

**ENSURING THE DOMESTIC VIOLENCE VICTIM A  
MEANS OF COMMUNICATION:  
WHY PASSING LEGISLATION THAT  
CRIMINALIZES IMPAIRING ANOTHER'S  
COMMUNICATION IS THE NEXT LOGICAL STEP  
IN COMBATING DOMESTIC VIOLENCE**

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## I. INTRODUCTION

On January 10, 2006, bill A. 431 was introduced in the New Jersey General Assembly<sup>1</sup> and offered a radical amendment to the State's definition of domestic violence. A. 431 reaches criminal acts such as homicide, assault, and harassment inflicted upon "any person who is 18 years of age or older or who is an emancipated minor." The bill also expands the definition of domestic violence to include an act by another which "purposely or knowingly impairs another person's means of communication."<sup>2</sup> Communication is defined as "any form of communication made by any means," which can include anything from a telephone call or an electronic page, to an e-mail, facsimile, or "any other means of transmitting voice or data."<sup>3</sup>

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<sup>1</sup> A. 431, 212th Leg., Reg. Sess. (N.J. 2006).

<sup>2</sup> A. 431 was first introduced in the previous session on October 18, 2004, as A. 3412. The bill has been referred to the Judiciary Committee, and was eventually resubmitted as A. 571 during the 213th Legislature, and again referred to the Judiciary Committee. According to N.J. Assemb. Joan M. Voss, one of the primary sponsors of the bill, all bills that are not signed during the current session get reintroduced at the beginning of the next session at the discretion of the bill sponsor. Currently, the number one problem facing the New Jersey Legislature is tax reform, Voss says, and most, if not all, other bills remain in limbo until the tax problems can be addressed. Telephone Interview with New Jersey Assemb. Joan M. Voss, 38th District (D) 2004–present (Feb. 27, 2007).

<sup>3</sup> A. 431. The bill uses the following definition of "communication":

"[A]ny form of communication made by any means, including, but not limited to, any verbal or written communication, communications conveyed by any electronic communication device, which includes but is not limited to, wire, radio, electromagnetic, photoelectric or photo-optical system, telephone, including a cordless, cellular or digital telephone, computer, video recorder, fax machine, pager, or any other means of transmitting voice or data and communications made by sign or gesture."

This bill attempts to do something that currently is not defined by statute in any other state: to explicitly classify and punish the restriction of communication as an act of domestic violence.<sup>4</sup> One issue regarding the proposed legislation is the breadth of its definition of domestic violence. Included in the bill's wide range of actions that could be classified as an act of domestic violence are: 1) keeping the victim confined in a room; 2) removing the telephone, disallowing use of the telephone, or cutting the telephone lines entirely; or 3) refusing to allow the victim to communicate via the Internet. The bill's definition of domestic violence would mainly apply to cases involving a controlling spouse who does not allow his wife to speak with her family and friends, and keeps her secluded in the household.<sup>5</sup> In such an instance, almost any attempt at restricting communication could constitute an act of domestic violence.

The breadth of A. 431's definition of domestic violence at first may seem problematic. For example, the bill does not explicitly indicate whether it would apply *only* in instances where the victim was trying to seek assistance in a domestic violence dispute. Consider a husband and wife<sup>6</sup> involved in a heated verbal argument. In the midst of the argument the telephone rings, and the husband blocks the path to the phone, which prevents the wife from answering, but never specifically says that he does not want

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<sup>4</sup> If A. 431 is enacted into New Jersey state law, it would place New Jersey in a class all by itself, as the only state that expressly criminalizes the restriction of communication as an act of domestic violence. To illustrate, consider Florida domestic violence statutes. When a victim of domestic violence files a petition for injunction for protection, Florida courts will take into consideration whether the respondent has ever "physically restrained the petitioner from leaving the home or calling law enforcement," and whether the respondent has "destroyed personal property, including, but not limited to, telephones or other communication equipment . . ." See FLA. STAT. § 741.30 (2005). Florida statutes do not explicitly classify the restriction of communication as an act of domestic violence; at best, it may be implied from the language that the courts can find that the destruction of property, such as telephone wires, opens the possibility for the occurrence of physical or psychological abuse, and that the act of destroying such property could be considered an act of domestic violence.

<sup>5</sup> Telephone Interview with New Jersey Assemb. Joan M. Voss, 38th District (D) 2004–present (Feb. 27, 2007).

<sup>6</sup> Domestic abuse can occur regardless of the nature of the parties involved (i.e. heterosexual couples, homosexual couples, married / unmarried couples, parent / child, etc.). For the purposes of this Note, either a husband-wife or a boyfriend-girlfriend relationship will be used as examples throughout.

her to talk on the telephone. The phone call turns out to be from a concerned next-door neighbor who overheard the fighting. The argument later ends without an escalation to physical violence. It is possible that under the language of the bill, the husband may have committed an act of domestic violence by refusing to allow his wife to answer the telephone, if it is believed he was purposely preventing her from communicating with another person who could have possibly offered assistance.

Without explicit language stating that the definition is to apply only in instances where the wife is seeking assistance, it is clear that problems could arise regarding the sweeping range of circumstances in which the legislation would mistakenly identify an act of domestic violence. Given our legal system's existing domestic violence remedies, the time has arrived for a redefinition of domestic violence, which would prevent the occurrence of physical or mental abuse by a batterer<sup>7</sup> before any serious harm can be inflicted upon a victim.

This Note will examine the advantages of expanding the definition of domestic violence to include impairing another's means of communication. Part I will discuss the history of domestic violence, how it was first recognized as a societal problem, and how it still presents problems today. A. 431's attempt to address some of the problems caused by domestic violence by redefining the crime to include impairing another's communication is important because batterers often attempt to isolate their partners from friends and family in order to restrict

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<sup>7</sup> Feminist scholar Donna Coker elaborates on the problem of battering: Battering may be experienced as a personal violation, but it is an act facilitated and made possible by societal gender inequalities . . . . Social supports for battering include widespread denial of its frequency or harm, economic structures that render women vulnerable, and sexist ideology that holds women accountable for male violence and for the emotional lives of families, and that fosters deference to male familial control. Batterers often use the political and economic vulnerability of women to reinforce their power and dominance over particular women . . . . Batterers also take advantage of the vulnerabilities of their victims, such as the victim's economic dependence on the batterer or on the state, her status as an illegal immigrant, her alcohol or drug dependency, or her responsibility to provide and care for children.

Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1, 39-41 (1999), reprinted in ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 12-13 (2000).

their ability to break away from an abusive relationship.<sup>8</sup> This kind of isolation by the abuser is one of the key factors that can lead to the development of “battered woman’s syndrome” in many domestic violence victims.<sup>9</sup> The proposed legislation seeks to prevent such isolation from occurring.

