violence. *See* Julie Goldscheid, *Gendered Violence and Work: Reckoning with the Boundaries of Sex Discrimination Law*, 18 COLUM. J. GENDER & L. (forthcoming 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1140246 (arguing that many forms of employment discrimination against victims should be actionable, particularly if the role that gender-based bias plays in such actions were more clearly identified). A few other commentators have discussed the viability of Title VII claims in some detail. *See* Nina W. Tarr, *Employment and Economic Security for Victims of Domestic Abuse*, 16 S. CAL. REV. L. & SOC. JUST. 371, 393-94 (2007) (arguing that sex discrimination laws offer limited utility to victims of domestic violence); Maria Amelia Calaf, Comment, *Breaking the Cycle: Title VII, Domestic Violence, and Workplace Discrimination*, 21 LAW & INEQ. 167 (2003) (arguing that generally employment discrimination against victims should be actionable under Title VII).

44. *See, e.g., Greer v. Beck's Pub & Grille*, No. C03-2070 LRR (N.D. Iowa Jan. 4, 2006) (unpublished decision, on file with author) (denying defendants' motion for summary judgment on a wrongful discharge claim where victim was fired after having sought a protective order against an abusive coworker) (as an attorney at Legal Momentum, I was counsel on this case); *Pooley v. Union County*, No. 01-343-JE (D. Or. Mar. 17, 2003) (unpublished decision, on file with author) (denying defendants' motion for summary judgment on a wrongful discharge claim where victim was subjected to harassment at work after having sought a protective order); *Apessos v. Mem'l Press Group*, 15 Mass. L. Rep. 322, 324 (Mass. Super. Ct. 2002) (finding that firing a victim for missing work to obtain a protective order stated a claim of termination in violation of public policy). *But see, e.g., Imes*

for an employer to fire at will a victim of domestic violence based on the violence against her. Thus, just as employers under general tort law have an incentive to avoid learning about domestic violence, employees under general employment law principles have a powerful incentive to avoid disclosing their situation to their employers. Existing law therefore tends to reduce the likelihood that employers and employees will work together effectively to address the situation.

Nonetheless, the growing number of businesses that are voluntarily taking steps to address domestic violence makes clear that under existing legal standards employers more generally *could* be taking more effective steps to address domestic violence. Indeed, any increased tort risk stemming from taking proactive steps is purely speculative. More likely, so long as an employer could show that it acted reasonably in light of any perceived threat, it still would not be deemed to be liable under a tort framework for third party violence; in fact, taking appropriate precautions would decrease the likelihood that an employer would be held responsible.

A recent survey of CEOs and employees at Fortune 1500 companies documents information gaps that may offer more of an explanation as to why it is uncommon for businesses to adopt effective domestic violence policies. The survey found that most CEOs think that relatively few of *their* employees are victims or survivors of domestic violence: 83 percent of CEOs think fewer than 10 percent of their full-time employees are victims or survivors of domestic violence.⁴⁵ Employees understand that the prevalence of domestic violence affecting their coworkers is much higher.⁴⁶ This misperception causes managers to underestimate the effects of domestic violence on their businesses; in other words, although the business may be suffering losses associated with absences, productivity decreases, or turnover caused by domestic violence, many managers will not identify domestic violence as the root cause. Again, coworkers better understand that domestic violence is having a significant effect on the bottom

v. City of Asheville, 594 S.E.2d 397 (N.C. Ct. App. 2004) (affirming grant of employer's motion to dismiss victim's wrongful termination claim on grounds that protected classes could only be created by the legislature); see also Tarr, *supra* note 43, at 395-402 (discussing possibilities and challenges in framing wrongful termination claims in this context); Sandra S. Park, Note, *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 (2003) (arguing that firing victims because of violence against them should state a claim of termination in violation of public policy).

45. See CAEPV 2007 Survey, *supra* note 37, at 4. The survey was the third benchmarking study tracking views of CEOs regarding domestic violence; all three were commissioned by Liz Claiborne, Inc., which has made raising awareness of the issue (and supporting its own employees who are dealing with domestic violence) a priority.

46. *Id.* (finding 51 percent of employees think more than 10 percent of full-time workers at their companies are victims or survivors; 19 percent of employees think more than 25 percent of full-time workers are victims or survivors).

line at their company.⁴⁷ The general discomfort and stigma that remain associated with domestic violence in our society further exacerbates this “under-counting.” Many victims feel deep shame; victim blaming remains common. Additionally, as noted above, under traditional employment law standards, victims may be fired with relative impunity. Thus, few victims will voluntarily share their situation with others (particularly managers) at work unless the employer has explicitly invited such disclosure by promulgating a policy on point.

At the same time as they discount the likelihood that they are employing victims of domestic violence, managers may overestimate the likelihood that employment of a (hypothetical) victim would result in workplace violence. Experts advocating that businesses adopt effective domestic violence policies often highlight that employing victims of domestic violence can lead to violence in the workplace.⁴⁸ Likewise, many of the legal commentators who have discussed in detail the effects of domestic violence on the workplace have focused on the legal liability that may be associated with workplace violence.⁴⁹ This emphasis is not surprising. Obviously, employers would like to avoid injuries to their employees. Serious incidents also tend to result in newspaper headlines and often litigation. Thus, such a focus clearly gets employers’ attention. But the 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. The Bureau of Labor Statistics has found that domestic violence accounts for just 5 percent of all workplace violence, and workplace violence itself is relatively uncommon.⁵⁰

47. *Id.* at 3 (finding 91 percent of employees believe that domestic violence affects the bottom line at their companies either “[a] lot” or “some” while just 43 percent of CEOs believe it affects their bottom line “[a] lot” or “some”).

48. See generally *infra* note 50.

49. See sources cited *supra* note 39. Both Julie Goldscheid and Nicole Buonocorte Porter discuss the possibility that the risk employers perceive as associated with employing a victim of domestic violence may be inflated by bias or mere speculation. See Porter, *supra* note 39, at 328-30; Goldscheid, *supra* note 43, at 46.

50. See BLS REPORT, *supra* note 36. Five percent of businesses of all sizes reported an incident of workplace violence over a period of twelve months, with just under one percent of businesses reporting an incident related to domestic violence. *Id.* Twenty-four percent of the largest businesses (employing more than one thousand employees) reported a workplace violence incident related to domestic violence. *Id.* This is obviously not a small number. However, remember that these employers likely employed many dozens or even hundreds of victims of domestic violence, most of whom were not the target of workplace violence. Of course, it is important to recognize that workplace violence in general, and workplace violence stemming from domestic violence in particular, may well be underreported. In fact, the definition of “workplace violence” used in the BLS study was relatively broad: physical assaults or *threats* of assault, harassment, intimidation, or bullying at work or while on duty. *Id.* The studies cited *supra* note 9, regarding prevalence of harassment of victims of domestic violence at work (much of which might fit within the BLS study’s definition of workplace violence), suggest that the BLS workplace violence study almost cer-

The two misperceptions reinforce each other. That is, employers don't realize that they are in fact employing many victims of domestic violence without experiencing any violent incidents at the workplace. They are aware of (and understandably concerned about) the relatively rare instances in which domestic violence escalates to workplace violence. Therefore, if employers learn that a particular employee is a victim of domestic violence, they often respond by firing her, perhaps believing this is the best means of keeping the workplace safe. Observing such terminations, any other victims who are employed by the employer are even less likely to disclose what is occurring to them, further perpetuating management's misperception that relatively few of the business's employees are victims of domestic violence. Finally, even companies that recognize that domestic violence does have significant effects on their business may feel that it is a private matter best left to employees or may not be aware that they can play a significant role in addressing the violence.⁵¹ Although such information gaps make it unlikely a purely market-based approach will adequately address the issue, legal reforms, as I suggest in Part V, should be consciously tailored to promote information exchange that would demonstrate that employers and employees do in fact have considerable shared interests.

The growing number of private employers that voluntarily adopt proactive policies designed to support employees who are victims of domestic violence and reduce the likelihood of violence occurring at the workplace confirms that addressing domestic violence can be in a business's interest. This trend is due in part to successful efforts by nonprofit organizations, workplace violence experts, and businesses that have made addressing domestic violence a priority to educate corporate leaders more generally.⁵² Government researchers have

tainly undercounts incidents of workplace violence as it defines it. However, it seems likely that more serious incidents (that is, actual assaults) are those most likely to be reported officially and thus captured in the BLS report. Thus, the BLS study is probably correct that incidents of *actual* violence at work stemming from domestic violence are relatively unusual.

51. In the benchmark survey done by Liz Claiborne, CEOs identified several barriers to implementing domestic violence workplace programs, including that domestic violence was not perceived as a major issue at the company, concern over legal ramifications of becoming involved, concerns over being "overly involved" in employees' personal lives, and lack of information about how domestic violence affected the workplace. CAEPV 2007 Survey, *supra* note 37, at 7. Eighty-one percent of CEOs agreed that most companies would be more willing to become involved if they had the "right program and tools to implement it." *Id.* at 5.

52. The Corporate Alliance to End Partner Violence (CAEPV), a private nonprofit group, is the most prominent organization supporting employers in such efforts. It defines its mission as to "aid in the prevention of partner violence by leveraging the strength and resources of the corporate community" and claims that its members and associate organizations reach over one million employees nationwide. See Corporate Alliance to End Partner Violence, CAEPV—Learn About Us, <http://www.caepv.org/about/purpose.php> (last vis-

also played a role. The CDC, as part of its injury prevention mandate, recently commissioned researchers to conduct an “inventory” of businesses that have taken a lead on the issue. The CDC report identifies the following steps as typical in an effective business response: promulgating a policy that specifically prohibits perpetrators from threatening or engaging in violence while at work and offers assistance to victims; implementing security measures to reduce the risk of workplace violence associated with domestic violence; providing resources to victims of domestic violence; educating employees and managers about domestic violence, including how to recognize signs of domestic violence and where to refer victims for help; and offering services to perpetrators to reduce future violence.⁵³

Businesses involved in the study indicated that their objectives in implementing such steps was “not only workplace safety but personal safety” for employees at home.⁵⁴ They sought to increase the likelihood that employees who were victims would “report” the violence so that safety planning would be possible and, of course, sought to minimize the productivity losses associated with the violence. Most companies create specialized “Domestic Violence Response Teams,” which include personnel from human resources, security, and legal departments to handle situations as they arise.⁵⁵ Interestingly, none of the businesses inventoried measured the cost-effectiveness of their programs, indicating perhaps that their motivations were not pri-

ited June 23, 2008). CAEPV distributes information related to domestic violence and domestic violence prevention, publicizes best practices of its members, and provides targeted technical assistance to businesses seeking to develop domestic violence policies. *Id.* Domestic violence service providers also often reach out directly to businesses to encourage them to take proactive steps. Safe Horizon, a large domestic violence service provider based in New York City, has recently launched an ambitious campaign called SafeWork 2010, which has the goal of securing pledges from at least two hundred Fortune 500 CEOs to make a commitment to address domestic violence in their own companies. See Chris Erickson, *Reaching Out: Victim Advocates Say Domestic Violence Needs to Be Addressed at Work—and They’re out to Convince CEO’s* [sic], N.Y. POST ONLINE EDITION, Oct. 1, 2007, http://www.nypost.com/seven/10012007/jobs/reaching_out.htm. For representative discussions of the issue by experts on workplace violence generally, see, for example, BRAVERMAN, *supra* note 28; PALUDI ET AL., *supra* note 28; and Fisher & Peek-Asa, *supra* note 28.

53. CDC INVENTORY, *supra* note 38, §§ 1.2.1 to .6 (May 2006); see also, e.g., BRAVERMAN, *supra* note 28, at 87-89; PALUDI ET AL., *supra* note 28, at 81-83; Fisher & Peek-Asa, *supra* note 28, at 108-11 (all recommending similar strategies). Most policies include a clear statement that victims will not be discriminated against; the possibility of paid or unpaid leave to address the violence; the offer of assistance with safety measures; and prohibition of activities relating to the perpetration of domestic violence by employees at work or use of work materials. See Stacey Pastel Dougan & Kimberly K. Wells, *Domestic Violence: Workplace Policies and Management Strategies*, ABA COMM. ON DOMESTIC VIOLENCE Q. E-NEWSLETTER (Am. Bar. Assoc., Chi., Ill.), Spring 2007, <http://www.abanet.org/domviol/enewsletter/vol7/DouganWellsSpring2007.pdf>.

54. CDC INVENTORY, *supra* note 38, § 3.2.1.

55. *Id.* § 3, at 3-20; see also, e.g., Dougan & Wells, *supra* note 53; BRAVERMAN, *supra* note 28, at 88; Fisher & Peek-Asa, *supra* note 28, at 82.

marily, or at least not strictly, bottom-line oriented, but rather may reflect a commitment to facilitate employee wellbeing or play a positive role as corporate citizens.⁵⁶

Legal reforms (broadly defined) can complement and encourage such voluntary action, as well as go beyond what individual employers can or would do. As discussed in Part IV, several individual states, as well as Congress, have developed model policies or funded initiatives to collect and disseminate policies that businesses have found effective. Supporting research to document cost savings and other business benefits could further spur voluntary business action. Second, legislation can spread costs among businesses and offer specific legal tools, such as the possibility of obtaining a “workplace restraining order,”⁵⁷ which, like an individual victim’s civil restraining order, can reduce the risk of workplace violence. Third, because of the expressive power of legal reform, passing laws that protect victims of domestic violence from losing their jobs has an impact beyond the specific substantive protections they provide. It indicates a societal commitment to addressing domestic violence and its workplace effects that can help counter the stigma and stereotyping that may contribute to the information gaps described above. Finally, legislatures may determine that as part of a larger commitment to addressing domestic violence they will mandate employment protections for victims that go beyond what individual businesses would choose to do on their own. The question then becomes whether and how to reimburse businesses for any costs incurred.⁵⁸

III. PLACING WORKPLACE DOMESTIC VIOLENCE LAW IN CONTEXT

Recognizing, as Part II does, that domestic violence has significant effects on workplaces and that a legislative response is desirable does not answer what the appropriate substantive scope of such legislation would be. The emerging body of legislation discussed in this

56. CDC INVENTORY, *supra* note 38, § 4 app. A. Companies more typically evaluate effectiveness in terms of greater awareness of domestic violence resources. See, e.g., B. Younger Urban, Harman Internat’l Domestic Violence Prevention Project, Evaluation Report (May 2004) (unpublished report, on file with author) (finding that after being trained on domestic violence, 91 percent of employees said they were more likely to know where to refer someone who is abused for help; 89 percent said they were more likely to be supportive of a colleague who is abused; and 86 percent said they were more aware of what to do if there is a threat of domestic violence at work).

57. See *infra* Part IV.E.

58. See *infra* Part V.D. Some might object that employers should not be forced to bear any costs associated with addressing domestic violence beyond making changes that are in their own economic interest. It remains, however, within legislatures’ authority to make such decisions, just as they regulate many other aspects of the employment relationship, including setting minimum wage and overtime rules, requiring accommodation of individuals with disabilities, etc. Further research into the economic (and potentially noneconomic) costs and benefits of various approaches could help inform the debate.