Part II of this Note makes a more in-depth examination of past attempts to criminalize acts of domestic violence—specifically, the introduction of mandatory arrest laws, and the Violence Against Women Act. Although questions may arise from redefining domestic violence to include the impairment of another’s means of communication (i.e., whether such legislation will raise awareness of the domestic violence issue, how its criminalization of the restriction of communication can be refined, and whether the legislation will be effective in preventing future cases of domestic violence), this Note proposes that such legislation is likely to succeed where other domestic violence remedies have failed.

Part III of this Note will discuss the New Jersey decision *State v. Kelly*<sup>10</sup> and its ruling to allow the admission of expert testimony regarding battered woman’s syndrome in domestic violence cases. *State v. Kelly* has been of great importance to domestic violence victims in many jurisdictions; not all jurisdictions afford battered women the protection the *State v. Kelly* ruling provides. Legislation penalizing the restriction of communication as a domestic violence crime would assist victims in jurisdictions that have refused to allow testimony of battered woman’s syndrome in a self-defense or duress claim.

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<sup>8</sup> See Ruth Jones, *Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser*, 88 GEO. L.J. 605, 616 (2000) (stating that “[t]he batterer isolates the woman from friends, family, colleagues, and neighbors in an effort to maintain control.”); see also LENORE E. A. WALKER, *THE BATTERED WOMAN SYNDROME*, 36 (2nd ed. 2000) (“The women reported that while the batterer knew where she was almost all of the time, she only knew where he was less than half the time.”).

<sup>9</sup> See ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 12 (2000) (discussing the “power and control wheel” developed by the Domestic Abuse Prevention Project, which identifies the “interrelated dimensions” of domestic abuse, including “physical abuse, economic abuse, coercion and threats, intimidation, emotional abuse . . . and abusing male privilege.”).

<sup>10</sup> 478 A.2d 364 (N.J. 1984).

## II. **RESPONDING TO DOMESTIC VIOLENCE: ATTACKING ACTS THAT INDUCE ISOLATION OF THE DOMESTIC VIOLENCE VICTIM**

### A. *A History of Domestic Violence*

Domestic violence historically has not been given much consideration by courts. In fact, early Anglo-American common law allowed for a husband to “chastise” his wife, i.e. subject her to corporal punishment.<sup>11</sup> Domestic violence has its roots in the history of nearly every culture, as indicated by Professor Elizabeth M. Schneider in her discussion of the rights that the first modernized societies gave to men to assert over their wives:

Roman society treated a wife as the property of her husband, and she was therefore subject to his control. According to early Roman law, a man could beat, divorce, or murder his wife for offenses committed by her that affected his honor or jeopardized his property rights . . . In the fifteenth century, the Catholic Church endorsed the Rules of Marriage, which permitted a husband to be the judge of his wife and to beat her with a stick if she committed an offense . . . The prevailing law of England gave a husband the legal right to beat his wife in order to maintain family discipline.

Some of the first laws against domestic violence can be traced back to the mid-seventeenth century. For example, the Puritans enacted laws prohibiting wife abuse because they perceived domestic violence as a disruption to their society; the laws they enacted, however, were not strictly enforced.<sup>12</sup> In fact, American courts chose not to intrude in most marital relationships, adhering to the English common law principles that emphasized the stability of the family over the protection of the wife against

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<sup>11</sup> See SCHNEIDER, *supra* note 9, at 13.

<sup>12</sup> See *id.* at 13–14. Schneider added that, “[a]ccording to Blackstone, a widely read nineteenth-century [sic] writer of legal treatises, husband and wife were one, and that one was the husband.” *Id.* Hence, a husband could not be punished for harming his wife because, in Blackstone’s eyes, the husband would merely be harming himself.

<sup>13</sup> *Id.* at 14 (citing ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO PRESENT 17, 21, 23 (1987)) (“[C]olonial courts preferred to reconcile couples even when there were complaints of abuse. Courts would also order runaway wives to return to the family home.”).

possible abuse at the hands of her husband.<sup>14</sup> This view did not change until the mid-to-late nineteenth century, which saw the first feminist campaigns for divorce on grounds of domestic violence; as a result, by the end of the nineteenth century almost every state had outlawed wife beating.<sup>15</sup>

Despite the fact that wife beating had been declared illegal, courts in the early twentieth century were still turning a blind eye toward victims of domestic violence.<sup>16</sup> Wife beating was almost unspoken of throughout most of the twentieth century,<sup>17</sup> and was not “rediscovered” as a problem until the 1960s, when the feminist movement began to gain strength.<sup>18</sup> The 1970s saw the establishment of battered women’s shelters,<sup>19</sup> and later years saw the enactment of legislation focused on protecting victims of abuse—i.e. mandatory arrest legislation and the Violence Against Women Act.

However, even after courts in both the American and English systems rejected a husband’s right to chastise his wife, the legal system still has not considered wife beating to be as much a priority as other violent offenses, such as assault and battery.<sup>20</sup> American reformers of domestic violence law were more likely than not opposed to women’s rights, and instead were more

<sup>14</sup> *Id.* (citing *Bradley v. State*, 1 Miss. (1 Walker) 156, 158 (Miss. 1824), a Mississippi Supreme Court decision granting the “husband the right to ‘chastise’ his wife,” and *Poor v. Poor*, 8 N.H. 307, 310–13 (1836), a New Hampshire decision holding that a wife who did not succumb to her husband’s authority could not obtain a divorce.”).

<sup>15</sup> *Id.* at 15–17 (discussing the advancement of the nineteenth-century women’s rights movement).

<sup>16</sup> As Professor Schneider indicates:

Courts [in the early twentieth century] discouraged separation and divorce, sometimes even to the point of judicial coercion of abuse victims: badgering wives into withdrawing complaints, denying their petitions for financial support from husbands, or assigning cases to a social service organization. These courts often failed to provide a battered woman with physical protection after she filed a complaint, which increased the possibility of retaliatory assault from her abuser.

*Id.* at 18 (citing LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE* (1988)).

<sup>17</sup> *See* SCHNEIDER, *supra* note 9, at 20.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 13. “Authorities denied that a husband had the right to beat his wife, but they rarely intervened in cases of marital violence.” *Id.*

concerned with the effects that wife-beating would have on the capacity of a woman to raise a family.<sup>21</sup> In the 1970s, marital rape was not considered a crime,<sup>22</sup> and up until 1972 a battered woman's only civil remedy was an injunction against her husband.<sup>23</sup> It wasn't until the 1980s when the first states (New Jersey among them) began finding husbands criminally liable for raping their wives.<sup>24</sup>

The last hundred years have seen significant advances toward raising awareness for and addressing domestic violence. Despite these advances, the fact remains that around the world one out of every three women has at one point been victimized by an act of domestic violence.<sup>25</sup>

*B. How Batterers Use Isolation to Assert Control, and Isolation's Effect on Victims of Domestic Violence*

According to clinical and forensic psychologist Lenore E.A. Walker, a common characteristic among batterers is the difficulty in accepting the fact that men and women are equals:

[B]atterers resort to violent acts as a way of competing with women's superior abilities and resources, particularly the well-known belief that women in general have greater verbal skills than do men . . . . [T]raditional men cannot tolerate a disparity in social, educational, or economic status in their wives' favor . . . . His ego is pictured as so fragile that disclosure of her talents would cause him embarrassment . . . .<sup>26</sup>

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<sup>21</sup> See Evan Stark, *Re-presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 990 (1995) (discussing American reformers' views towards feminism in the 1800s).