Article builds on—and, equally importantly, departs from—more traditional “domestic violence” legislation and more traditional “employment” legislation. This Part briefly describes evolution of each these bodies of law to offer context for the new laws discussed in Part IV. It demonstrates that both domestic violence law and employment law have struggled with the extent to which society as a whole, or, in the employment context, employers, should bear responsibility for addressing or accommodating what have traditionally been considered “private” family matters. Domestic violence advocates have successfully reframed domestic violence as a “public” problem, requiring a systemic response. As shown in Part IV, this reframing in turn informs domestic violence employment law, as evidenced by a willingness to impose costs on all employers or spread costs among employers, in sharp distinction to accommodations required by the employment laws discussed in this Part.

A. *Legal Responses to Domestic Violence*

Domestic violence has deep roots in the traditional patriarchal family structure. As recently as the nineteenth century, a man legally owned his wife and had a right to chastise her physically for (purported) misconduct. Even after chastisement was no longer legally sanctioned, “privacy” concerns served to shield domestic violence from court scrutiny.⁵⁹ As Elizabeth Schneider observes, “It took the rebirth of feminism in the 1960s for the ‘rediscovery’ of battering.”⁶⁰

As a result of dedicated advocacy, there has been a sea change in legal responses to domestic violence. The initial generation of legal reforms, begun in the 1970s, focused on two areas: family law and criminal law. Advocates successfully lobbied for statutory amendments requiring the consideration of domestic violence in custody, visitation, and divorce proceedings, and for the creation of civil protective orders in every state.⁶¹ On the criminal law side, “mandatory arrest” laws, specialized domestic violence prosecution units, and use of strategies to encourage prosecutions even if the victim is unwilling or unable to participate, have dramatically increased domestic vio-

59. See generally Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996) (showing how even after wife beating was no longer officially legal, men who beat their wives were typically granted formal and informal immunity from prosecution to protect the “privacy” of the family).

60. ELIZABETH M. SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* 20 (2000).

61. See Barbara J. Hart, *The Legal Road to Freedom*, in *BATTERING AND FAMILY THERAPY: A FEMINIST PERSPECTIVE* (Marsali Hansen & Michele Harway eds., 1993); see also Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 810 (1993).

lence prosecutions.⁶²

Although the criminal law and family law that governs domestic violence is primarily a matter of state law, in 1994, Congress first passed the Violence Against Women Act (VAWA), a multi-pronged federal strategy to combat domestic violence, dating violence, sexual assault, and stalking.⁶³ VAWA created a private federal cause of action for gender-based violence that was struck down by the Supreme Court in *United States v. Morrison* as unconstitutional.⁶⁴ Nonetheless, the rest of the original VAWA, as well as reauthorizations of VAWA in 2000 and 2005, remain good law. VAWA authorizes funding for a variety of domestic violence services, including training police departments, prosecutors, and both family and criminal law judges, as well as for representation of victims in civil proceedings.⁶⁵ VAWA also provides additional substantive legal rights for victims, including immigration protections for battered immigrants and anti-discrimination protections for victims of domestic violence living in public or subsidized housing.⁶⁶

62. See, e.g., Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1678-97 (discussing strategies employed). Recent Supreme Court decisions that shield police departments from liability for failing to comply with state mandatory arrest laws, see *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005), and that make it more difficult for prosecutors to rely on victims' prior statements, see *Davis v. Washington*, 547 U.S. 813 (2006), may lead to some backsliding.

63. Violent Crime Control and Enforcement Act of 1994, Pub. L. No. 013-322, 108 Stat. 1796 (1994). VAWA was title IV of this Act.

64. 529 U.S. 598, 617 (2000).

65. Violence Against Women and Department of Justice Reauthorization Act of 2005, 119 Stat. 2960, Pub. L. No. 109-162 (2006). Training and legal services money, together with resources to meet immediate safety needs of victims by creating shelters and nonresidential support programs, make up the bulk of VAWA funding. In fiscal year 2007, for example, appropriations under VAWA and the related Family Violence Prevention and Services Act totaled \$557 million, including \$156 million in "Services, Training, Officers, Prosecutors" (STOP) grants (grants usable to improve law enforcement response to violent crimes against women); \$62 million in Grants to Encourage Arrests (grants usable to implement pro-arrest policies); \$39 million for civil legal assistance for victims; \$39 million in services for rural victims; and \$125 million for shelters and related services for battered women. See CAMPAIGN FOR FUNDING TO END DOMESTIC & SEXUAL VIOLENCE, VAWA APPROPRIATIONS FOR FISCAL YEARS 2006 AND 2007, AND FISCAL YEAR 2008 REQUESTS (2007), available at <http://www.naesv.org/Resources/approps102707.pdf>. Other relatively large appropriations under VAWA include \$15 million for transitional housing and \$44 million for rape prevention and education. *Id.* For more information on VAWA grant requirements, see Office on Violence Against Women, U.S. Dep't of Justice, Federal Laws and Legislation, <http://www.usdoj.gov/ovw/regulations.htm> (last visited June 23, 2008). As noted below, see *infra* text accompanying note 159, VAWA 2005 authorized \$1 million for creation of a federal clearinghouse to collect best practices by businesses.

66. See, e.g., Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960, (2006), Title VIII (Protection of Battered and Trafficked Immigrants) & Title VI (Housing Opportunities and Safety for Battered Women and Children).

Collectively, these reforms have dramatically improved the legal response to domestic violence and thus made countless victims safer. Nonetheless, as these reforms have been achieved, their limitations, particularly those related to the criminal justice system, have become apparent. As numerous commentators have observed, the move to a criminal justice focus, in which the state becomes the actor charged with addressing domestic violence, by its very terms takes control away from the victim.⁶⁷ Relying on the criminal justice system also raises special concerns for women of color and immigrants.⁶⁸ And criminal definitions of domestic violence focus on isolated incidents of physical violence, while many victims feel that other forms of emotional abuse or manipulation are actually the more significant aspects of control.⁶⁹ Similar concerns have been expressed regarding the emphasis on civil protective orders.⁷⁰ And it is clear that bias and stereotypes limit the effectiveness of reforms in both areas.⁷¹

67. See, e.g., G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 293-304 (2005) (critiquing the reliance on mandatory arrest laws); Sack, *supra* note 62, at 1678-97 (reviewing range of critiques of reliance on criminal justice system offered by battered women's advocates); see also Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 21-22 (2006) (arguing that criminalization of violation of civil protective orders inappropriately authorizes the state to prosecute nonviolent behavior in the home); cf. Naomi Cahn, *Policing Women: Moral Arguments and the Dilemmas of Criminalization*, 49 DEPAUL L. REV. 817 (2000) (discussing tensions in criminalization of domestic violence in connection with other criminal liability that disproportionately affects women, including prostitution, child abuse and neglect, and sexual assault).

68. See, e.g., Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 810-12 (2001); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1251 (1991); Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231, 242-51 (1994).

69. See, e.g., Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 962-65 (2004) (arguing for redefinition of battering to criminalize a course of coercive and controlling conduct).

70. See, e.g., Jane C. Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U. J. GENDER SOC. POL'Y & L. 499, 504-05 (2003) (questioning whether focus on civil protective orders as means of protecting battered women is effective in increasing safety); Suk, *supra* note 67, at 57-58 (arguing that criminalization of violation of civil protective orders suggests that they too significantly decrease victim autonomy).

71. See, e.g., Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining Solutions*, 11 AM. U. J. GENDER SOC. POL'Y & L. 657, 686-90 (2003) (describing role that bias against battered women as mothers plays in custody determinations). Of course, it is not just judges, police officers, or prosecutors who can be biased. Representatives of employers are often biased too. Thus, implementation of the new employment laws may also be limited by bias and stereotype. Therefore, internal trainings as well as public education efforts must address head-on the potential distortion caused by common stereotypes regarding battering and battered women.

The possibilities and challenges inherent in these reforms are the subject of extensive commentary, and they, obviously, are not the focus of this Article.⁷² Nor am I suggesting in any way that workplace legislation can or should replace criminal and family law in addressing domestic violence; these systems remain essential for many victims. There are, however, a few points related to this history that both help shape domestic violence employment legislation and demonstrate how it can complement these other strategies. First, as several other commentators have noted, a key strategy embraced by battered women's advocates beginning in the 1970s was to redefine what had been characterized as a "private" family matter off limits from state intervention as a "public" problem requiring state enforcement of criminal laws to promote safety and punish wrongdoing.⁷³ Their success in this respect has truly been remarkable, and I will argue that it plays a key role in distinguishing legislation addressing workplace effects of domestic violence from legislation addressing other "family" issues that impact the workplace.

Second, both family law and criminal law reforms tend to encourage the victim of an abusive relationship to separate from the abuser. Thus, ensuring that a victim has a source of income independent of her abuser is extremely important to making these strategies effective. Additionally, workplace-based strategies may help victims who are unlikely or unwilling to use some of these other legal strategies, including victims who are taking steps to end the abuse but hope to remain in the relationship.

Third, as a society, we expend considerable resources in managing the effects of domestic violence and working to prevent future violence. If workplace interventions can play a significant role in reducing domestic violence, it may be appropriate to commit public funds to the effort.

Finally, somewhat distinct from the individual victim-rights-based approach of the family law reforms or the emphasis on punishing the perpetrator of criminal law reforms, there has also been a

72. See *supra* notes 67-71.

73. See, e.g., Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1869 (1996) ("[M]uch of [the] feminist academic discourse concerning domestic violence has centered on the argument that 'private' violence must be reconceptualized as 'public' in order to compel state intervention."); Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 984-85 (1991) ("The concept of privacy encourages, reinforces and supports violence against women. . . . Privacy says that what goes on in . . . violent relationship[s] should not be the subject of state or community intervention. *Privacy says that it is an individual, and not a systemic problem. Privacy operates as a mask for inequality, protecting male violence against women.*" (emphasis added)); cf. Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1671-72 (1990) (noting that decisions by individual police officers or court clerks not to respond to domestic violence calls are "public" acts rather than "private" acts).

growing interest in addressing domestic violence as a public health crisis. As noted above, studies typically find that at least one in four women is a victim of domestic violence. Domestic violence typically causes serious physical and emotional injuries. The CDC has therefore implemented a variety of public health strategies to address the problem. These include documenting the extent of domestic violence, identifying risk and protective factors, developing and testing prevention strategies, and then implementing effective strategies on a wide-scale basis.⁷⁴ The public health paradigm likewise has helped shape emerging workplace legislation.

B. *Relevant Employment Law Models and Critiques*

The domestic violence employment laws also grow out of, and move beyond, traditional employment law. Thus, a brief description of the laws that have been the models for domestic violence laws, and of some of the critiques of that law that have become prevalent in recent years, is helpful.

Title VII of the Civil Rights Act of 1964, the primary federal employment nondiscrimination law, provides that employers may not discriminate on the basis of race, color, sex, religion, or national origin.⁷⁵ Courts have traditionally interpreted it primarily to guarantee “formal equality,” that is, that everyone must be treated the same.⁷⁶ In practice, this has meant, for example, that women must be treated the same as men and blacks the same as whites. This approach presumes that race, color, sex, and national origin are irrelevant in the workplace. In many cases, this is true. However, commentators have long recognized that a formal equality approach is not particularly effective at addressing situations in which salient distinctions might require that the structure of the workplace be changed in some fashion; such commentators have articulated the need for a broader understanding of equality that includes providing necessary accommodations to provide equal opportunity.⁷⁷ Commentators have also in-

74. See generally CTRS. FOR DISEASE CONTROL & PREVENTION, DEP’T OF HEALTH & HUMAN SERVS., PREVENTING VIOLENCE AGAINST WOMEN: PROGRAM ACTIVITIES GUIDE, available at <http://www.cdc.gov/ncipc/dvp/vaw.pdf> (outlining the CDC’s prevention strategies).

75. 42 U.S.C. § 2000e-2 (2008).

76. The definition of discrimination on the basis of religion includes the failure to accommodate religious observances and practice, unless doing so would impose an undue hardship on a business. See 42 U.S.C. § 2000e-2 (2008). Therefore, the protections of discrimination on the basis of religion explicitly go beyond formal equality. Additionally, commentators have recently observed that in certain other respects Title VII’s antidiscrimination provisions can require changing workplace structures or other accommodations. See *infra* note 81.

77. See, e.g., MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW (1990); Linda Hamilton Krieger, *Foreword—Backlash Against the*

creasingly suggested that traditional antidiscrimination protections, which generally require a showing of intentional discrimination, are ill-suited to combat more subtle forms of bias and structural barriers that often pose significant barriers to full participation of minorities and women in the workplace.⁷⁸

In the 1990s, Congress passed two laws, the Family and Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA), that required employers to make specific changes in the workplace in response to employees' particular needs. The FMLA provides eligible employees up to twelve weeks off in a twelve month period to care for their own or a family member's "serious health condition," or upon birth or adoption of a new child.⁷⁹ The ADA requires employers to make "reasonable accommodations" for employees with disabilities.⁸⁰ The laws were perceived as groundbreaking because they were understood to be fundamentally distinct from nondiscrimination requirements.⁸¹ In fact, the ADA and the FMLA were hailed as welcome harbingers of a larger transformation of the workplace to be more responsive to individual needs and a substantive equality analysis.⁸² As applied, however, they are now widely understood to have fallen far short of these expectations.⁸³ Particularly in the case of the ADA, specific decisions have limited the reach of the statute and, while rarely made explicit, there seems to be an underlying con-

ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies, 21 BERKELEY J. EMP. & LAB. L. 1, 6-7 (2000).

78. See, e.g., Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 2 (2006); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 324-45 (1987); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460-61 (2001).

79. 29 U.S.C. § 2612(a)(1)(D) (2008).

80. 42 U.S.C. § 12111(9) (2008).

81. See, e.g., John J. Donohue III, *Employment Discrimination Law in Perspective: Three Concepts of Equality*, 92 MICH. L. REV. 2583, 2608-09, 2612 (1994); Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307, 312-20 (2001); Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 1-14 (1996); Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833, 840-55 (2001); Krieger, *supra* note 77, at 3-4; Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197, 1200-04, 1209-12 (2003).

82. See generally, e.g., Krieger, *supra* note 77, at 3-4 (describing initial perceptions of the ADA).

83. Empirical studies of the ADA have demonstrated neutral to negative effects upon employment of individuals with disabilities. See, e.g., Samuel R. Bagenstos, *Has the Americans with Disabilities Act Reduced Employment for People With Disabilities?*, 25 BERKELEY J. EMP. & LAB. L. 527, 528 (2004) ("[N]o knowledgeable observer disputes . . . [that] the ADA has failed significantly to improve the employment position of people with disabilities."). Studies likewise suggest that the FMLA has had little impact. See Michael Selmi, *The Limited Vision of the Family and Medical Leave Act*, 44 VILL. L. REV. 395, 396 (1999) ("[T]he FMLA essentially replicated what the market was already providing—unpaid leave for large employers.").

cern that the accommodation mandates—which are perceived as requiring “special” treatment for specific individuals—are in tension with guarantees of equality.⁸⁴

Both laws also reflect a deep-seated reluctance to impose costs associated with individual accommodations for employees on employers, at least small ones. The FMLA was passed despite strenuous business objections. When initially introduced in 1985, the FMLA would have covered all employers, no matter how small.⁸⁵ That bill did not pass, and as the legislation was reintroduced over the next eight years, the proposed threshold gradually rose to fifteen employees, then twenty, then thirty-five, and then finally fifty employees, the threshold in the law actually enacted.⁸⁶ The high employee threshold, combined with a requirement that employees have worked at least one year for their current employer and a requisite number of hours in the year prior to requesting leave, mean that about half the American workforce is not eligible to take FMLA leave.⁸⁷ The ADA (like Title VII) only applies to employers with at least fifteen employees and further does not require accommodations that would cause an “undue hardship” on the employer.⁸⁸

The willingness of Congress to accommodate business concerns regarding costs by limiting the reach of these laws may be in part because antidiscrimination mandates, with their focus on formal equality, are popularly perceived as costing employers (at least almost) nothing. After the passage of the FMLA and the ADA, Christine Jolls, Samuel Bagenstos, and other commentators challenged this assumption, demonstrating persuasively that Title VII’s nondiscrimination requirements may impose costs that are equivalent to those imposed by “accommodation” mandates.⁸⁹ Nonetheless, the percep-

84. See James Leonard, *The Equality Trap: How Reliance on Traditional Civil Rights Concepts Has Rendered Title I of the ADA Ineffective*, 56 CASE W. RES. L. REV. 1, 8-9 (2005).

85. See H.R. 2020, 99th Cong. (1985).

86. See Ann O’Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 42-43 & n.221 (2007).

87. 29 U.S.C. § 2611(2), (4) (2000); U.S. Dep’t of Labor, Families and Employers in a Changing Economy, <http://www.dol.gov/esa/whd/fmla/fmla/1995Report/summary.htm> (report finding that 46.5 percent of private sector workers and 54.9 percent of all U.S. workers are eligible for FMLA leave); see also O’Leary, *supra* note 86, at 42-45 (demonstrating how the small business exception, probationary period exception, and part-time workers exception exclude a disproportionately high percentage of women and low-income workers).

88. 42 U.S.C. § 12111(10) (2000) (defining “undue hardship” as an accommodation that would require “significant difficulty or expense” when considered in relation to the size, resources, nature, and structure of the employer’s operation).

89. See Samuel R. Bagenstos, *Rational Discrimination, Accommodation and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 880-81 (2003) (arguing prohibition on intentional discrimination may require employers to make changes that are not economically rational); Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 652-66 (2001) (arguing that disparate impact cases under Title VII, which may require employers to change facially neutral policies, are economically equivalent to accom-

tion remains that antidiscrimination laws cost employers “nothing” and that accommodation mandates are expensive to employers, leading legislatures to excuse smaller or resource poor employers from such requirements. As shown in Part IV, these limitations are transported to the domestic violence context in laws modeled on the ADA and FMLA, although other new domestic violence laws depart from this model to impose costs more generally.

Responding to the growing recognition of the limits of antidiscrimination law and the disappointments of the accommodation mandates, employment law scholars currently tend to emphasize the need to understand legislation providing individual employment rights as part of a broader strategy to achieve larger objectives, particularly where success depends on changing workplace structures or societal norms. For example, in a prominent article arguing for paid family leave legislation, Gillian Lester notes that addressing gender inequities in the work world and in family care-giving responsibilities requires “composite . . . interlocking social policies,” including high quality affordable child care, effective antidiscrimination laws, a shorter work week, and changes to income tax policies, as well as paid family leave.⁹⁰ In another influential example, Susan Sturm demonstrates how employers need to engage in problem solving to address “second generation” discrimination problems such as structural bias, and she argues that rather than focusing on specific rules, the law should help shape normative expectations and establish presumptions that will encourage employers to creatively address the problem.⁹¹ She emphasizes the role that intermediary organizations such as human resources professionals, insurance companies, and nonprofit organizations can play in developing company policies.⁹² Such intuitions are likewise true in the domestic violence context,

modation mandates); *see also, e.g.*, Sharon Rabin-Margalioth, *Anti-Discrimination, Accommodation and Universal Mandates—Aren't They All the Same?*, 24 BERKELEY J. EMP. & LAB. L. 111, 137-39 (2003); Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 583-84 (2004); J. H. Verkerke, *Disaggregating Antidiscrimination and Accommodation*, 44 WM. & MARY L. REV. 1385, 1401-02 (2003) (each building on Jolls' analysis to argue that nondiscrimination and accommodation mandates are more properly understood as overlapping than distinct). *But see* Schwab & Willborn, *supra* note 81, at 1200-01 (disagreeing with Jolls' conclusions and arguing that accommodations are fundamentally different).

90. Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1, 4-5 (2005); *see also, e.g.*, Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 4 (2004) (arguing that the limited impact of the ADA is the result of “the inability of antidiscrimination laws to eliminate the deep structural barriers to employment that people with disabilities face” and arguing instead for expanded social welfare benefits).

91. Sturm, *supra* note 78, at 520-22; *see also generally* KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 157-95 (2004) (reviewing recent critiques of the possibility of traditional employment discrimination law to address discrimination in the contemporary workplace).

92. Sturm, *supra* note 78, at 522-37.

where effective solutions require flexibility and creative problem solving by businesses and where individual rights-based legislation must be complemented by other social policies.

IV. THE LEGISLATIVE RESPONSE TO THE WORKPLACE EFFECTS OF DOMESTIC VIOLENCE

In the past ten years, there has been an explosive growth of state laws, executive orders, and administrative guidelines addressing the effects of domestic violence in the workplace. This Part offers a detailed discussion of the new laws. Although other commentators have noted the rapid expansion of domestic violence employment laws, and particularly their potential import for poor women,⁹³ none has comprehensively evaluated their substantive contours. Analysis of the new laws reveals two common challenges. First is how to deal with the fact that employment laws, by their nature, most obviously regulate a relationship between the employer and the victim, while the perpetrator is the cause of workplace disruptions and violence, as well as, less directly, a victim's absences. Second, and relatedly, because ultimate responsibility rests most clearly with the perpetrator, the question of how to assign costs associated with any employment-related accommodations is particularly difficult.

These challenges are not unique to the domestic violence context. In fact, the debate over "accommodation" mandates such as the FMLA and the ADA focused in large part on the question of whether and to what extent employers could be asked to bear the costs of such changes. The striking thing about the emerging domestic violence laws is that they answer these questions in dramatically different

93. See Naomi Cahn & Michael Selmi, *Women and the "New" Corporate Governance: The Class Ceiling*, 65 MD. L. REV. 435 (2006); Naomi Cahn & Michael Selmi, *Women in the Workplace: Which Women, Which Agenda?*, 13 DUKE J. GENDER L. & POL'Y 7 (2006) (both discussing growth of domestic violence employment legislation as a strategy for restructuring the balance between work and family, with particular salience for low-income women); see also Goldscheid, *supra* note 43 (advocating expansion of antidiscrimination protections); Ralph Henry, *Domestic Violence and the Failures of Welfare Reform: The Role for Work Leave Legislation*, 20 WIS. WOMEN'S L.J. 67 (2005) (advocating expanding leave options for victims as a counterpoint to welfare reform legislation); Tarr, *supra* note 43 (advocating expansion of employment protections for victims and providing detailed discussion of Illinois's domestic violence employment legislation); Wendy R. Weiser & Deborah A. Widiss, *Employment Protections for Domestic Violence Victims*, CLEARINGHOUSE REV., May-June 2004, at 3 (offering overview of new legislation). *But see* Marta B. Varela, *Protection of Domestic Violence Victims Under the New York City Human Rights Law's Provisions Prohibiting Discrimination on the Basis of Disability*, 27 FORDHAM URB. L.J. 1231 (2000) (arguing against a then proposed, now enacted, New York City law on the ground that existing disability law was sufficient to protect victims). Additionally, in a thoughtful piece using domestic violence as a case study for an employment law class, Lea B. Vaughn asks students to imagine different potential frames for the issue and touches on some of the questions of appropriate scope of legislation in this area that are central to this Article. See Lea B. Vaughn, *Victimized Twice—The Intersection of Domestic Violence and the Workplace: Legal Reform Through Curriculum Development*, 47 LOY. L. REV. 231 (2001).

fashions. Some laws, modeled on the FMLA and the ADA, adopt their provisions limiting coverage to relatively large or resource-rich employers. But others, particularly those that grow out of a criminal justice or public health focus, either impose costs on all employers or develop mechanisms to spread costs across employers. In other words, the particular history of legislative responses to domestic violence, reviewed in Part III, and its shift to the perception of domestic violence as a public problem requiring systemic solutions, seems to shape in significant ways the employment-based strategies developing now. In turn, the variety of mechanisms employed in the domestic violence employment legislation may offer suggestions for tackling other work-family issues for which existing models have proven inadequate.

This Part begins with an analysis of laws providing time off to victims, where the split according to model is most evident. It then turns to laws addressing the termination of victims and the need to make workplace modifications, assessing the promise and limitation of traditional employment law models as well as other approaches being used. Finally, it discusses statutes permitting employers to seek their own injunctive relief against perpetrators of actual or threatened workplace violence, statutes providing unemployment insurance benefits to employees who separate from jobs because of domestic violence, and government actions encouraging the development of domestic violence policies.

A. *Domestic Violence Leave Legislation*

As noted above, a victim typically will need some time off from work to take steps to address the domestic violence.⁹⁴ To understand the significance of laws providing job-protected leave to victims of domestic violence, it is essential to recognize that employers in this country are not required to give their workers sick leave, vacation time, or any other right to return to a job after an absence. And many do not. Almost half (47 percent) of private sector workers have no paid sick days;⁹⁵ the working poor are disproportionately disadvantaged.⁹⁶ The FMLA provides job-protected leave for employees who work for large employers. However, since FMLA leave is only available for employees with a "serious health condition," it generally cannot be used for employees with short-term health needs, such as a common cold or, more relevantly, a black eye or sprained wrist; nor

94. See *supra* text accompanying notes 14-17.

95. VICKY LOVELL, INST. FOR WOMEN'S POLICY RESEARCH, NO TIME TO BE SICK: WHY EVERYONE SUFFERS WHEN WORKERS DON'T HAVE PAID SICK LEAVE 1 (2004).

96. JODY HEYMAN, THE WIDENING GAP: WHY AMERICA'S WORKING FAMILIES ARE IN JEOPARDY AND WHAT CAN BE DONE ABOUT IT 132-34 (2000).

can it be used for nonmedical domestic violence-related needs.⁹⁷ Thus, in the absence of legislative protection, a victim of domestic violence who misses work to go to court or meet with a counselor to do safety planning typically knows that her absence could cause her to lose her job. Since an independent income stream may be at least as important to her safety as any of these other help-seeking steps, the rational choice for many victims is to forego taking such measures in order to ensure ongoing employment.

Several states have responded to this problem by passing legislation, which I will refer to as “domestic violence leave legislation,” that specifically provides victims a right to take time off from their work without losing their jobs. As of June 2008, California, Colorado, Florida, Hawaii, Illinois, Kansas, Maine, New York, North Carolina, Oregon, and Washington have laws that specifically provide victims of domestic violence job-protected leave from work to take steps—at least participating in a criminal proceeding or obtaining a civil protective order—to address the violence.⁹⁸ These state laws provide unpaid leave, although some permit a victim to choose to use (or an employer to require that the employee use) accrued paid leave to cover the absence. Additionally, in March 2008, the District of Columbia passed the country’s first legislation requiring employers to provide *paid* time off to victims of domestic violence to take steps to address the violence.⁹⁹

In addition to permitting victims to take time off to go to court, the domestic violence leave laws typically cover additional immediate needs a victim may face: relocating to a new home or safe location and receiving treatment for medical conditions or psychological counseling to address the effects of the violence. Of course providing job-protected leave raises the possibility of employee abuse; the enacted

97. This is not to say that victims who have qualifying “serious health conditions” caused by domestic violence cannot take leave under the FMLA. *See, e.g.*, *Municipality of Anchorage v. Gregg*, 101 P.3d 181, 190 (Ak. 2004) (finding employee eligible for FMLA leave due to conditions resulting from a combination of her pregnancy, a car accident, and a “high level of emotional stress” stemming from domestic violence); *see also* LEGAL MOMENTUM, KNOW YOUR RIGHTS: MEDICAL LEAVE FOR SURVIVORS AND FAMILY MEMBERS (2005), available at <http://www.legalmomentum.org/site/DocServer/self%20and%20family%20member%20leave.pdf?docID=545>. Additionally, modified schedules or leave is sometimes required as a “reasonable accommodation” under the ADA or state disability statutes. *See* LEGAL MOMENTUM, KNOW YOUR RIGHTS: DISABLED VICTIMS OF DOMESTIC OR SEXUAL VIOLENCE 4 (2005), available at <http://www.legalmomentum.org/site/DocServer/disabilities%20accommodations.pdf?docID=305>.

98. *See* CAL. LAB. CODE §§ 230 & 230.1 (2006); COLO. REV. STAT. § 24-34-402.7 (2007); FLA. STAT. § 741.313 (2007); HAW. REV. STAT. § 378-72 (2007); 820 ILL. COMP. STAT. 180/1-180/45 (2006); KAN. STAT. ANN. § 44-1132 (2006); ME. REV. STAT. ANN. tit. 26, § 850 (2007); 2007 Or. Laws ch. 180 (enacted, to be codified in OR. REV. STAT. ch. 659A); 2008 Wash. Legis. Serv. ch. 286 (West) (enacted, to be codified in WASH. REV. CODE tit. 49).

99. Accrued Sick and Safe Leave Act of 2008, 55 D.C. Reg. 3452 (Apr. 4, 2008), available at <http://www.dccouncil.washington.dc.us/images/00001/20080311113451.pdf>. The Washington D.C. law will also provide paid sick days for employees.

statutes include certification provisions which permit employers to ask for “proof” documenting that the individual is in fact a victim of domestic violence and is using the leave for a purpose authorized under the statute.¹⁰⁰ Collectively, these laws mean that more than a quarter of U.S. employees work in a state that provides an affirmative right to take time off to address domestic violence.¹⁰¹

In drafting and lobbying for such laws, advocates naturally looked to existing legal models. One obvious model was the FMLA, the only federal statute that provides employees a right to job-protected leave, and state analogues. As discussed above, the FMLA provides up to twelve weeks off work to address “serious health conditions,” but it only applies to employers with at least fifty employees.¹⁰²

The other model that advocates looked to in drafting domestic violence leave laws was a group of state laws that provide that employers cannot discriminate against or penalize employees who are victims of crime for absences from work to attend criminal trials or, in many cases, who conferred with the police or the district attorney in preparation for a trial.¹⁰³ The laws, which I will call “crime victim job protection” laws, were passed gradually over the past twenty-five years, picking up speed as the victims’ rights movement gained momentum.¹⁰⁴

100. The “proof” requirements vary but generally permit a victim to provide any of a variety of documents, including a civil protective order, police report, medical records, or a statement from a professional who has assisted the victim in addressing the situation. *See, e.g.*, 820 ILL. COMP. STAT. 180/20(c) (2006). Additionally, while fraud remains theoretically possible, the fact that most of the statutes simply provide unpaid leave (or permit use of otherwise available paid leave) further mitigates against abuse.