<sup>22</sup> Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 50 (1992) (explaining that in 1970, while approximately half of battered women reported being raped by their husbands, the husbands would not be prosecuted for rape because statutes did not include intercourse with a wife in their definitions of rape).

<sup>23</sup> *Id.* at 52. These injunctions were also extremely limited in the fact that the victim and the abuser had to be married, and there was no criminal penalty if the abuser violated the injunction. *Id.* at 52-53.

<sup>24</sup> *Id.* at 51.

<sup>25</sup> Family Violence Prevention Fund, THE FACTS ON DOMESTIC VIOLENCE, <http://www.endabuse.org/resources/facts/DomesticViolence.pdf> (citing Heise, L., Ellsberg, M., and Gottemoeller, M., *Ending Violence Against Women*, Population Reports, Series L, No. 11 (Dec. 1999)).

<sup>26</sup> WALKER, *supra* note 8, at 19-20.



Such stereotypical views often breed domestic violence.<sup>27</sup> As a result of his insecurities, the man develops the belief that he needs to control his female partner in order to maintain her loyalty to him.<sup>28</sup> Ultimately, he becomes “excessively dependent” on his partner,<sup>29</sup> and domestic violence will often result. One of the more prolific warning signs of domestic violence in a relationship is the man showing signs of jealousy, leading to attempts to keep the woman isolated.<sup>30</sup> Isolation is prominent in battering relationships.<sup>31</sup>

Battering is rooted in the belief accepted in many cultures that it is acceptable for men to use force against women.<sup>32</sup> There are generally four forms of battering: 1) physical; 2) sexual; 3) psychological and emotional; and 4) destruction of property.<sup>33</sup> Of all the different types of abuse that a battered woman can suffer, many report that it is the emotional abuse that is the most scarring.<sup>34</sup> Batterers rely on a number of different tactics to

<sup>27</sup> See *id.* at 20.

<sup>28</sup> See *id.*

<sup>29</sup> See Women’s Rural Advocacy Programs, What is Abuse?, <http://www.letswrap.com/dvinfo/whatis.htm> (last visited Oct. 21, 2006) [hereinafter WRAP Abuse], describing some of the character traits of men who become batterers:

Batterers tend to be excessively dependent on the victim—they perceive their partner as the only person they can relate to, who understands them, etc., regardless of how much they actually share with their partner. They have an extraordinary fear of losing the relationship and can go to any lengths (even murder) to keep it.

*Id.*

<sup>30</sup> See WALKER, *supra* note 8, at 20 (explaining that the batterer’s dependency on the woman in an abusive relationship leads to jealousy and isolation).

<sup>31</sup> For a discussion about the existence of social isolation in relationships involving battering, see WALKER, *supra* note 8, at 35–36. Social isolation is not the only means by which the batterer may attempt to isolate his female partner—the batterer may also attempt to financially isolate his victim, by refusing to give her access to cash, checking accounts, or charge accounts. *Id.*

<sup>32</sup> WRAP Abuse, *supra* note 29.

<sup>33</sup> *Id.*

<sup>34</sup> SCHNEIDER, *supra* note 9, at 65. Schneider discusses the effects of abusive behavior on a participant in one of the studies conducted by Liz Kelly, a Professor of Sexualized Violence at London Metropolitan University and also the Director of Child and Woman Abuse Studies Unit. *Id.* The participant, a battered woman, discusses the crippling terror she experienced from the psychological abuse alone: “What he did wasn’t exactly battering but it was the threat. I remember one night I spent the whole night in a state of terror, nothing less than terror all night . . . . And that was worse to me than getting whacked.” *Id.*

maintain control over their partners: intimidation, physical and economic abuse, asserting male privilege, coercion and threats, and isolation.<sup>35</sup> The psychological torture that a battered woman endures at the hands of her abuser has often been measured against and compared to the torture that is suffered by prisoners of war and hostages.<sup>36</sup> Eventually, the effects of living in such an abusive relationship can lead to what Dr. Walker coined “the battered woman syndrome,” a type of post-traumatic stress disorder that results from constant physical and psychological abuse suffered at the hands of a batterer.<sup>37</sup>

The battered woman<sup>38</sup> frequently lives a life of almost total isolation.<sup>39</sup> A batterer will use isolation to increase control over his partner.<sup>40</sup> Also, as a result of the abuse, the battered woman will withdraw from friends and family to protect herself from being further embarrassed and to perhaps spare others from potential harm.<sup>41</sup> The isolation is magnified in relationships where the man and woman live together.<sup>42</sup> In such instances, the detrimental effect on the battered woman of social isolation becomes even more apparent. She becomes less trusting of her family and

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<sup>35</sup> ELLEN PENCE & MICHAEL PAYMAR, DOMESTIC ABUSE INFORMATION MANUAL: THE DULUTH DOMESTIC ABUSE INTERVENTION PROJECT (1993), available at [http://www.eurowrc.org/05.education/education\\_en/12.edu\\_en.htm](http://www.eurowrc.org/05.education/education_en/12.edu_en.htm).

<sup>36</sup> See WALKER, *supra* note 8, at 34–35. As Walker indicates, there are eight areas of psychological abuse suffered by prisoners of war: 1) isolation of the victims; 2) induced debility producing exhaustion; 3) obsessiveness and possessiveness; 4) threats such as death of self, death of family and friends, sham executions, and other direct threats; 5) degradation and humiliation; 6) drug or alcohol administration; 7) altered states of consciousness produced through hypnotic states; and 8) occasional indulges which keep hope alive that the torture will end. *Id.* at 35. A battered woman will often endure these forms of psychological torture. *Id.*

<sup>37</sup> See, e.g., Gena Rachel Hatcher, *The Gendered Nature of the Battered Woman Syndrome: Why Gender Neutrality Does Not Mean Equality*, 59 N.Y.U. ANN. SURV. AM. L. 21, 23 (2003); Christine Emerson, *United States v. Willis: No Room for the Battered Woman Syndrome in the Fifth Circuit?*, 48 BAYLOR L. REV. 317, 318 (1996).

<sup>38</sup> Domestic violence is commonly referred to as “violence against women by intimate partners.” Jenny Rivera, *The Violence Against Women Act and the Construction of Multiple Consciousness in the Civil Rights and Feminist Movements*, 4 J.L. & POL’Y 463, 465 n. 6 (1996). A question that often arises when discussing domestic violence is what exactly is a “battered woman”? For a list of some of the characteristics commonly found in a battered woman, see WRAP Abuse, *supra* note 29.

<sup>39</sup> WRAP Abuse, *supra* note 29.

<sup>40</sup> See SCHNEIDER, *supra* note 9, at 12.

<sup>41</sup> WALKER, *supra* note 8, at 35.