101. As will be discussed in greater detail below, because of high employee thresholds built into many of these leave laws, they actually reach a smaller proportion of the workforce. Additionally, Christine Jolls has demonstrated that the actual benefit to employees of such mandates depends on whether and how costs associated with the mandates may be passed on to the employees. *See* Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223 (2000). The domestic violence leave laws fit within Jolls’ model of “accommodation” laws in that they provide benefits to a discrete class of employees. *Id.* at 231-32. According to Jolls, the value of the benefit will depend on whether employers are barred from reducing wages or employment levels of employees receiving time off under such provisions. *Id.* at 243-61. Without binding protections, Jolls argues that such benefits may actually work to the detriment of those ostensibly “protected.” *Id.* at 257-61. This is important because domestic violence victims are not a protected class under federal or most state antidiscrimination law. Thus, theoretically, an employer could lower wages of victims to offset the cost of providing the leave. As a practical matter, however, such a reaction is unlikely, and it would probably be in violation of antidiscrimination provisions built into the leave laws. Additionally, a policy of lowering wages of domestic violence victims or refusing to hire them would probably violate Title VII because it would have a disparate impact on women.

102. *See supra* notes 79 & 87 and accompanying text.

103. These laws are closely related to (and sometimes part of) provisions that similarly provide that employees cannot be discharged or penalized for missing work to serve on a jury. These, too, typically apply to all employers, no matter how small.

104. The National Conference of Commissioners on Uniform State Laws, a nonpartisan body made up of commissioners appointed by states, promulgated a model “Victims of

As of June 2008, there are at least thirty-four states that have crime victim job protection laws.¹⁰⁵ They are generally housed in the criminal law, courts, judicial procedure, or evidence sections of state codes, rather than in the employment sections—and thirty-one of the thirty-four cover all employers, no matter how small. While they might be said to be motivated primarily by an interest in ensuring effective prosecution of crime (and many are enforceable by criminal prosecution), most of these laws also explicitly include a private cause of action and even attorneys' fees. Generally speaking, the crime victim laws do not specify a certain number of days of job-guaranteed leave that an individual has a "right" to take off; rather, they specify that employers may not penalize employees for participating in the prosecution of the crime, which has the indirect effect of permitting victims to take what is in essence job-guaranteed leave.

Analyzing the domestic violence leave laws that have been passed reveals a striking pattern: those that are modeled most closely on the FMLA, specifying the right at interest as a certain number of days of leave, also, like the FMLA, only apply to employers with at least fifty employees.¹⁰⁶ This is true even when the amount of leave provided is

Crime Act" in 1992, which includes relatively broad employment rights protecting employees from being penalized for attending a criminal justice proceeding if "attendance is reasonably necessary to protect the interests of the victim" or to participate in preparation for a criminal justice proceeding. UNIF. VICTIMS OF CRIME ACT § 207 (1992), available at <http://www.law.upenn.edu/blj/ulc/fnact99/1990s/uvca92.htm>. The model applies to all employers. The model language was adopted in Arkansas and Delaware exactly; it is very similar to language enacted in several other states.

105. See ALA. CODE § 15-23-81 (2007); ALASKA STAT. § 12.61.017 (2007); ARIZ. REV. STAT. ANN. § 13-4439 (2007); ARK. CODE ANN. § 16-90-1105 (2008); COLO. REV. STAT. § 24-4.1-303(8) (2007); CONN. GEN. STAT. § 54-85b (2007); DEL. CODE ANN. tit. 11, § 9409 (2007); FLA. STAT. ANN. § 92.57 (2007); GA. CODE ANN. § 34-1-3 (2007); HAW. REV. STAT. § 621-10.5 (2007); IND. CODE § 35-44-3-11.1 (2007); IOWA CODE § 915.23 (2007); MD. CODE ANN. CRIM. PROC. § 11-102 (2007); MASS. GEN. LAWS ch. 258B, § 3(I) (2007); MICH. COMP. LAWS ANN. § 780.790 (2007); MINN. STAT. ANN. § 611A.036 (2007); MISS. CODE ANN. § 99-43-45 (2007); MO. REV. STAT. § 595.209.1(14) (2007); MONT. CODE ANN. § 46-24-205(3) (2007); NEV. REV. STAT. § 50.070 (2007); N.H. REV. STAT. ANN. § 275.62 (2007); N.Y. PENAL LAW § 215.14 (2007); N.D. CENT. CODE § 27-09.1-17 (2007); OHIO REV. CODE ANN. § 2930.18 (2004); OR. REV. STAT. § 659A.192 (2005); 18 PA. STAT. ANN. § 4957 (2007); R.I. GEN. LAWS § 12-28-13 (2007); S.C. CODE ANN. § 16-3-1550 (2007); UT. CODE § 78-11-26; VT. STAT. ANN. tit. 13, § 5313 (2007); VA. CODE ANN. § 18.2-465.1 (2007); WIS. STAT. § 103.87 (2007); WYO. STAT. ANN. § 1-40-209(a) (2007); V.I. CODE ANN. tit. 34, § 203(e) (2008). My research identified just three general crime victim laws—Arizona's, adopted in 2001, Oregon's, adopted in 2003, and Rhode Island's, adopted in 2004—that *do* include an employee-threshold and an undue hardship exception. The Oregon law has a six-employee threshold; the Arizona and Rhode Island laws, which are substantively identical, each include a fifty-employee threshold. The latter laws are also strikingly different from the typical crime victim law in other ways; in fact, they "look" much more like the FMLA.

106. Compare Family and Medical Leave Act, 29 U.S.C. § 2612(a)(1)(D) (2000) (an eligible employee "shall be entitled to a total of 12 workweeks of leave during any 12-month period") with COL. REV. STAT. 24-34-402.7 (2007) ("An employer shall permit an employee to request and take up to three working days of leave from work in any twelve-month period."), FLA. STAT. § 741.313 (2007) (Employers "shall permit an employee to request and take up to 3 working days of leave from work in any 12-month period . . ."), 820 ILL.

far less than the twelve weeks provided by the FMLA and could easily be borne by much smaller employers. For example, Colorado and Florida's domestic violence leave laws, structured like the FMLA, permit just three days of leave.¹⁰⁷ In fact, although the Illinois and Colorado laws were both initially introduced with lower employee thresholds that were raised to fifty during political negotiation, more recently introduced bills in Massachusetts,¹⁰⁸ Pennsylvania,¹⁰⁹ New Jersey,¹¹⁰ and Oklahoma¹¹¹ that follow this general model were introduced with the high fifty-employee threshold.¹¹² Proposed federal legislation in this area has also tended to be modeled on the FMLA and adopt either a fifteen-employee or fifty-employee threshold.¹¹³

By contrast, domestic violence leave laws that are modeled on the crime victim job protection laws—that is, as prohibitions on punitive actions by an employer against an employee who takes “reasonable time off” to address domestic violence—generally, also like the crime

COMP. STAT. 180/20(A)(2) (2006) (qualified employees “shall be entitled to a total of 12 workweeks of leave during any 12-month period”), and MIAMI-DADE CTY., FLA. CODE § 11A-61 (“Employees . . . shall be entitled to a total of thirty (30) work days of unpaid domestic leave during any twelve (12) month period . . .”).

107. See COLO. REV. STAT. § 24-34-402.7; FLA. STAT. § 741.313.

108. See S.B. 2338, 184th Reg. Sess. (Mass. 2006).

109. H.B. 89, 190th Gen. Assemb. (Pa. 2007-08).

110. A.B. 434 & S.B. 1194, 212th Leg. (N.J. 2006). Interestingly, a more recently introduced bill in New Jersey that would provide 20 days leave was introduced without an employee-threshold. A.B. 573, 213th Leg. (N.J. 2008).

111. S.B. 549, 51st Leg., 1st Reg. Sess. (Okla. 2007).

112. For a listing of pending bills in this area, see LEGAL MOMENTUM, STATE LAW GUIDE: EMPLOYMENT RIGHTS FOR VICTIMS OF DOMESTIC OR SEXUAL VIOLENCE (2008), available at http://www.legalmomentum.org/site/DocServer/Employment_Rights_May_08.pdf?docID=2721.

113. Two bills introduced in the 110th Congress would explicitly provide leave to victims for a variety of domestic violence-related needs. See Survivors' Empowerment and Economic Security Act, S.1136, 110th Cong. (2007) (SEES Act); Security and Financial Empowerment (SAFE) Act, H.R. 2395, 110th Cong. (2007). These bills, as well as similar legislation introduced as SAFE or the Victims Economic Security and Safety Act (VESSA) in earlier Congresses, are largely modeled on the FMLA. SEES/SAFE, as introduced, would provide up to thirty days unpaid leave and apply to all employers with at least fifteen employees. Comparable leave provisions were also included in the bipartisan Senate version of the 2005 reauthorization of the Violence Against Women Act, S. 1197, recommended by the Senate Judiciary committee in June 2005. Importantly, however, political pressures dictated that the employee threshold in that bill be raised to fifty employees. Even with these adjustments designed to increase support for the provisions, they were not included in the bill that was ultimately enacted. See Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-169, 119 Stat. 2960 (2006). Additionally, a bill has recently been introduced that would amend the FMLA to provide leave to employees to attend criminal proceedings related to violent crimes (including domestic violence crimes) against them or immediate family members. See Crime Victims Employment Leave Act, H.R. 5845, 110th Cong. (2008). This bill proposes what would in essence be a crime victim job-protection law. However, as an amendment to the FMLA, it would only apply to employers with at least fifty employees and employees who meet that law's hour and longevity requirements. See *supra* note 87 and accompanying text. As such, it is a significant departure from a more comprehensive approach that has been taken by most states that have enacted crime victim job protection laws. See *supra* note 105 and accompanying text.

victim leave laws, have no employee threshold, although some permit leave to be limited if it would be an undue burden or hardship on the employer. In other words, in most states that have passed these laws, all employers, no matter how small, are expected to permit their employees to take key steps to address domestic violence. Laws in Kansas,¹¹⁴ Oregon,¹¹⁵ Maine,¹¹⁶ and Washington¹¹⁷ provide reasonable time off to take any of a range of steps to address domestic violence. North Carolina and New York have passed narrower protections that simply provide that employers cannot penalize victims for taking reasonable time off to obtain a protective order.¹¹⁸ Although these laws typically are not as detailed as the domestic violence leave laws modeled on the FMLA, each does include a mechanism for private enforcement either in court or in an agency.

The pattern is not absolute. A few states have enacted interesting hybrids. California first amended an existing crime victim job protection law—which, as is typical, did not specify a certain number of days and was applicable to all employers—to permit employees to take time off to obtain civil protective orders; it subsequently added a separate section, only applicable to larger employers, that permits victims to take leave to seek medical attention, obtain services from a domestic violence shelter or program or rape crisis center, obtain psychological counseling, participate in safety planning, or relocate.¹¹⁹ Hawaii mandates that all employers, no matter how small, provide up to five days off and that larger employers provide up to thirty days off.¹²⁰ Washington D.C.’s paid leave law will require all employers to provide at least three days off, employers with between twenty-five and ninety-nine employees to provide five days off, and employers with more than 100 employees to provide seven days off.¹²¹

The domestic violence leave laws modeled on the FMLA and those modeled on the crime victim laws provide substantively similar benefits: they permit domestic violence victims to take time off from work

114. H.B. 2928, 2005-06 Reg. Sess. (Ks. 2006) (not yet codified). Kansas’s law provides “reasonable time off” and then specifies that this includes up to eight days unpaid leave in addition to any available paid leave.

115. S.B. 946, 74th Leg., Reg. Sess. (Or. 2007) (enacted, to be codified in OR. REV. STAT. § 659A). Oregon’s domestic violence leave law, like its crime victim leave law, covers employers with at least six employees and permits employers to refuse or limit leave if it would be an “undue hardship.” *Id.*

116. ME. REV. STAT ANN. tit. 26, § 850 (2007). Maine’s law permits employers to refuse to provide leave if they can establish that it would be an “undue burden.” *Id.*

117. 2008 Wash. Legis. Serv. ch. 286 (West) (enacted, to be codified in WASH. REV. CODE tit. 49).

118. N.C. GEN. STAT. § 50B-5.5 (2007); N.Y. PENAL LAW § 215.15 (2007).

119. CAL. LAB. CODE §§ 230-230.1 (2006).

120. HAW. REV. STAT. § 378-72 (2007).

121. Accrued Sick and Safe Leave Act of 2008, 55 D.C. Reg. 3452 (Apr. 4, 2008), available at <http://www.dccouncil.washington.dc.us/images/00001/20080311113451.pdf>. The Washington D.C. law will also provide paid sick days for employees.

to take necessary steps to address the violence. Nonetheless, the “model” used for the law seems to lead to dramatically different results regarding employer coverage. Of course, surveying the landscape of the laws as enacted cannot fully explicate the specific political negotiations and strategies that yielded them; each, necessarily, is the result of a balancing of various interests by state legislatures.¹²² Indeed, the pattern may be nothing more than a kind of “path dependency,” wherein a law that looks like the FMLA triggers an assumption that its coverage should also mirror the FMLA. But I think the difference may be attributable in large part to the perceived scope of the interests at stake. Structuring the benefit as an individual right to a certain number of days off invites weighing the benefit to the employee against the employer’s resources and excusing smaller employers. Framing the interest at stake instead as furthering a larger public interest shifts the balance and seems to make it easier for legislatures to ask all employers to play a role. Thus building on a crime victims frame, fitting clearly within the reframing of domestic violence as a “public” matter requiring systemic solutions, seems to give legislatures some comfort in imposing the requirement to provide time off on all employers.

B. Antidiscrimination Provisions

As noted in Part II, it is common for victims of domestic violence to be fired simply because the employer feels uncomfortable with domestic violence, blames the victims for the situation, or sees termination as the only means of reducing the “risk” of workplace harassment or violence. This reality means that victims are, with good reason, often afraid to tell their employers about what is going on at home. Additionally, some may feel that obtaining protective orders or taking other steps to address the violence could jeopardize their employment. This is counterproductive. Although privacy laws, and appropriate respect for victims’ autonomy, generally mean that employers should not adopt policies that *require* victims to disclose that they are experiencing domestic violence,¹²³ employers and employees

122. More generally, it is impossible to infer a single legislative “intent”; different legislators may cast their votes for a bill for very different reasons. But the significant patterns revealed are striking. Just as empirical studies of case results can help us understand patterns and tensions in how laws are applied by courts, “empirical” studies of legislative “results” (that is, laws that are actually enacted) can help us understand patterns and tensions in how laws are created by legislatures.

123. Domestic violence advocates tend to share a belief that the victim is best positioned to assess the probability that an abuser will take various actions. Accordingly, some victims may be relatively sure that there is little to no likelihood that they would be attacked at work and have no reason to “alert” their employers to this highly speculative risk. In general, it is sound policy to make the workplace a safe place for disclosure but also to not pry into individuals’ personal lives.

are better off if victims know they can ask for help at work if necessary without jeopardizing their employment. Additionally, there is an independent interest in ensuring that victims are not fired simply because an employer is uncomfortable with domestic violence or blames the victim for the situation (as discussed more fully in Part V, somewhat different considerations come into play when ongoing violence may pose a particularized threat to the workplace).

Responding to the concern that victims are often fired, Illinois, New York City, and Westchester County, N.Y., have made discrimination against victims of domestic violence specifically illegal, just as they prohibit discrimination on the basis of race, national origin, or sex.¹²⁴ In recent years, several other states, including California, New York, New Jersey, Pennsylvania, and Oklahoma have introduced provisions similar to that enacted in New York City, Westchester County, and Illinois.¹²⁵

Where in place, such laws undoubtedly provide welcome job security to employees who are victims of domestic violence, and they should make it safer for employees to ask employers for assistance.¹²⁶ But the antidiscrimination model is something of a strange “fit” for the problem and, more to the point, only a partial fix. First, domestic violence victims often need flexibility from their employers or specific

124. 820 ILL. COMP. STAT. 180/30 (2006); N.Y.C. ADMIN. CODE § 8-107.1 (2007); WESTCHESTER COUNTY CODE §§ 700.02, 700.03 (2007). Illinois’ and New York City’s provisions are technically separate from their more general antidiscrimination laws, but they track the general language quite closely. Connecticut and Rhode Island have enacted narrower provisions, as part of their criminal codes, that prohibit employer discrimination against victims for having obtained a protective order (and, in Rhode Island’s law, specifically also prohibits discrimination against victims for choosing *not* to obtain a protective order). CONN. GEN. STAT. § 54-85b (2007); R.I. GEN. LAWS. § 12-28-10 (2007). It is also important to note that the “domestic violence leave laws,” discussed *supra* Part IV.A, make it illegal to discriminate against victims for taking time off. However, they do not explicitly offer general discrimination protections. Although one might reasonably argue that legislatures could be assumed to have intended the antidiscrimination language in the leave laws to extend to pure “status” discrimination (since it makes little sense to provide that an individual who asks for time off is protected but one who does not need time off is not), at least one court has implicitly rejected such arguments. *See* *Imes v. City of Asheville*, 606 S.E.2d 117, 118 (N.C. 2004) (issuing summary affirmation of dismissal of wrongful discharge claim brought by victim of domestic violence); Brief for Legal Momentum et al. as Amici Curiae Supporting Plaintiff-Appellant at 15-19, *Imes*, 606 S.E.2d 117 (No. 250A04) (arguing that statutory protections would be rendered virtually meaningless if state law were interpreted to permit an individual to be fired simply because she is a victim) (as an attorney at Legal Momentum, I was a counsel on the amicus brief).

125. For citations to and descriptions of pending and recent bills, see LEGAL MOMENTUM, STATE LAW GUIDE: EMPLOYMENT RIGHTS FOR VICTIMS OF DOMESTIC OR SEXUAL VIOLENCE, *supra* note 112.

126. Like other antidiscrimination laws, these laws prohibit discrimination against victims *because* of their situation; they do not mean that employers cannot terminate or otherwise discipline employees for performance problems related to domestic violence, so long as they do so consistently (that is, so long as they would take the same action against other employees with comparable performance problems that are unrelated to domestic violence).

workplace modifications to address their situations. The general principle of formal equality as developed under Title VII law, however, encourages employers to treat everyone the “same”; employers are well served by taking no notice of protected classifications. Thus, using Title VII’s antidiscrimination provisions as the model for structuring protections for domestic violence victims could have the unintended effect of discouraging employers from providing employees who are victims of domestic violence with the flexibility they need.¹²⁷

Second, unlike race or sex, “domestic violence victim status” is not a *personal* characteristic: it is a descriptive statement regarding a certain kind of criminal or controlling behavior to which an individual has been subjected. Thankfully, domestic violence victim “status” is not immutable; individuals successfully move past violent relationships and become domestic violence survivors. The fact that domestic violence victim status is not immutable has limited salience. Although immutability is often described as a hallmark of Title VII’s employment protections, Title VII’s prohibition on religious discrimination makes clear that it is not strictly required, and state employment discrimination laws increasingly reach other “statuses” that are more transitory or voluntary, such as marital status, military service, and arrest or conviction records.¹²⁸

Rather, recognizing that domestic violence victim “status” is not a personal characteristic is significant because many victims face discipline or termination not because of their “status,” or even because of a diffuse fear that they may “lure” violence towards the workplace, but very specifically because their abuser’s harassing conduct interferes with the efficient operation of the business. This common scenario is not (necessarily) covered by a standard discrimination protection, in part because it has no precise analogue in typical discrimination because of race, sex, or other paradigmatic protected classes.¹²⁹ Illinois and New York City address this vulnerability by

127. As a technical matter, treating domestic violence victims differently, and arguably “better,” than other employees should not give rise to an employment discrimination claim because *not* being a victim is not a protected status. Nonetheless, under formal equality doctrines, employers may be uncomfortable providing benefits *for* an individual, based on that individual’s membership in a protected class, that they do not provide for others. *Cf.* Peggie R. Smith, *Parental-Status Employment Discrimination: A Wrong in Need of Right?*, 35 U. MICH. J.L. REFORM 569, 598-600 (2002) (making a similar argument with respect to the limitations of defining “parental status” as a protected class).

128. *See, e.g.*, N.Y. EXEC. L. § 296 (1)(a) (McKinney 2008) (marital status and military service), (15) (previous convictions) & (16) (arrests not resulting in convictions).

129. This concern is related to, but somewhat distinct from, the question of whether Title VII covers claims of associational discrimination, such as discrimination against a white employee because of his marriage to a black woman. *See, e.g.*, *Holcomb v. Iona College*, No. 06-3815, 2008 U.S. App. LEXIS 6897, *21-24 (2d Cir. 2008) (discussing split of authorities on whether such claims are cognizable under Title VII). In the Title VII context, courts permitting the claim tend to emphasize that discrimination against the individual employee is “because of race,” and thus covered under Title VII, because it is the dif-

defining discrimination to include actions taken against a victim because of disruptions or threats from the perpetrator of violence against her.¹³⁰ But Westchester County law and other proposed bills have not similarly explicitly provided that prohibited discrimination would include acts taken against the victim because of her perpetrator's actions. While a court might find the concept implicit in protections for the victim, there is a possibility that even if a jurisdiction enacts "status" discrimination protections, such a law would be inadequate to address one of the most common "justifications" for firing victims.¹³¹

The other significant problem with turning to antidiscrimination models to protect victims from termination is that, as a practical reality, proposing domestic violence victim status as an additional protected class predisposes businesses to oppose such bills.¹³² This is

ference between the employee's race and that of the person with whom he is associating that gives rise to the discriminatory treatment. *See id.* The domestic violence situation presents a somewhat different question because firing a victim because of a perpetrator's violent actions is arguably distinct from the specific basis ("domestic violence victim status") on which protection is provided. Unlike Title VII, the ADA specifically prohibits associational discrimination. *See* 42 U.S.C. § 12112(b)(4) (2000) (making it unlawful under the ADA to "exclude[e] or otherwise deny[] equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association"). The ADA provisions are also not precisely analogous to the domestic violence context since, in the ADA context, the discrimination occurs because of the disability (that is, protected status) of the *nonemployee* with whom the individual employee has a relationship.

130. *See* 820 ILL. COMP. STAT. 180/30(a)(2) (2006) (prohibited discriminatory conduct includes conduct against an individual because "the workplace is disrupted or threatened by the action of a person whom the individual states has committed or threatened to commit domestic or sexual violence against the individual or the individual's family or household member"); *see also* N.Y.C. Admin. Code § 8-107.1 (2007) (containing similar prohibitions against discriminatory conduct).

131. On the other hand, a determination that a standard antidiscrimination provision does make it illegal to fire a victim based on the actions of a perpetrator raises the opposite question of whether there are situations where the risk of workplace violence is so severe that terminating the victim's employment should be permitted. In this respect, the domestic violence context raises questions that are related to, but again distinct from, threats to safety that may be posed by employment of certain individuals with disabilities. The ADA and its regulations permit employers to adopt job requirements that prohibit employment of an individual who poses a direct threat to the health or safety of the individual or others in the workplace. *See* 42 U.S.C. § 12113(b) (2000); 29 C.F.R. § 1630.15(b)(2) (2008). This is not a perfect analog because in the domestic violence context, it is not the individual victim herself that poses the threat but the perpetrator who threatens to commit violence against her or her co-workers. Nonetheless, at least one commentator has borrowed from the ADA context to suggest that employers should be able to terminate a victim if there is a "direct threat" to the workplace. *See* Porter, *supra* note 39, at 329-30. As described in Part V, I propose a comprehensive strategy that goes beyond a simple antidiscrimination mandate to balance these various competing concerns.

132. An article in the *ABA Journal* on the effects of domestic violence on the workplace quoted Julie Goldscheid, an expert in the area, as noting accurately, "People flinch at the idea of creating new protected classes, but this shouldn't be controversial." Margaret Graham Tebo, *When Home Comes to Work*, A.B.A. J., Sept. 2005, at 42, 45. In a forthcoming article, Professor Goldscheid argues that often termination of victims of domestic violence

ironic since the employer can benefit by being able to talk frankly about the situation, and victims are unlikely to share what is going on unless they know that they will not be fired for doing so. Framing the need for protection from termination as an antidiscrimination measure obscures a business's understanding that ensuring victims feel safe disclosing their situation is in the business's interest. Additionally, it fails to fully articulate the larger public interests at stake (as evidenced by the recognition by several courts that firing a victim because of the violence against her states a tort claim of wrongful termination in violation of public policy).¹³³

C. Workplace Modifications/Individual Accommodations

Domestic violence is a recognized cause of workplace violence and disruption of the workplace. Taking safety precautions at the workplace can reduce this risk. Responding to the need for workplace modifications, Illinois and New York City borrowed from the Americans with Disabilities Act framework to enact legislation requiring employers to "reasonably accommodate" victims of domestic violence to permit them to perform their jobs.¹³⁴ Illinois defines several illustrative accommodations within its statute:

"Reasonable accommodation" may include an adjustment 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, in response to actual or threatened domestic or sexual violence.¹³⁵

should be actionable under Title VII and also argues for adding victims of domestic violence as an explicitly protected class under antidiscrimination law. *See* Goldscheid, *supra* note 43, at 46-57. She notes, however, that the practical concerns regarding political opposition to enacting such legislation are considerable. *See id.* at 58. I agree that a strong case can be made for antidiscrimination law applying more broadly to termination of victims. However, as discussed in Part V, I think moving away from antidiscrimination models offers significant conceptual and practical benefits.

133. *See* sources cited *supra* note 44.

134. 820 ILL. COMP. STAT. 180/30(B)(3) (2006); N.Y.C. Admin. Code § 8-107.1(3)(a) (2007).

135. 820 ILL. COMP. STAT. 180/30(B)(3) (2006). New York City's law does not substantively define reasonable accommodation within the text of the law, but a Committee Report issued when the city council was considering the provision describes it similarly:

[The reasonable accommodations] provision would require employers to allow victims of domestic violence, sex offenses, or stalking to take leave from work to seek legal assistance, counseling, or assistance in developing a safety plan. Other reasonable accommodations could include but not be limited to re-assigning seating so that a victim need not sit near an entrance, changing a victim's telephone number, removing his or her name from the company's phone directory, or adjusting starting and leaving times. In sum, this requirement could enable victims to remain viable and productive members of the workforce and to maintain a source of reliable and independent income.

As discussed above, the ADA (and comparable state laws) is a relatively unusual employment law in its requirement that employers accommodate the specific individual needs of employees with disabilities; accordingly, the ADA framework was an obvious model for laws requiring employers to make necessary changes to address the effects of domestic violence on individual employees and the workplace.

However, again, this approach comes with certain limitations, both in terms of how it frames the issue and its likelihood of passing. As noted above, “domestic violence victim status” is not a personal characteristic, and likewise, workplace changes to reduce the threat of harassment or violence are not the equivalent of accommodating an individual’s disability.¹³⁶ They are changes responding to violent or harassing conduct by a third party against the individual victim and her employer. Many such changes, by reducing the likelihood of such disruptions, benefit the employer at least as much as the employee. Framing the change as a “reasonable accommodation” for the individual employee obscures this reality.

The reasonable accommodation model also seems to carry with it certain political limitations. That is, just as leave laws modeled on the FMLA adopted the 50-employee threshold, both the New York City and the Illinois legislation requiring reasonable accommodations adopt the “undue hardship” employer defense built into the ADA.¹³⁷ This means that individuals who work for relatively resource-poor employers may not have a right to necessary safety precautions. More generally, as with the expansion of antidiscrimination protections, modeling legislation on the ADA predisposes businesses to oppose it and makes it quite difficult to pass such legislation.

Interestingly, the Occupational Safety and Health Act (OSHA) explicitly requires employers to provide a workplace “free from recognized hazards that are causing or are likely to cause death or seri-

NEW YORK CITY COUNCIL, REPORT OF THE GOVERNMENTAL AFFAIRS DIVISION & COMMITTEE ON GENERAL WELFARE, 3-4 (2003), available at <http://webdocs.nycouncil.info/attachments/59086.htm> (regarding New York City Council Prop. Int. No. 107, March 25, 2002).

136. It is important to note that many disability rights advocates and commentators argue that disability accommodations are not necessary because of an “intrinsic” lack of capability on the part of the person with the qualifying disability but rather necessary because of the mismatch between the social world and that person’s condition. In other words, for example, using a wheelchair only precludes access, and thus requires specific accommodations, in a world in which curb cuts, ramps, and elevators are not standard.

137. See N.Y.C. Admin. Code. § 8-102(18) (2007) (defining “reasonable accommodation” as change that can be made without causing “undue hardship” to the covered entity’s business). Illinois’ law defines undue hardship similarly. I am not suggesting that any accommodation, no matter how expensive, should be required, but rather that consideration of costs, as well as the related possibility of terminating a victim’s employment because of potential safety threats, be integrated with other provisions to ensure in such situations that a victim maintains an independent income source. See *infra* Part V.A.

ous physical harm” to employees.¹³⁸ OSHA covers all U.S. employers. The agency that administers OSHA has made it clear that it understands the general duty clause as requiring employers to take steps to address potential workplace violence, including violence that spills over from domestic violence outside the workplace.¹³⁹ Likewise, the National Institute for Occupational Safety and Health (NIOSH), the branch of the CDC that oversees workplace violence, and the FBI also emphasize that businesses have a duty to address potential workplace violence stemming from domestic violence.¹⁴⁰ All three entities recommend many of the same kind of changes categorized as reasonable accommodations under the Illinois and New York City laws.¹⁴¹ Additionally, standard tort law also recognizes that employers may be held responsible for failing to address potential workplace violence.¹⁴² These other frameworks help make clear that safety-increasing modifications are not individual employee benefits but rather changes that respond to a third-party threat and that benefit an entire workplace, as well as larger public interests.