<sup>42</sup> See *id.*

friends at the influence of the batterer, and often she will lose the ability to maintain objectivity in relationships.<sup>43</sup>

A batterer will attempt to keep his partner from being exposed to any kind of network of social support.<sup>44</sup> Such isolation has a devastating effect, because once the abuser establishes control over his partner through the psychological abuse that accompanies the isolation, the psychological effects of the abuse hinder a battered woman's ability to protect herself.<sup>45</sup> For a battered woman, social isolation is a major barrier to escaping an abusive relationship.<sup>46</sup>

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<sup>43</sup> *Id.*

<sup>44</sup> Nabila El-Bassel, et al., *Social Support Among Women in Methadone Treatment Who Experience Partner Violence: Isolation and Male Controlling Behavior*, 7 VIOLENCE AGAINST WOMEN 246, 254 (March 2001). El-Bassel's article explores partner violence among women in drug treatment, and how the woman's abusive partner would use social isolation to prevent her from seeking support. *Id.* The article provides multiple accounts of abused women in drug treatment recalling both the physical and the psychological abuse they suffered at the hands of their abuser. It is clear that the abusive partners would rely on isolation techniques to separate their partners from any outlet of support—friends or family—that may encourage a woman to end the abusive relationship. *Id.* at 255. One of the women recounted how she would be isolated in a room for days at a time:

I stood being abused for three years, and the only way that I got out of it was when he went to jail because he threatened [me] to stay there or else, "I'll kill you." You know, some people say it, but some people, you don't know if they mean it . . . I was locked up in a room and he would make me pee in a Pepsi bottle. He put pills in everything I drank. This way he kept me asleep and when my sister would call up, [he] would say, "Oh, she's sleeping." He always had an excuse, 'til after a couple of months, my sister said, "But I don't see my sister." He had me locked in a room with a padlock, and I was afraid to leave because he threatened me. He was a mechanic. He said, "I'll fix your sister's brakes so she gets killed with her kids."

*Id.* at 255.

<sup>45</sup> See Jones, *supra* note 8, at 612–13 ("This control prevents coercively controlled women from availing themselves of the existing legal remedies because the physical abuse affects their internal survival mechanisms.").

<sup>46</sup> Women's Rural Advocacy Programs, *Why Women Stay: The Barriers to Leaving*, <http://www.letswrap.com/dvinfo/whystay.htm> (last visited Oct. 21, 2006). The Woman's Rural Advocacy Programs website lists numerous factors which prevent a battered woman from leaving her abuser, including: economic dependence; fear of greater physical danger; loyalty to the abuser; and demolished self-esteem. *Id.* Social isolation plays such a key role in providing barriers to leaving an abusive relationship because it cuts the battered woman off from the support of her friends and family, and also results in a woman lacking information about any alternatives that may be available. *Id.*

The effect of isolation is especially debilitating for women living in rural areas, because the geographical isolation can magnify a battered woman's isolation.<sup>47</sup> The effects are magnified for many reasons: "a rural battered woman may not have phone service"; traveling away from home to a "big city" can be intimidating; rural women living on a farm often have strong emotional ties to their home and any farm animals that live on the land; and extreme weather in rural areas often exaggerates isolation, especially during the winter months, when rural people are unemployed and alcohol use increases.<sup>48</sup>

*C. The Proposed Legislation Combats Domestic Violence by Preventing Isolation*

Isolation is clearly prevalent in many of the relationships where the abused woman has developed battered woman's syndrome.<sup>49</sup> According to New Jersey Assemblywoman Joan M. Voss, the sponsors of A. 431 recognized the coexistence of isolation in abusive relationships and the physical and mental abuse suffered in such relationships.<sup>50</sup> An examination of the bill's statement gives further insight into what the sponsors believed the bill would add to New Jersey's current domestic violence law:

This bill would add to the list of enumerated acts constituting domestic violence the act of purposely or knowingly impairing another person's means of communication. The types of acts intended to be covered by the bill include destroying a telephone or cutting a telephone line, so that the victim is unable to contact the police or other persons for assistance. Although impairing another's means of communication is not currently a crime, in the view of the sponsor *this act is serious*

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<sup>47</sup> Women's Rural Advocacy Programs, Problems of Rural Battered Women, <http://www.letswrap.com/dvinfo/rural.htm> (last visited Oct. 21, 2006).

<sup>48</sup> *Id.*

<sup>49</sup> See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (citing LENORE WALKER, *THE BATTERED WOMAN SYNDROME* 27–28 (1984), stating that social and economic isolation is common among domestic violence victims).

<sup>50</sup> Telephone Interview with New Jersey Assemb. Joan M. Voss, 38th District (D) 2004–present (Feb. 27, 2007). Voss stated that it is imperative that the domestic violence victim has a means of communicating with individuals outside of the relationship.

*and potentially dangerous enough that a victim should be able to benefit from the protections of the domestic violence act.*<sup>51</sup>

Isolation is not specifically mentioned in the bill; it simply proposes that the act of purposely impairing another's means of communication should be considered an act of domestic violence.<sup>52</sup> The bill's relevance to battered woman's syndrome becomes clearer, however, when one considers the circumstances that lead to the development of the syndrome.

Most people have difficulty understanding how a woman could find herself in a situation where she lacks access to or the ability to communicate with the outside world, and often believe, incorrectly, that a battered woman can choose to leave the abusive relationship whenever she wishes.<sup>53</sup> Another misconception is that the battered woman is masochistic because she remains in the abusive relationship despite being beaten.<sup>54</sup> The truth is that fear will often keep the battered woman from escaping the relationship: fear of what the batterer will do if he learns that she has told another about being beaten; fear that no one will believe her; or fear that, because she is ashamed of the abuse she has suffered, others will find out about her situation.<sup>55</sup>

A battered woman goes through repeated cycles of violence, where at the end of each cycle the batterer shows loving behavior, giving the battered woman hope that the batterer may change his ways.<sup>56</sup> This repeated cycle of abuse eventually deprives the

<sup>51</sup> A. 431, 212th Leg., Reg. Sess. (N.J. 2006) (emphasis added).

<sup>52</sup> The current definition of domestic violence under New Jersey's Prevention of Domestic Violence Act is as follows:

'Domestic violence' means the occurrence of one or more of the following acts inflicted upon a person protected under this act by an adult or an emancipated minor: (1) Homicide; (2) Assault; (3) Terroristic threats; (4) Kidnapping; (5) Criminal restraint; (6) False imprisonment; (7) Sexual assault; (8) Criminal sexual contact; (9) Lewdness; (10) Criminal mischief; (11) Burglary; (12) Criminal trespass; (13) Harassment; (14) Stalking.

N.J. Prevention of Domestic Violence Act, tit. 2C, § 25:19 (1991).

<sup>53</sup> See Kelly, 478 A.2d at 205 ("[E]xperts point out that one of the common myths, apparently believed by most people, is that battered wives are free to leave.").