D. Unemployment Insurance Provisions

Victims who either choose or are forced to leave a job because of domestic violence risk having no choice but to return to an abuser if they are not able to find alternative employment or another independent income stream.¹⁴³ In recent years, many states have amended their unemployment insurance statutes to meet this need.

The unemployment insurance system provides partial-wage replacement to individuals who lose a job through no fault of their own.¹⁴⁴ The system is administered by the states, with support from

138. 29 U.S.C. § 654(a) (2008).

139. Letter from Roger A. Clarke, Director, U.S. Dep’t of Labor, Occupational Safety & Health Admin., to Mr. John R. Schuller (Dec. 10, 1992), available at http://www.osha-slc.gov/pls/shaweb/owadis/show_document?p_table=INTERPRETATIONS&p_id=20951 (recognizing that where the risk of harm from workplace violence is foreseeable, employer is bound to take steps to minimize those risks); see also, e.g., BRAVERMAN, *supra* note 28, at 96-97; PALUDI ET AL., *supra* note 28, at 81-82; (both discussing responsibility under OSHA to address workplace risks stemming from violence, including domestic violence).

140. FED. BUREAU OF INVESTIGATION, U.S. DEP’T. OF JUSTICE, WORKPLACE VIOLENCE: ISSUES IN RESPONSE 40-45 (2004) (suggesting employer should take steps such as “[a]dopting policies that will allow an abused worker time off for purposes such as going to court to seek a restraining order or appearing to testify at a criminal trial . . . [r]eviewing the employee’s work space and modifying it, if necessary, to make sure that a possible assailant cannot get there . . . [and] consistent[] with the employee’s privacy rights and wishes . . . tak[ing] measures to inform other employees . . . so they can block an abuser’s calls or make sure he is kept out of the workplace”).

141. See, e.g., PALUDI ET AL., *supra* note 28, at 82 (describing OSHA’s recommendations to address domestic violence).

142. See *supra* text accompanying notes 39-41.

143. See *supra* text accompanying notes 20-23.

144. See, e.g., Cal. Dep’t of Human Res. Dev. v. Java, 402 U.S. 121, 125-26 (1971).

the federal government.¹⁴⁵ Unemployment insurance explicitly serves interrelated public and private purposes. Insurance benefits are intended to serve as a safety net for workers who lose their jobs while they look for new gainful employment, and more generally, to minimize the effects of economic recessions by keeping consumer spending up even in economic downturns. The system is funded primarily by taxes on employers. Like other “insurance” systems, unemployment insurance premiums are experience-rated. Employers who are the subject of frequent claims (that is, employers who frequently lay off employees or otherwise have employees leave employment under qualifying circumstances) must pay a higher rate, just as drivers who frequently get in accidents must pay a higher premium to obtain automobile insurance.

In most states, the general rule is that individuals are ineligible for unemployment benefits if they leave work voluntarily without “good cause” or if they are discharged for “misconduct.” These conditions stem from the general proposition that the benefits are intended for individuals who are stopping work through no fault of their own. In the early days of the unemployment system, most states allowed workers to leave their jobs for valid personal reasons.¹⁴⁶ Many states, however, then narrowed these provisions, denying benefits to individuals who left work for non-work related causes.¹⁴⁷

In recent years, this trend toward very limited access to benefits for personal reasons has been somewhat reversed, most often by amending state statutes to provide specific kinds of personal reasons that qualify as “good cause.”¹⁴⁸ Domestic violence has been one of the

145. See Federal Unemployment Tax Act, 26 U.S.C. § 3301-3311 (2000); see also Gillian Lester, *Unemployment Insurance and Wealth Redistribution*, 49 UCLA L. REV. 335, 340-58 (2001) (providing a general overview of the unemployment insurance system).

146. NAT’L EMPLOYMENT LAW PROJECT, CHANGING WORKFORCE, CHANGING ECONOMY: STATE UNEMPLOYMENT INSURANCE REFORMS FOR THE 21ST CENTURY 18 (2004) (“In the 1940s, 41 of 48 states allowed workers to leave their jobs for valid personal reasons; in 2004, only 15 states do so.”).

147. *Id.*

148. Other areas of growth include providing benefits to workers who must leave a job due to health reasons, child care needs, or family hardship and to workers who must leave their jobs to move with a spouse or partner. See generally *id.* at 17-30; Lester, *supra* note 90, at 3-4 (noting that as of 2001, twenty-one states had introduced bills to expand their unemployment insurance programs to provide wage replacement to parents following the birth or adoption of a child). There has also been a related effort to broaden state-funded temporary disability insurance to cover paid family leave, see *id.*, most notably the enactment in 2002 of paid family leave through California’s disability insurance program. California Family Temporary Disability Insurance Program, CAL. UNEMP. INS. CODE § 3301 (2007). A recently introduced federal bill would encourage states to permit workers to recover benefits for a range of “compelling family reasons,” including domestic violence, a family member’s illness or disability, and following a spouse to a new job. See Unemployment Insurance Modernization Act, S. 1871, 110th Cong. (2007).

areas of most rapid growth.¹⁴⁹ In 1996, Maine amended its unemployment insurance law to make clear that victims who were fired because of domestic violence could receive benefits.¹⁵⁰ In the decade since Maine changed its law, twenty-nine additional states and the District of Columbia have amended their unemployment insurance laws to address domestic violence.¹⁵¹ Additional states have introduced legislation in the current or recent legislative sessions.¹⁵²

The proliferation of state laws permitting domestic violence victims to obtain benefits responds to the concern that, without benefits, individuals who lose their jobs often have to remain with, or return to, an abusive partner or become homeless. As the New York State legislature explained, “We would not want to heighten a potential life threatening situation by forcing a victim to choose between their job and their life.”¹⁵³ A victim of domestic violence who is forced to leave a job because of the violence—a criminal act against her—is (usually) leaving a job “through no fault of her own.” Providing benefits to her thus fits well within the traditional rationale of unemployment insurance benefits. But, of course, her separation from the job may also be through no “fault” of the employer, in that it is the perpetrator’s actions that may have precipitated the termination. Thus, the standard model of charging benefits to the employer unfairly penalizes

149. For a good overview of the early history of legislation in this area written by several of the key advocates, see Rebecca Smith, Richard W. McHugh, & Robin R. Runge, *Unemployment Insurance and Domestic Violence: Learning from Our Experiences*, 1 SEATTLE J. SOC. JUST. 503 (2002); see also Tarr, *supra* note 43, at 402-10 (reviewing emerging legislation and discussing specific actions for unemployment benefits brought by domestic violence victims).

150. ME. REV. STAT. ANN. tit. 26, § 1043(23)(B)(3) (2007) (providing “misconduct” may not solely be founded on “[a]ctions taken by an employee that were necessary to protect the employee or an immediate family member from domestic violence if the employee made all reasonable efforts to preserve the employment”).

151. ARIZ. REV. STAT. § 23-771 (2007); CAL. UNEMP. INS. CODE §§ 1030, 1032, 1256 (2007); COLO. REV. STAT. ANN. § 8-73-108(4)(r) (2007); CONN. GEN. STAT. § 31-236(a)(2)(A) (2007); DEL. CODE ANN. tit. 19, § 3315(1) (2007); D.C. CODE §§ 51-131-136 (2007); 820 ILL. COMP. STAT. 405/601 (2006); IND. CODE § 22-4-15-1(1)(c)(8) (2007); KAN. STAT. ANN. § 44-706(a)(12) (2006); LA. REV. STAT. ANN. § 23:1770-76 (2007); ME. REV. STAT. ANN. tit. 26, § 1043(23)(B)(3) (2007); MASS. GEN. LAWS ANN. ch. 151A, §§ 1, 14, 25, 30 (2007); MINN. STAT. § 268.095(1)(8) (2007); MONT. CODE ANN. § 39-51-2111 (2007); NEB. REV. STAT. ANN. § 48-628(1)(a) (2005); N.H. REV. STAT. ANN. § 282-A:32(I)(a)(3) (2008); N.J. STAT. ANN. § 43:21-5(j) (2007); N.M. STAT. ANN. § 51-1-7 (A) (2007); N.Y. LAB. LAW § 593(1)(a) (2008); N.C. GEN. STAT. § 96-14(1)(b)(1f) (2007); OKLA. STAT. tit. 40, §§ 2-405(5), 3-106(G)(8) (2007); OR. REV. STAT. § 657.176(12) (2005); R.I. GEN. LAWS § 28-44-17.1 (2007); S.C. CODE ANN. §§ 41-35-125 & 41-35-130 (2007); S.D. CODIFIED LAWS § 61-6-13.1 (2007); TEXAS LAB. CODE ANN. §§ 207.045-.046 (2007); 21 VT. STAT. ANN. § 1253 (2007) (Vermont’s law establishes a procedure separate from its standard unemployment insurance benefits funds for domestic violence victims); WASH. REV. CODE §§ 50.20.050, .20.100, .20.240, .29.020 (2008); WIS. STAT. § 108.04(7)(s) (2007); WYO. STAT. ANN. § 27-3-311 (2007).

152. For descriptions of pending and recent bills, see LEGAL MOMENTUM, STATE LAW GUIDE: UNEMPLOYMENT INSURANCE BENEFITS (2008), available at http://www.legalmomentum.org/site/DocServer/UI_feb_08.pdf?docID=1241.

153. N.Y. Bill Jacket, 1999 S.B. 827, Ch. 268.

the employer for this separation by raising the premiums it must pay in the future. Many state legislatures have responded to the reality that the responsible party, the abuser, is beyond the reach of the system by simply providing that benefits will not be charged back to the employer's account.¹⁵⁴ In effect, this spreads the cost of providing the benefits to realize the public interest in protecting domestic violence victims across all employers.¹⁵⁵

E. Workplace Restraining Orders

Employers obviously have a legitimate interest in taking steps to reduce the likelihood that a perpetrator of domestic violence will engage in harassing or violent conduct against the victim or her co-workers at the workplace. The challenge is to find mechanisms that may be used by an employer to achieve these objectives other than firing the victim. One approach is to make safety-related modifications at the workplace. Another is to permit employers to take direct legal action against the perpetrator.

About ten years ago, states began to pass laws, which I refer to as "workplace restraining orders," permitting employers to apply for restraining orders (the equivalent of the personal protective order that victims of domestic violence may seek) against perpetrators of actual or threatened violence. These new laws provide civil injunctive relief against an individual who has harassed, threatened, assaulted, or stalked an employee on the employer's worksite or while conducting the employer's business. As of June 2008, ten states (Arizona, Arkansas, California, Colorado, Georgia, Indiana, Nevada, North Carolina, Rhode Island, and Tennessee) have enacted workplace restraining

154. See, e.g., ARIZ. REV. STAT. ANN. § 23-771(D) (2007). A recently passed law in Louisiana adopts a slightly different approach by establishing a separate account, to be funded through legislative appropriations, from which domestic violence claims will be paid. LA. REV. STAT. ANN. § 23:1770-76 (2007). It is theoretically possible that permitting employers to shift the costs associated with unemployment benefits onto a common fund or separate account could have the unintended effect of making it easier to fire victims of domestic violence without "cause" than other employees because employers would not bear the costs associated with such a termination. Further study should be done to determine the extent of such potential risk. More to the point, as discussed in Part V, pairing unemployment insurance reforms with other legislative reforms that make it easier for victims to maintain employment should reduce this risk.

155. In other contexts, advocates have also recognized the potential of unemployment or temporary disability insurance to serve as a mechanism to spread the costs of partial or full wage replacement for individuals who temporarily cannot work across employers, employees, or both and have increasingly focused on these systems as a fruitful possibility for achieving paid benefits for family care-giving needs. See, e.g., Lester, *supra* note 90. Not coincidentally, the family hardship and care-giving exceptions, as well as the domestic violence exceptions, primarily benefit women and reflect the reality that the traditional eligibility requirements were designed in large part around norms of a male workforce, which results in a significant gender gap in who receives unemployment insurance. See NAT'L EMPLOYMENT LAW PROJECT, *supra* note 146.

order laws.¹⁵⁶ These laws are generally strongly supported by the business lobby, and many, sensitive to the possibility that tort standards suggest that employers should ignore potential workplace violence, explicitly provide that an employer acting in good faith will be immune from civil liability for seeking or failing to seek an injunction.¹⁵⁷ It is also important to note that even in jurisdictions that have not created workplace restraining orders, employers may take actions, such as filing a police report or civil action for trespass or harassment, against a perpetrator who interferes with the business.

Workplace restraining orders can be helpful in that they make clear that the problem is not the victim but, rather, the abuser who is harassing the victim. However, they can pose real risks. The order in such a case is issued in the name of the business, and the laws permit the business to decide whether to seek such an order. But the perpetrator of violence will typically understand the order as coming at the individual victim's behest and may take his anger out on the victim outside the workplace or may respond to such an order by actually attacking the workplace.¹⁵⁸ Thus, a business taking steps to address domestic violence by seeking a protective order without consulting the individual victim may actually increase the danger to the victim and, potentially, to her coworkers. Such provisions should include requirements that the victim be alerted and protections from

156. ARIZ. REV. STAT. § 12-1810 (2007); ARK. CODE ANN. § 11-5-115 (2008); CAL. CIV. PROC. CODE § 527.8 (2007); COLO. REV. STAT. § 13-14-102(4)(B) (2007); GA. CODE ANN. § 34-1-7 (2007); IND. CODE § 34-26-6 (2007); NEV. REV. STAT. §§ 33.200-360 (2007); N.C. GEN. STAT. § 95-261 (2007); R.I. GEN. LAWS § 28-52-2 (2007); TENN. CODE ANN. § 20-14-101-109 (2007).

157. See, e.g., NEV. REV. STAT. §§ 33.200 to .360 (2007); see also *supra* notes 39-41 and accompanying text (discussing potential tort liability).

158. Obtaining a protective order does not guarantee that violence will end. In fact, it is common for perpetrators of domestic violence to violate protective orders. See, e.g., TJADEN & THOENNES, *supra* note 6, at 53 (finding approximately one half of protective orders obtained by women against intimate partners who had physically abused them, and approximately two-thirds of orders obtained against intimate partners who have stalked or raped them, are violated). Because of this concern, domestic violence advocates generally maintain that a victim should not be required to seek a protective order; rather, she should make a reasoned decision after assessing the situation and potential risks that may be posed by issuance of an order. The factors in the business situation are a little different, but it would be foolhardy for a business to take such a step without at least consulting the victim and learning how she expects the abuser would respond. Nina Tarr similarly observes that issuance of a workplace restraining order may heighten the risk of violence against a victim. See Tarr, *supra* note 43, at 374. Professor Tarr sees less benefit that I do to offering employers the possibility of taking direct legal action against the perpetrator and characterizes such laws as a "paternalistic" response to domestic violence that takes too much autonomy away from the victim. See *id.* Although I am generally sympathetic to her concerns regarding victim autonomy, I believe workplace restraining orders, particularly when linked to other opportunities for a victim to take steps she deems appropriate in addressing the violence, see *infra* Part V.A, may play a valuable role in balancing of the employer's and employee's interests and advancing their shared interest in promoting workplace safety and productivity.

her being fired based on her situation, as discussed in greater detail in Part V.

F. Government Action Encouraging Effective Workplace Policies

In addition to the specific protections described above for employees and for businesses, legislation may also address the issue by helping businesses understand that it is both in their interest to take steps to address domestic violence and, equally important, that it is doable. Toward this end, the 2005 reauthorization of VAWA authorized the appropriation of funds to create a national clearinghouse of best practices by employers in addressing domestic violence.¹⁵⁹ Funding to create the center was appropriated in the federal fiscal year 2008 budget.¹⁶⁰ Additionally, seventeen states have required state employers to adopt policies addressing domestic violence and/or have developed model policies for private businesses.¹⁶¹ Puerto Rico went even further, specifically requiring *all* businesses to adopt a “protocol” addressing domestic violence.¹⁶²

Model policies typically encourage employment-related supports for victims (e.g., time off and protection from firing); emphasize the need for safety modifications in the workplace; and prohibit perpetrators from engaging in domestic violence while at work or using company property.¹⁶³ Many also encourage businesses to help employees access domestic violence supports through a company sponsored Employee Assistance Plan and/or through community resources. Not surprisingly, these provisions are similar to those identified by the CDC as strategies adopted by private employers that have taken a lead on the issue.¹⁶⁴

159. See Violence Against Women Act and Department of Justice Reauthorization Act of 2005, Pub. L.No. 109-162, § 701 (2005).

160. Consolidated Appropriations Act of 2008, Public L. 110-161, 121 Stat. 1844 (2007).

161. For descriptions of the various approaches taken by states and links, where available, to the policies, see LEGAL MOMENTUM, STATE LAW GUIDE: DOMESTIC AND SEXUAL VIOLENCE WORKPLACE POLICIES (2007), available at <http://www.legalmomentum.org/site/DocServer/policies.pdf?docID=502>.

162. 2006 P. R. Laws 217, available at http://puertolaw.typepad.com/doing_business_in_puerto_files/protocol_domestic_violence_in_the_workplace.pdf. The law includes a cryptic requirement that such protocol must include a “public policy statement, a legal and applicability basis, personnel liability and uniform procedures and measures to follow in the management of cases.” Given its opaqueness, it is unclear how effective this legislation will be; a more promising strategy might specify or recommend measures that should be included in such policies. See Dougan & Wells, *supra* note 53 (discussing elements of an effective policy).

163. See LEGAL MOMENTUM, STATE LAW GUIDE: DOMESTIC AND SEXUAL VIOLENCE WORKPLACE POLICIES, *supra* note 161.

164. See *supra* text accompanying notes 53-56.

G. Common Challenges

After discussing the emerging legislation in such detail, it is helpful to step back and return to the two common challenges identified at the beginning of this Part.

The first challenge, implicit in all of the various forms of legislation, is whether and how employment laws, which typically regulate the relationship between an employer and an employee, can be used to address workplace effects of domestic violence caused by a third party perpetrator. As discussed above, Title VII and the ADA were developed to address what really are *individual* characteristics of employees. They do not translate well to the domestic violence situation because it is the perpetrator's actions, rather than the victim's own characteristics, that require the employer to take preventative action or, often, that precipitate a decision to fire a victim. Workplace restraining order provisions, by contrast, can be effective because they authorize the employer to take actions directly against the perpetrator, but they must be applied with sensitivity to protect the related, but potentially separate, interests of the individual victim.

Second, and relatedly, because the perpetrator is the cause of workplace disruptions, as well as of a victim's absences or need to leave a job because of violence, legislatures must grapple with how to apportion costs associated with any employment-related accommodations. The various statutes discussed take different approaches. The ADA-modeled accommodation mandates impose the costs on employers, but only if they do not impose an "undue hardship." OSHA regulations, by contrast, require all employers to take reasonable precautions against threatened violence. The unemployment provisions consciously spread costs across employers. Most strikingly, the domestic violence leave laws reach dramatically different answers depending, it seems, on whether the law is modeled on the FMLA, in which case it will only apply to large employers with at least fifty employees, or on crime victim job protection laws, in which case it will apply to all employers.

This pattern holds significance for considering employment accommodation mandates more generally. It suggests that focusing on larger "public" interests at stake in the need for potential accommodations, such as a common desire for effective criminal prosecution or to address general public health or safety needs, may significantly increase the willingness of legislatures to impose costs on employers. In other words, if changes are framed as *individual* benefits for a single employee (here the victim), it seems appropriate to balance such costs against the employer's resources and excuse employers that are deemed too small or resource-poor. But if the changes are framed instead as furthering common objectives (that of the public at

large, the employer and coworkers, as well as the individual employee) legislatures seem much more comfortable either imposing costs on all employers or creatively considering ways to spread costs.

V. DEVELOPING A COMPREHENSIVE AND TARGETED APPROACH

The sheer volume of new legislation discussed in Part IV demonstrates a significant interest in addressing the workplace effects of domestic violence. Nevertheless, the current patchwork of protections is inadequate. In this Part, I propose reframing the need for domestic violence employment laws as furthering our public strategy of combating domestic violence, rather than as protections or benefits for individual victims or individual employers. While perhaps subtle, the shift in focus is more likely to yield a successful, comprehensive, and targeted strategy for tackling the issue. Such a strategy could be adopted by individual states or by Congress.¹⁶⁵

My proposal rests on an understanding, as described in Parts II and III, that the issue involves multiple interested parties with interlocking objectives. Employees who are victims want to be able to take reasonable steps to address the violence without losing their jobs or, if a separation from work is necessary, an adequate independent income source. Employers and coworkers of the victim, as well as the victim herself, want to keep their workplaces safe and productive. The public at large has an interest in reducing incidents of domestic violence, from public health and criminal justice perspectives and a more general commitment to ensuring individuals can live free from violence. And, although not the focus of analysis in this Article, perpetrators of domestic violence have an interest in fair workplace procedures that properly assess when and whether employers may take action in response to violence they commit.¹⁶⁶ An effective strategy will need to serve all of these interrelated needs.¹⁶⁷ Additionally, as

165. As discussed in Part IV, states have been far ahead of the federal government in tackling workplace-related effects of domestic violence. Given that the legal regulation of domestic violence in family law and criminal law is also primarily a matter of state law, it may not be surprising that the employment laws are also primarily state laws. Comparable legislation, however, has been introduced in the current and recent Congresses, *see supra* note 4, and there obviously would be benefits to establishing a federal floor of basic provisions that states could choose to go beyond. Congress probably has authority to enact such legislation pursuant to the Commerce Clause. *See cases cited supra* note 4.

166. Employers who take actions against alleged perpetrators of domestic violence may face liability under a variety of theories, especially if the accusations turn out to be unfounded. *See generally* FREDERICA LEHRMAN, DOMESTIC VIOLENCE PRACTICE AND PROCEDURE §§ 10:26-10:30 (1996 & Supp. 2005) (discussing potential defamation, wrongful discharge, invasion of privacy, and ADA claims). Additionally, even those concerned primarily with “victims’” rights need to be concerned about how alleged perpetrators are treated since it is not uncommon for persons, ultimately determined to be victims, to themselves be accused of battering a partner. *See, e.g., SCHNEIDER, supra* note 60, at 67-68.

167. There is potentially a cost to such reframing as well. Domestic violence grows out of larger issues of gender subordination, and, Julie Goldscheid argues, there is an inde-

the analysis of emerging legislation in Part IV made clear, moving away from the individual-rights framework of traditional employment law models makes it more likely that legislation will appropriately address the role of the perpetrator and, relatedly, the possibility of spreading costs associated with changes beyond the individual employer and employee.

The remainder of this Part describes four particular suggestions that flow from consciously reframing the issue as a public problem requiring systemic solutions. First, I argue that various legislative initiatives can reinforce each other, yielding benefits greater than the sum of the parts. Second, I suggest that we need to consciously develop legislative models that encourage employers and employees to work together. Third, reframing the issue as implicating larger public health and safety issues also underscores the need to better understand the costs and benefits involved. Accordingly, future reforms should include a commitment to measuring effectiveness of new legislation, as well as other voluntary business initiatives to address the problem. Fourth, we should consider the possibility of using public expenditures to cover costs that are beyond those that can reasonably be borne by individual employers or employees.

A. *Pair Legislative Strategies*

Up until now, most of the legislation discussed in Part IV (e.g., time off for victims, discrimination protections, and unemployment insurance provisions) has been sought by victims and their advocates and opposed by employers and their advocates. Workplace restraining orders, on the other hand, have been sought by employers and greeted with skepticism, if not outright opposition, by victims and their advocates. By approaching the situation from the individual “business” perspective or “victim” perspective, many advocates and legislatures have failed to recognize the benefits of addressing the is-

pendent value in framing the need to address the workplace effects of domestic violence as a means of addressing sex discrimination, separate from cost reduction and safety concerns that may be more politically palatable. See Goldscheid, *supra* note 43, at 20-21. Feminist scholars have made this point more generally as domestic violence services have been increasingly framed as public health or public safety issues rather than a women’s rights issue. See, e.g., SCHNEIDER, *supra* note 60, at 23-28. Such commentators suggest that domestic violence cannot be “solved” or “treated” without addressing the underlying issues of women’s equality that it expresses. See *id.* I share the concerns raised by such commentators. However, as explained more fully in the text, I believe that at least in the employment context, the conceptual and practical benefits offered by moving away from an individual rights and gender-specific focus are significant and, on balance, worth the cost. Indeed, as briefly noted in the Conclusion, the successful transformation of domestic violence from a “private” concern with which employers, and society, have no responsibility to a public matter may offer lessons for reframing other so-called “private” matters, such as need to accommodate family care-giving responsibilities, for which existing employment law has been largely inadequate.

sue more comprehensively. In fact, compartmentalizing the problem in this fashion may actually make it less likely that effective reforms are adopted at all. Pairing certain legislative initiatives together can help remove potential objections and more appropriately balance employers' and victims' interrelated interests, as well as the public's interests, making legislation both more likely to pass and more likely to be effective once passed.

Example 1: Integrate victim employment protections with workplace restraining orders

Employers typically oppose proposed legislation that protects employees from being fired based on their status as victims. In part, this opposition is motivated by a concern that creating a new protected class will increase the number of unjustified employment discrimination complaints against employers. But employers' objections also tend to stem from the belief that, if they cannot fire the victim of violence, they are increasing the likelihood that violence will occur at the workplace. Thus, passing a workplace restraining order law, which gives employers their own independent authority to take legal action against the perpetrator, helps neutralize employers' concern regarding provisions that protect victims from being fired. The reverse is also true. Employers seek workplace restraining order legislation so that they can respond to potential threats in the workplace. However, without employment protections, victims are unlikely to disclose their situations to their employers, and employers are thus only likely to learn about threats to the workplace after they have already materialized. Thus, to truly address the problem of workplace violence effectively, both provisions may well be necessary.

Example 2: Integrate unemployment insurance provisions with domestic violence leave provisions

Victims, no matter what the size of their employers, often need time off from the workplace and the confidence that there will be a job or another source of income in the future. Making both time and income available helps ensure that those who are interested in ending an abusive relationship will be able to do so. The crime victim job protection laws, which apply to all employers, suggest that even small employers can provide some number of days off. But it is also true that larger employers can more readily handle extended absences than smaller employers. Consciously integrating unemployment provisions with domestic violence leave statutes can address this reality without leaving victims who work for small employers without recourse. For example, under a tiered leave program, all employees could receive at least some job-protected leave; employees that work for larger employers could receive more generous leave while unemployment benefits could be

available for those who work for smaller employers until they find new employment.

Example 3: Integrate analysis of the risk of workplace violence with consideration of both workplace accommodations and availability of unemployment insurance benefits

As noted above, there are many relatively inexpensive steps an employer, in consultation with a victim of domestic violence, may take to reduce the risk that domestic violence will spill over into physical violence at the workplace. Nonetheless, in certain instances, it might be impossible, or prohibitively expensive, to safeguard a workplace while the victim continues to work there. In such cases, the best approach might be for her to separate from the employment but receive access to unemployment insurance benefits or some other independent income stream. A comprehensive legislative strategy would integrate analysis of the risk posed to the workplace, the cost of safety precautions at her workplace, and the victim's need for independent income if separated from the workplace.¹⁶⁸

Putting these various examples together demonstrates how a comprehensive strategy that is sensitive to these interrelated objectives can be greater than the sum of its parts and more appropriately balance the various interests. Victims would be assured that they would not be fired simply for disclosing what was occurring to them. Victims, no matter what the size of their employer, would have access to a reasonable amount of time off to take steps to address the violence. Individuals who work for larger employers would have greater amount of time; those that worked for smaller employers might lose their job if they needed too much time but would have access to a separate form of income. Employers would be empowered, after consulting with the victim, to take direct legal action against a perpetrator of threatened violence. They would also be required to take reasonable safety precautions to secure the workplace. If, after

168. As noted above, *see supra* text accompanying notes 20-23, an independent source of income is one of the most important factors in whether a victim of domestic violence will be able to end an abusive relationship. Continued employment is obviously one important source of such income, and as noted above, the community of a workplace (as well as the self confidence that can come from having a job) may provide additional intangible benefits to victims. Nonetheless, income could also come from a government-sponsored income program, such as unemployment insurance benefits, disability benefits, or welfare benefits. Because of moral hazard concerns, none of these benefit programs replace a salary completely. Rather, they typically provide half or less of salary. Thus, victims (and their advocates) would obviously prefer continuation of paid employment if possible. However, for purposes of promoting an interest in reducing violence, the income simply must be sufficient to allow a victim who wishes to separate from an abuser to do so, recover from the violence, and find new work.

good faith efforts, it is clear that it will be prohibitively expensive to safeguard the workplace, a victim could be lawfully terminated provided that she then had access to unemployment insurance benefits or another independent stream of income.

Such an integrated approach reasonably satisfies the interests of both employers and employees, as well as the public commitment to effectively addressing domestic violence. In fact, although providing access to unemployment insurance benefits and empowering employers to seek workplace restraining orders goes beyond what an individual business can do on its own, the other provisions I've outlined are quite similar to the strategies employed by businesses that have voluntarily developed domestic violence policies.¹⁶⁹ Linking them together is most likely to encourage a frank discussion of the situation and best protect the safety of the individual victim, her coworkers, and her employer; by contrast, enacting individual components without the others may not offer sufficient protection to either the employer's or employee's interests to actually achieve the common objectives.