<sup>54</sup> *Id.*; see also Emerson, *supra* note 37, at 321 (discussing popular misconceptions about why battered women do not leave the relationships).

<sup>55</sup> Emerson, *supra* note 37, at 321-22.

<sup>56</sup> *Id.* at 321. According to the Walker Cycle Theory of Violence, a battered woman repeatedly goes through three stages of battering. WALKER, *supra* note 8, at

battered woman “of her ability to exercise independent judgment.”<sup>57</sup> The battered woman often suffers from “learned helplessness”—a feeling that, no matter what actions she may take, she does not have the ability to protect herself from repeated beatings.<sup>58</sup> As Dr. Walker explains, a woman suffering from learned helplessness believes she has no control over what happens to her; because of this false belief, she fails to seek assistance or end the abusive relationship—even if there is nothing physically stopping her from leaving.<sup>59</sup>

An alternative theory on the behavioral responses and reactions of women suffering from abuse is the “survivor theory,” proposed by Edward Gondolf and Ellen Fisher.<sup>60</sup> The survivor theory posits that battered women, rather than reverting to a

126. The first stage is the tension building stage, during which tension between a couple is gradually escalated by acts of name-calling, other mean intentional behaviors, and possibly physical abuse. *Id.* During this stage, the batterer will express hostility towards the woman, but she attempts to ignore his hostility and instead tries to do what pleases the batterer, or at least, tries not to further aggravate him. *Id.* The second stage is the acute battering incident. *Id.* As the woman begins to wear down from the constant tension between herself and the batterer, she begins to withdraw from him. *Id.* This withdrawal usually triggers a violent outburst from the batterer, which can either be verbal abuse or physical attacks that will leave the woman shaken and injured. *Id.* at 126–27. The third stage is the loving-contrition stage. *Id.* at 126. The batterer will apologize, show remorse, and promise never to act violently again. *Id.* at 127. The woman wants to believe him, and is reinforced in her belief that he will change and that she should remain in the relationship. *Id.* The batterer may promise to seek help, and may even believe that he will not become violent again. *Id.* The absence of tension that is sometimes characteristic of this stage eventually fades, and as the third stage ends, the first one begins again.

<sup>57</sup> See Jones, *supra* note 8, at 609.

<sup>58</sup> See WALKER, *supra* note 8, at 10–11.

<sup>59</sup> See LENORE E. WALKER, THE BATTERED WOMAN 44–54 (1979), *reprinted in* NANCY K. D. LEMON, DOMESTIC VIOLENCE LAW 76 (2nd ed. 2001). Dr. Walker elaborates on the theory of learned helplessness:

Once we believe we cannot control what happens to us, it is difficult to believe we can ever influence it, even if later we experience a favorable outcome. This concept is important for understanding why battered women do not attempt to free themselves from a battering relationship. Once the women are operating from a belief of helplessness, the perception becomes reality and they become passive, submissive, ‘helpless.’ They allow things that appear to them to be out of their control actually to get out of their control.

*Id.*

<sup>60</sup> See EDWARD GONDOLF & ELLEN FISHER, BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS 11–18 (1988), *reprinted in* LEMON, *supra* note 59, at 80–87.

“passive” state as the learned helplessness theory suggests, instead respond to their abuse by increasing their efforts to obtain help.<sup>61</sup> However, the increased efforts to find assistance often go unanswered, as the sources of help that the battered woman seeks often fail to stop the abuse.<sup>62</sup>

Although the two theories diverge as to how the battered woman responds to domestic abuse, the learned helplessness theory and the survivor theory are both premised in the belief that the end result of the abuse is the same: the woman remains with her abuser.<sup>63</sup> Both theories provide insight as to why legislation criminalizing the restriction of communication is relevant to battered woman’s syndrome. The learned helplessness theory indicates that perhaps the only way a battered woman incapacitated by repeated abuse can be empowered to escape the relationship is by forced removal from her abuser’s control.<sup>64</sup> Legislation such as A. 431 provides an additional means of interrupting the cycle of domestic violence, by increasing the number of opportunities authorities have to intervene in abusive relationships. Authorities would no longer have to wait until the first signs of physical abuse to intervene; instead, they may immediately intervene if they know of or are alerted to any restriction on any means of communication.

The learned helplessness theory also helps explain why a woman suffering from battered woman’s syndrome may find herself in a situation where she lacks access to a telephone or another means of communication, and how she would benefit from the proposed legislation. Although a woman who suffers from learned helplessness may not attempt to call the police even if she did have access to a telephone or other means of communication, A. 431 would allow a third party, such as another

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<sup>61</sup> *Id.*; see also Renée Callahan, *Will the “Real” Battered Woman Please Stand Up? In Search of a Realistic Legal Definition of Battered Woman Syndrome*, 3 AM. U. J. GENDER & L. 117, 125–28 (1994) (providing statistics which indicate that many women who suffer from domestic abuse increase their efforts to contact family members or friends about the violence over the period of time from the first domestic violence incident to the last).

<sup>62</sup> See Callahan, *supra* note 61, at 132–33 (“Despite her efforts, the general disinterest of society in her predicament coupled with inadequate resources routinely force her to return to her batterer.”).

<sup>63</sup> *Id.* at 131.

<sup>64</sup> See Jones, *supra* note 8, at 609.

family member of the victim, to ask the police to investigate the possibility that the victim is being forcibly secluded by her abuser. Even if the abuser is not physically keeping the victim from communicating with others, the police may discover other indications of abuse upon such an initial investigation.

Additionally, the survivor theory proffers that attempts by battered women to obtain help often go unmet.<sup>65</sup> Criminalizing the restriction of communication should increase the chances of obtaining help for a battered woman making repeated attempts to acquire assistance but who finds her efforts interrupted by the abuser who refuses her access to phone, e-mail, or other means of communication.

Domestic violence law as it stands is not satisfactory to prevent harm to victims suffering from battered woman's syndrome. New Jersey's domestic violence law includes false imprisonment and kidnapping,<sup>66</sup> both acts resulting in the isolation of the victim. There is nothing in the New Jersey statute's definition of specific offenses that would penalize a husband who doesn't allow his wife to use the telephone to contact family or friends, or to call the police when she fears an outbreak of physical violence may be imminent.<sup>67</sup> An effective way for the legislature to prevent domestic violence is by attacking such acts, which induce isolation.

### ***III. PAST ATTEMPTS BY THE LEGISLATURE TO PREVENT DOMESTIC VIOLENCE***

Punishing the restriction of communication would not only help prevent the development of battered woman's syndrome in domestic violence victims—it is also the next logical step toward the overall goal of permanently eliminating domestic violence. Past legislation has made attempts at preventing the outbreak of domestic violence, but while the methods discussed below have proven somewhat effective, each has flaws that contribute to the continued existence of domestic violence in today's society.

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<sup>65</sup> See GONDOLF & FISHER, *supra* note 60, at 11–18, *reprinted in* LEMON, *supra* note 59, at 80–87.

<sup>66</sup> N.J. Prevention of Domestic Violence Act, N.J. STAT. ANN. § 2C:25-19 (West 2005).

<sup>67</sup> *See id.*



### A. *Mandatory Arrest Legislation*

One method that law enforcement has adopted to break the abuser's control is mandatory arrest law. To determine whether legislation such as A. 431 is necessary to prevent domestic violence, it is important to discuss the effect mandatory arrest law has had in preventing such abuse.

In the beginning of the battered women's movement, one of the earliest issues discovered was the failure by the police to protect battered women from assault.<sup>68</sup> Historically, police rarely made arrests in domestic violence cases.<sup>69</sup> It wasn't until the 1970s, when women's advocacy groups became aware of the tendency of the police to avoid making arrests in domestic violence situations, that such groups began to call for a greater use of arrest.<sup>70</sup> Women's advocates began filing class-action lawsuits which raised the issue with the courts that "domestic violence was criminal, sanctionable activity that was a harm against the 'public' . . . [and] not just an individual woman."<sup>71</sup> From that litigation came the development of statutes calling for mandatory arrest in domestic violence situations.<sup>72</sup>

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<sup>68</sup> See SCHNEIDER, *supra* note 9, at 44.

<sup>69</sup> See Lawrence W. Sherman, *The Influence of Criminology on Criminal Law: Evaluating Arrests for Misdemeanor Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 1, 10 (1992). Sherman writes that it was encouraged in police training manuals and by the American Bar Association that arrest should only be used as a tool of last resort in conflicts occurring between husband and wife. *Id.* In fact, the policy a police officer was to follow when faced with a domestic violence situation was "to proceed slowly in the hope that the problem would be resolved or that a disputant would have left before they arrived." *Id.* at 10-11.

<sup>70</sup> Women's advocate groups did not call for mandatory arrest policies right away. They first addressed the issue of domestic violence and battered women by opening their homes to victims, starting shelters, and proposing legislation. Zorza, *supra* note 22, at 53. However, women became increasingly aware that their efforts would have to focus on ensuring that police were enforcing existing domestic violence laws. See *id.*

<sup>71</sup> SCHNEIDER, *supra* note 9, at 44.

<sup>72</sup> Sherman, *supra* note 69, at 10. Not only did these statutes require arrest, but they also led to the development of civil protection order provisions and the enactment of rules regarding child custody when domestic violence issues are present. SCHNEIDER, *supra* note 9, at 44. The Violence Against Women Act (VAWA), discussed later in this paper, called for domestic violence to be treated as a "serious violation of criminal law." George B. Stevenson, *Federal Antiviolence and Abuse Legislation: Toward Elimination of Disparate Justice for Women and Children*, 33 WILLAMETTE L. REV. 847, 889 (1997).

## 1. The Development of Mandatory Arrest Law

Early American law gave the husband superiority over most aspects of the marriage, because the husband “acquired rights” to his wife by law.<sup>73</sup> Even after states began enacting statutes which prohibited wife-beating, a battered wife was limited in the types of remedies she could seek; for instance, if she filed for divorce on the grounds of extreme cruelty, the husband could defeat the petition merely by showing she provoked his violence by “misbehaving.”<sup>74</sup> In addition, the state laws punishing wife-beating that were passed from 1870 up until the 1920s were primarily pretextual and were not primarily concerned with promoting women’s rights.<sup>75</sup>

Americans were becoming increasingly aware of the problem of domestic violence in the 1970s.<sup>76</sup> Domestic violence laws at that time were generally under-enforced by the police because of the common law in many states, which barred officers from making an arrest unless they were witnesses to the offense.<sup>77</sup> In cases of domestic violence, police are usually called to the scene after the actual instance of violence has taken place. Thus, under the common law, police officers were not able to make arrests because they had arrived on the scene too late. There are also indications that some police officers have personal attitudes towards domestic violence which might influence their reluctance to make any arrests.<sup>78</sup> Research indicates that the workplace culture among

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<sup>73</sup> See Reva B. Siegel, “The Rule of Love”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2122 (1996).

<sup>74</sup> See *id.* at 2133.

<sup>75</sup> See Stark, *supra* note 21, at 988. See also Siegel, *supra* note 73, at 2136–38, where Professor Siegel explains that political groups in the 1870s not known for actively supporting women’s rights began taking an interest in punishing wife-beaters. For instance, the Ku Klux Klan began using wife-beating as an excuse for assaulting black men. *Id.* at 2136. Husbands who beat their wives were characterized as deviants, and were punished by being flogged at a whipping post; but it was extremely rare that a white man would be sent to the whipping post for wife-beating. See *id.* at 2138. As Professor Siegel writes: “While advocated for the purpose of protecting women, the appeal of the whipping post lay in its capacity to break men.” *Id.*

<sup>76</sup> *Id.* at 53.

<sup>77</sup> See Sherman, *supra* note 69, at 11–12.

<sup>78</sup> See Barbara Fedders, *Lobbying for Mandatory-Arrest Policies: Race, Class, and the Politics of the Battered Women’s Movement*, 23 N.Y.U. REV. L. & SOC. CHANGE 281, 290 (1997).

many police departments "often encourages, or at least tolerates, abusive behavior among officers."<sup>79</sup>

Another problem was that law enforcement officers responded to domestic violence incidents from the standpoint of mediators rather than officers of the law. Police officers trained in conflict mediation arrived on the scene of a domestic violence call and acted as marriage counselors instead of investigating the possibility that a law had been broken.<sup>80</sup> Using conflict mediation led to a decrease in arrests.<sup>81</sup> Many police departments discouraged their officers from making arrests out of fear that an arrest might actually aggravate matters; many officers believed that if the husband was arrested, he would return home from jail angrier than before, therefore escalating the violence in the relationship.<sup>82</sup>

In response, women's advocates argued that the best way to assist battered women was to impose regulations requiring police to make arrests in domestic violence situations.<sup>83</sup> The late 1970s

<sup>79</sup> *Id.*; see also Sherman, *supra* note 69, at 11–12. Perhaps most important was the realization that police under-enforce most laws, not just laws particular to domestic violence. *Id.* Sherman writes that studies have shown "police officers ignoring burglary, larceny, malicious destruction of property, drunk driving, hit and run accidents, and a broad range of other offenses." *Id.* at 13 (citing DONALD J. BLACK, *THE MANNERS AND CUSTOMS OF THE POLICE* 94 (1980); MICHAEL K. BROWN, *WORKING THE STREET* 182–220 (1981)).

<sup>80</sup> See Sherman, *supra* note 69, at 13. Sherman describes the mediation techniques used by police officers in the 1960s:

The techniques quite sensibly included separation of the man and woman from each other and, if possible, other members of the household. Each party would then be able to give the officer her or his version of what happened without fear of being contradicted by the other party, leading to more shouting or worse. After hearing the two versions, police were supposed to consult with each other to discuss alternative actions. A preferred method was to get the two parties to calm down, sit down, and rationally discuss what would happen next. If that was not possible, officers would often advise one of the parties to leave for a cooling off period . . . . Consistent with past practice, *arrest was reserved for cases of serious injury or assaults on police.*

*Id.* (emphasis added).