A handful of states have passed most of the elements discussed above, perhaps implicitly recognizing the potential value of a comprehensive approach. North Carolina, for example, provides reasonable time off to employees, no matter how small their employers, to seek judicial relief.¹⁷⁰ It provides businesses with the authority to seek injunctive relief against workplace violence, but specifies that they must consult with the employee who is the target to assess potential safety risks.¹⁷¹ The legislature required the Governor's Commission on Domestic Violence to develop model policies, track violent incidents in state workplaces, and work with state agencies to implement effective workplace violence prevention programs.¹⁷² Its attorney general's office has hosted two major workplace summits, bringing together businesses that have taken a leadership role in addressing the issue to share best practices.¹⁷³ And victims who need to leave a job because of the violence can access unemployment insurance benefits.¹⁷⁴ It is not an accident that North Carolina has all of these laws. The North Carolina Coalition Against Domestic Violence

169. See *supra* notes 52-56 and accompanying text.

170. N.C. GEN. STAT. § 50B-5.5 (2007).

171. *Id.* § 95-261.

172. *Id.* § 143B-394.16(a)(3).

173. N.C. Dep't of Justice, Domestic Violence in the Workplace Summit: Don't Let Domestic Violence Hurt Your Business, <http://www.ncdoj.com/DocumentStreamerClient?directory=WhatsNew/&file=WorkplaceSummitInvite.pdf> (last visited June 23, 2008) (advertisement for summit held in Asheville, N.C. on Nov. 9, 2006); N.C. Dep't of Admin., Domestic Violence in the Workplace Summit, Oct. 30, 2003 (Chapel Hill, N.C.), <http://www.doa.state.nc.us/dvio/> (postevent Web site for Summit held Oct. 30, 2003) (last visited June 23, 2008).

174. N.C. GEN. STAT. § 96-14(1f).

has focused on economic security as essential for victims and worked over several years to help educate lawmakers about the changes that are necessary to make that possible and local businesses on the benefits of proactively addressing domestic violence.¹⁷⁵

B. Encourage Collaboration Between Employers and Employees

In addition to the benefits that are possible by passing strategically-paired packages of the kinds of laws already being enacted in the various states, review of the legislation suggests new models should be developed to encourage the collaborative problem solving between employer and victims that businesses who have successfully implemented domestic violence policies say works best.¹⁷⁶ In this respect, it is particularly important to consider the problem of victims being fired because of a fear of workplace violence. As described in Part IV, the individual employment rights framework adapted from Title VII and the ADA has both conceptual and practical limitations. On the former point, the need for workplace protections is largely caused by third-party actions rather than a personal characteristic of the victim, so there are substantive limitations in using traditional employment discrimination models to tackle the problem.¹⁷⁷ On the latter point, modeling domestic violence laws on either Title VII or the ADA tends to raise red flags with employers, obscuring the extent to which employers and victims share an interest in effectively addressing the situation.¹⁷⁸

In part, the situation could perhaps be remedied by crafting protections in language that is more tailored to the situation. For example, rather than prohibiting discrimination against victims of domestic violence, an alternative approach could provide that “victims may not be fired or refused employment because they obtain a protective order or take other steps to secure their safety; because they ask for modifications at work to reduce the likelihood of harassing or violent conduct occurring at the workplace; or because the workplace is disrupted by harassing conduct by the perpetrator of violence against them.”¹⁷⁹

175. Telephone interview with Beth Froehling, Interim Executive Dir. & Pub. Policy Dir., N.C. Coal. Against Domestic Violence (July 2006). Despite its significant advances, North Carolina’s protections also remain something of a patchwork, most notably in that the legislative structure fails to protect individuals of domestic violence from being fired simply because of the violence against them. *See supra* notes 44 & 124 (discussing *Imes v. City of Asheville*, 594 S.E.2d 397 (N.C. App. 2004)).

176. *See supra* text accompanying notes 52-56.

177. *See infra* Part IV.B and IV.C.

178. *See id.*

179. As noted above, Rhode Island and Connecticut have each adopted provisions, as part of their criminal code, that prohibit terminating victims because they have obtained a protective order. *See* CONN. GEN. STAT. § 54-85b (2007); R.I. GEN. LAWS. § 12-28-10 (2007).

Reframing the language in this way has several benefits. Substantively, it better describes why victims typically need employment protections and speaks directly to the problems posed by harassment at the workplace. It could better help employers understand the extent to which it may be in their own interest to offer such protections to victims and thus might be more likely to be enactable. As described above, such language could be integrated with a requirement that employers take reasonable protective measures against threatened workplace violence and, potentially, an exception permitting separation (with access to unemployment benefits or other independent income source for the victim) in the relatively rare cases where there is a specific particularized threat to the workplace that cannot be addressed effectively through such protective measures.¹⁸⁰

Building in part on Susan Sturm's insights regarding effective strategies to counter structural bias and harassment,¹⁸¹ I suggest that beyond simply prohibiting negative actions against employees, legal standards should encourage collective problemsolving, such as that described by employers who have voluntarily developed effective approaches.¹⁸² Thus, employers should be required to discuss with employees who voluntarily disclose that they are victims of violence what changes could be made at work to help keep the workplace safe and productive. As Julie Goldscheid points out, requiring such a dia-

The language I propose above would go further to explicitly address the problem of a termination due to harassing conduct by the perpetrator of the violence. It would, however, arguably leave a gap in coverage. Individuals who were fired or refused employment *purely* based on their status as victims might not be covered; in practice, however, it is far more common for victims to face negative employment actions based on the specific reasons outlined in the proposed statutory language than on the basis of their "status" alone.

180. As noted above, such changes may be framed as "reasonable accommodations" for the victim or as general workplace safety requirements. *See supra* Part IV.C. I would tend to expand on the workplace safety framework rather than the ADA framework because I believe this more appropriately recognizes that the modifications are for the benefit of the employer generally, not just the individual employee, and are a result of the perpetrators' actions. However, the substance of the proposal is similar to that made by other commentators who suggest an ADA model should be used. *See Porter, supra* note 39, at 325-30; Goldscheid, *supra* note 43, at 54-56. Both also suggest that where, even after reasonable accommodations, the threat posed is too great, the victim may be lawfully terminated. *See Porter, supra* note 39, at 325-30; Goldscheid, *supra* note 43, at 54-56. As noted in the text, the comprehensive approach I am suggesting goes one step further by advocating that any provisions allowing terminations based on such risk assessment be integrated with mechanisms to ensure that the victim maintains an adequate independent income source from unemployment insurance benefits or some other funding source.

181. Susan Sturm's insights regarding effective strategies to counter structural bias and harassment may be an instructive example of such an approach. She analyzes three companies that have implemented effective approaches to combating barriers to women's advancement and concludes that legal regimes help set the normative goals for an employment strategy and that liability avoidance spurred change, but "economic and ethical motivations" figured prominently as well. *See Sturm, supra* note 78, at 489-520.

182. *See supra* text accompanying notes 54-56. Again, other commentators have suggested a similar requirement modeled on the "interactive process" required by the ADA. *See Goldscheid, supra* note 43, at 51-54; Porter, *supra* note 39, at 325-30.

logue could combat implicit bias that may lead employers to blame the victim or exaggerate the potential risk posed to the workplace.¹⁸³ Toward that end, and to counter the disincentives that tort law could otherwise provide to taking proactive steps,¹⁸⁴ it might be appropriate to craft affirmative defenses (or tailored liability limitations) for companies that implement effective policies to address domestic violence against any claims that arise from workplace violence that, despite such precautionary acts, occurs.¹⁸⁵ Of course, as Sturm also points out, it would also be essential that courts considering such defenses actually assess the effectiveness of such strategies.¹⁸⁶ Such a process-focused approach could better facilitate the kind of open exchange that is necessary to address the situation.

C. Assess Effectiveness

The data reviewed in Part II suggested that workplace interventions can play a central role in reducing domestic violence, benefiting victims and employers, as well as the general public. However, despite the rapid passage of laws in numerous states, there has been very little effort to assess whether these laws are in fact achieving their objectives. What little we know comes from informal assessments of efficacy rather than structured research. For example, the Maine Commissioner of Labor, Laura Fortman, recently testified before a U.S. Senate subcommittee about her state's experience with a domestic violence leave law. Most interestingly, she reported that the Maine Chamber of Commerce had originally opposed the leave law, but after seeing it in action for a few years, announced that its members had heard "no complaints" and that accordingly it would support an expansion of the law to cover family members.¹⁸⁷ She also reported a conversation at a conference of human resources officials in her state; the conference attendees were generally supportive of Maine's domestic violence workplace legislation but said the state needed to do more to increase awareness of the laws.¹⁸⁸ While certainly promising, the testimony also left open the possibility that part of the reason businesses had hardly felt its effects was that few victims were

183. Goldscheid, *supra* note 43, at 51-54.

184. See *supra* text accompanying notes 57-58.

185. Cf. Sturm, *supra* note 78 (discussing significance of affirmative defenses in the sexual harassment context).

186. *Id.* at 538-42.

187. "Too Much, Too Long? Domestic Violence in the Workplace" Hearing Before the Subcomm. on Employment & Workplace Safety of the S. Comm. on Health, Education, Labor & Pensions, 110th Cong. (Apr. 17, 2007) (statement of Laura A. Fortman, Comm'r, Maine Department of Labor) (quoting testimony of Peter Gore, Senior Governmental Affairs Specialist, Maine Chamber of Commerce), available at http://help.senate.gov/Hearings/2007_04_17/Fortman%20.pdf.

188. *Id.*

aware of its protections. Anecdotal reports from advocates in other states report similar challenges in raising awareness of new protections.¹⁸⁹

As noted above, the CDC approaches domestic violence as a public health matter and toward this end studies the scope of the problem as well as efficacy of various strategies on changing behavior. Much of the research documenting the effects of domestic violence on the workplace discussed in Part II was funded by the CDC. Assessing the success of various legislative strategies, as well as the effectiveness of individual businesses' policies, can help inform future development.¹⁹⁰ As a first step, the CDC or other public entities (along with victim advocates and intermediary organizations that work with the corporate world) should focus on simply raising awareness of new laws and helping both victims and employers understand their rights and responsibilities. Sensitive evaluation methods could then help assess the pros and cons of various approaches and determine to what extent they help achieve the intertwined objectives of improving the safety and productivity of both victims and workplaces. Any such studies should be designed not only to measure economic benefits but also increases in safety and wellbeing that may be less easily quantified.

D. Consider Role for Public Expenditures

The public interest in assisting victims of domestic violence does not vary based on the size of their employers. For the reasons discussed in Part II, addressing the workplace effects of domestic violence can be a primary strategy in reducing domestic violence. But, as discussed above, domestic violence laws modeled on the FMLA and the ADA (like the FMLA and the ADA themselves) simply determine that certain costs are too great for at least some employers to bear and leave no recourse for individuals who happen to work for such smaller or resource-poor employers. Recognizing the larger public interests at stake, legislatures should consider public funding, or other cost-spreading mechanisms, to supplement costs that they deem unreasonable for either individual employers or individual employees to bear as a result of a perpetrator of domestic violence's criminal actions. Various possibilities could be used to compensate

189. E-mails from Wendy Pollock, Senior Staff Attorney, Sargent Shriver Ctr. on Poverty & the Law, to author (on file with author) (reporting challenges in publicizing Illinois' law providing time off and protection from termination); e-mails from Anya Lochner, Legal Aid Soc'y, Employment Law Ctr. to author (on file with author) (reporting challenges in publicizing California's domestic violence leave law).

190. Cf. Fisher & Peek-Asa, *supra* note 28, at 113-14 (noting variation among recommendations regarding domestic violence workplace strategies and advocating structured research to determine effectiveness).

the employer (e.g., grants or tax credits) or the individual (e.g., unemployment insurance benefits, grants, crime victim compensation, or welfare benefits).¹⁹¹

Public funding can also play a role in some of the other strategies addressed above: public education efforts to raise awareness of new laws; support for businesses to implement effective domestic violence policies, including simply helping equip them to make referrals to community domestic violence resources, and research to evaluate the effectiveness of various responses. The key is that understanding employment-focused interventions as part of a larger strategy of combating domestic violence can justify public expenditures. In other words, just as we fund shelters, criminal prosecutions, or civil legal services, we should consider funding some workplace-related needs.

VI. CONCLUSION

Until the nineteenth century, domestic violence was sanctioned as an appropriate means for the male head of the household to control his wife. Even long after the demise of legal authorization for the practice, certain stereotypical gender norms play a role in its perpetuation. The second-wave feminists who, beginning in the 1970s, spearheaded the modern movement to end domestic violence, defined battering within a larger framework of gender subordination; shelters were designed not simply to provide safe homes to women who had been victims of violence but also to permit women to self-govern, creating a separate space defined outside traditional gender roles.¹⁹² Domestic violence continues to be a significant barrier to women's full participation in society, including, as detailed in this Article, in the workplace.

Accordingly, one framework for legislation combating the effects of domestic violence on the workplace is a civil rights frame and the individual rights model of employment law that fits within it. As discussed above, there are state statutes that borrow from Title VII, as well as the Americans with Disability Act and the Family and Medical Leave Act, to protect domestic violence victims. However, these may be less effective than new laws built on criminal law, workplace safety, or unemployment insurance models. In part, the limitations

191. Victims' compensation is a publicly administered program that is funded by fines levied on criminal offenders. See Victims of Crime Act (VOCA), 42 U.S.C. §§ 10601-10603 (2000); U.S. DEPT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OVC FACT SHEET, VICTIMS OF CRIME ACT CRIME VICTIMS' FUND (2005), available at <http://www.ojp.usdoj.gov/ovc/publications/factshts/vocacvf/fs000310.pdf>. VOCA funds are already used to help compensate victims for missed work. Assessing the appropriateness of these various approaches (both in terms of practicality and in terms of economic efficiency) is beyond the scope of this Article.

192. SCHNEIDER, *supra* note 60, at 20-23.

in the traditional civil rights approach are due to the fact that it is (at least often) the perpetrator, not the victim, that causes the need for workplace interventions. But in part, these limitations are also due to a deep-seated reluctance to impose costs on employers for accommodating what are perceived to be “individual” or “private” needs. By contrast, new laws drawing from criminal justice, workplace safety, and unemployment insurance approaches tend to impose costs more generally or spread costs across employers.

It is difficult to know exactly why this division has occurred, but I believe it may be in part because domestic violence advocates have so successfully redefined what was once perceived as “merely” a private issue as, instead, a public crisis requiring systemic solutions. Understanding the public nature of the problem, legislatures are comfortable asking employers to help address the situation—and, indeed, a growing number of employers embrace the constructive role that they can play. And thus, although somewhat ironic, the steadfast refusal of the legal system to address domestic violence which led to the determined efforts to reconceptualize this “private” family matter as a “public” responsibility may offer the promise of helping us rethink how we deal with other issues that fall on the “fault line between work and family”¹⁹³ for which traditional employment law has been inadequate.

193. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 738 (2003).