<sup>81</sup> See *id.*

<sup>82</sup> See *id.* at 14–15.

<sup>83</sup> See Zorza, *supra* note 22, at 53. Zorza discusses the case *Hartzler v. City of San Jose*, 120 Cal. Rptr. 5 (Cal. Ct. App. 1975), to demonstrate how the police's failure to make arrests in domestic violence situations can have tragic consequences. *Id.* at 53–54. In *Hartzler*, a woman called the police over 20 times to complain that she and her

saw a number of successful class action lawsuits brought by feminist attorneys against police departments for failing to respond in an appropriate fashion to domestic violence calls.<sup>84</sup> Such litigation eventually led to the development of a mandatory arrest law, requiring the arrest of a suspect if the police had probable cause to believe that domestic violence had occurred.<sup>85</sup> These laws are usually accompanied by “no-drop policies,” which deny domestic violence victims the option to withdraw their complaint once formal charges have been filed against the suspect.<sup>86</sup>

One of the rationales behind mandatory arrest is that battered women often refuse to prosecute complaints after they have been filed.<sup>87</sup> Another assertion is that eliminating a police officer’s ability to use discretion on domestic violence calls reduces the possibility that the officer will be influenced by personal attitudes.<sup>88</sup> Additionally, battered women’s advocates believe that mandatory arrest is necessary to break the pattern of control that the abuser has over the battered woman, because it provides her relief from the abuse and an occasion to seek help.<sup>89</sup>

Some feminist advocates maintain that it would be better policy to continue the courts’ practice of dismissing cases when the victim decides not to participate.<sup>90</sup> These advocates recognize that raising awareness of domestic violence must be carefully

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two daughters were being abused by her husband, but the police only made an arrest once. When she again called the police and told them that the husband was coming to her house to kill her, the police told her to wait until he arrived; when the police finally arrived (after a response to a neighbor’s call), the woman’s husband had stabbed her to death. The trial court’s dismissal of the case was upheld by the California Court of Appeals, which reasoned that the police had never “induced decedent’s reliance on a promise, express or implied, that they would provide her with protection.” *Id.*

<sup>84</sup> See Fedders, *supra* note 78, at 287–88.

<sup>85</sup> See SCHNEIDER, *supra* note 9, at 184.

<sup>86</sup> *Id.* “No-drop policies” also limit the discretion of a prosecutor “to drop a case based only on the fact that the victim is unwilling to cooperate or participate.”

<sup>87</sup> *Id.* at 184–85. Women who are victims of domestic violence probably refuse to continue the prosecution of their complaint for many reasons: fear of retribution by the accused, guilt for prosecuting a loved one, or they may want to avoid having their children’s father taken away. *Id.*

<sup>88</sup> See Fedders, *supra* note 78, at 290.

<sup>89</sup> See *id.* at 289.

<sup>90</sup> SCHNEIDER, *supra* note 9, at 184.

balanced with “preserv[ing] a woman’s autonomy from excessive state intervention,” and that enforcing the no-drop policies takes the decision to prosecute away from the woman, making her feel less empowered.<sup>91</sup> But proponents of mandatory arrest legislation firmly believe that the positive results generated by the legislation outweigh any negative effects on women’s autonomy.<sup>92</sup>

## 2. Why Mandatory Arrest is an Imperfect Solution

Significant changes in police policy regarding domestic violence laws were made throughout the 1980s and into the 1990s.<sup>93</sup> This resulted in a number of states adopting mandatory arrest laws.<sup>94</sup> Studies have shown, however, that a battered woman’s safety is not ensured by the mandatory arrest of her abuser, and that her protection is secondary to society’s interest in ensuring the enforcement of criminal laws.<sup>95</sup> The studies also found that while mandatory arrest deterred abusers who were employed, it could “increase violence against victims whose abusers were

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<sup>91</sup> *Id.*

<sup>92</sup> *See id.* Schneider offers four major arguments for favoring mandatory arrest legislation and no-drop policies. *Id.* at 185. First, mandatory arrest law “further[s] the proper role of state and prosecutor in domestic violence cases.” *Id.* “The role of the prosecutor is to represent the people of the state . . . [and] the decision whether to prosecute a crime should not rest with the victims but with the state.” *Id.* Second, mandatory arrest law protects victims by removing pressures that a batterer may exert on his partner to drop the case. *Id.* Third, mandatory arrest law has a profound effect on the batterer: it not only tells the batterer that such behavior will not be tolerated, but it also prevents the batterer from manipulating the system and avoiding justice. *See id.* Lastly, such legislation sends the message that domestic violence will be treated as a serious crime and will no longer be ignored. *See id.*

<sup>93</sup> *See Fedders, supra* note 78, at 289 (“By 1994, the legislatures of twenty-three states and the District of Columbia had adopted mandatory arrest statutes, which removed police discretion in most domestic violence cases and required police officers to make arrests.” (citing Miriam H. Ruttenberg, *A Feminist Critique of Mandatory Arrest: An Analysis of Race and Gender in Domestic Violence Policy*, 2 AM. U. J. GENDER & L. 171, 180 (1994))).

<sup>94</sup> *See Stevenson, supra* note 72, at 889 (“As of August 1996, 27 states and the District of Columbia [had] adopted laws that mandate or encourage arrest of a person who assaults a family member, or of a person who violates a domestic violence protection order.” (citing VIOLENCE AGAINST WOMEN GRANTS OFFICE, U.S. DEPT. OF JUSTICE, GRANTS TO ENCOURAGE ARREST POLICIES FINAL RULE 8 (1996))).

<sup>95</sup> *See Jones, supra* note 8, at 629–30 (“Criminal prosecution primarily vindicates societal interests. The protection of the battered woman is a secondary, although important by-product of the proceedings.”).

unemployed.”<sup>96</sup> In fact, studies showing a deterrent effect may not actually indicate a decrease in the occurrence of domestic violence incidents, but rather a greater hesitation by victims to report the incidents to the police because they may believe an arrest would not help the situation—i.e. they may depend on the abuser for income.<sup>97</sup>

Another argument involves the control that a battered woman already suffers at the hands of her abuser. As shown above, mandatory arrest legislation and no-drop policies effectively take the decision to prosecute out of the hands of the victim and place it into the hands of the prosecutor. Critics of mandatory prosecution law argue that taking this decision from the victim actually does more harm than good; the decision whether to prosecute a loved one prevents an opportunity for the battered woman to take control back in a “generally powerless relationship.”<sup>98</sup> As Professor Schneider writes:

Mandatory prosecution and no-drop [policies] . . . disempower battered women by robbing them of their decision to prosecute. Not only are battered women powerless in their ability to control their relationship, but they become powerless to prevent the government from interfering in their lives. All of this hurts battered women by reinforcing the notion that they are incapable of making rational decisions, and by increasing the chance that they will be blamed for being reluctant to take action about their battering.<sup>99</sup>

Critics further argue that domestic violence victims will be less likely to call the police if doing so will lead to an automatic

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<sup>96</sup> *Id.*

<sup>97</sup> Fedders, *supra* note 78, at 291–292. Fedders explains:

After an incident of domestic violence . . . a woman might wish to call the police and have them come to her home. She might reason that a police officer could diffuse an explosive situation or frighten her batterer into ceasing his abuse. She may engage in a careful cost-benefit analysis and determine that, while police *presence* would be useful, an *arrest* would not. A woman may be dependent on the income of her batterer, for example, or she may not want their children to witness their father’s arrest. Such a woman, if aware of a mandatory-arrest policy in her jurisdiction, would likely refrain from calling the police at all, and would thereby be deprived of a potentially useful tool in her struggle to end the violence in her life.

*Id.* at 292.

<sup>98</sup> See SCHNEIDER, *supra* note 9, at 186.

<sup>99</sup> *Id.*

arrest.<sup>100</sup> Battered women are often reluctant to terminate their relationship with the batterer—because the victim still loves the abuser, is afraid of losing his financial support, or fears retaliation.<sup>101</sup> Ending the relationship with the batterer is one of the most difficult tasks for the battered woman.<sup>102</sup> Mandatory arrest law may result in the woman siding with the batterer, “further entrenching her in the abusive relationship.”<sup>103</sup>

This may even lead to the arrest of battered women who refuse to cooperate with the police.<sup>104</sup> In fact, since the introduction of mandatory arrest policies, studies have shown an increase in the arrest of women in many jurisdictions.<sup>105</sup> Recent trends in arrest data from 1993 to 2002 show surprising gender differences: arrests of males decreased 6 percent, whereas arrests of females increased 14 percent.<sup>106</sup> When examining certain offenses separately, the variance grows even wider: aggravated assaults offenses showed a 12 percent decrease in the arrest of males, whereas arrests of females increased by 25 percent; and among “other assaults,” arrests among women increased by 41 percent, while male arrests decreased by 1 percent.<sup>107</sup> This increase in the arrests of women could reflect the introduction of mandatory arrest policies and the over-enforcement of such policies by police departments. It is also possible the increase is the result of women being mistakenly arrested in domestic violence situations after engaging in self-defense, or false charges by their partners.<sup>108</sup> This data is not meant to show that women have increasingly perpetrated domestic violence crimes; instead, it

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 185.

<sup>102</sup> See WALKER, *supra* note 8, at 11 (“In fact, the most dangerous point in the domestic violence relationship is at the point of separation.”).

<sup>103</sup> SCHNEIDER, *supra* note 9, at 187.

<sup>104</sup> *Id.*

<sup>105</sup> See Sherry L. Hamby, *Measuring Gender Differences in Partner Violence: Implications from Research on Other Forms of Violent and Socially Undesirable Behavior*, 52 *SEX ROLES* 725, 735 (2005).

<sup>106</sup> *See id.*

<sup>107</sup> *Id.* However, Hamby indicates that overall, males are still arrested for assault more than three times as often as women. *Id.*

<sup>108</sup> *See id.* at 736.

illustrates the fact that police officers often arrest both parties in many domestic violence cases due to mandatory arrest laws.<sup>109</sup>

Although many women's advocates praise mandatory arrest policies for removing police discretion from domestic violence situations,<sup>110</sup> there is much distrust among feminists of the use of state mechanisms (such as mandatory arrest policies) to come to the aid of battered women. This distrust exists largely because the state has historically not been efficient in protecting women from abuse.<sup>111</sup> This feeling is especially prominent among women in the Black community, especially if they "have grown up in a community with an excessive police presence," for they may have become suspicious of police motives, and developed feelings of fear and concern for loved ones (abusers included) who have been arrested.<sup>112</sup> It has been argued that while mandatory arrest policies may not always be an inappropriate response, they still present problems that are unique to Black women and other women of color who may have developed a mistrust of the police.<sup>113</sup>

### B. *The Violence Against Women Act*

The Violence Against Women Act ("VAWA") is the first federal legislation to specifically target the problem of violence against women.<sup>114</sup> The primary purpose of VAWA is to provide local authorities with the resources to protect women from assaults by spouses or partners, and for acts of rape.<sup>115</sup> In addition, VAWA

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<sup>109</sup> See *id.* at 735.

<sup>110</sup> See Fedders, *supra* note 78, at 289 ("Battered women's advocates . . . have a deep mistrust of police discretion, because they believe that discretion provides police with a justification for crediting not the victim but the batterer." (citing Sarah M. Buel, *Mandatory Arrest for Domestic Violence*, 11 HARV. WOMEN'S L.J. 213, 217 (1988))).

<sup>111</sup> See SCHNEIDER, *supra* note 9, at 184; see also Fedders, *supra* note 83, at 292 ("[F]or significant numbers of women, the state is not a source of comfort but a cause for mistrust or anger.").

<sup>112</sup> See Fedders, *supra* note 78, at 292-93.

<sup>113</sup> *Id.* "Women must have the right to receive effective police assistance when they are suffering abuse, no matter from whom. This assertion is particularly important for Black women, who face a historic presumption by police that their race predisposes them to enjoy violence." *Id.* at 294.

<sup>114</sup> See SCHNEIDER, *supra* note 9, at 188.

<sup>115</sup> See Siegel, *supra* note 73, at 2196.



contains multiple provisions that represent attempts by the federal legislature to raise awareness of the existence of violence against women.<sup>116</sup> However, VAWA has not been without its share of criticism, as some believe its approach actually discriminates against men.<sup>117</sup> The possibility also exists that VAWA may not be reauthorized,<sup>118</sup> which is why there is a need for additional legislation to protect domestic violence victims, such as legislation penalizing communication impairment. Furthermore, the most significant provision of VAWA, which provides a civil rights remedy for female victims of domestic violence, was declared unconstitutional by the U.S. Supreme Court in *United States v. Morrison*.<sup>119</sup>

### 1. The Failure of VAWA's Civil Rights Remedy

VAWA was passed in 1994, and in 2000 Congress reauthorized it to include crimes of dating violence and stalking, to create a legal assistance program for victims of domestic violence and assault, to promote supervised visitation programs for families experiencing violence, and to expand the protection of immigrants experiencing domestic violence.<sup>120</sup> VAWA has been effective in combating domestic violence, dating violence, sexual assault, and stalking.<sup>121</sup> The Act was reauthorized again in 2005 to

<sup>116</sup> The provisions introduced in VAWA include: funding for women's shelters; establishment of the National Domestic Violence Hotline; rape education and prevention programs; and training for federal and state judges. SCHNEIDER, *supra* note 9, at 188. VAWA is the most publicized portion of the Violent Crime Control and Law Enforcement Act, a comprehensive piece of federal legislation intended "to allow grants to increase police presence, to expand and improve cooperative efforts between law enforcement agencies and members of the community to address crime and disorder problems, and otherwise to enhance public safety . . ." Stevenson, *supra* note 72, at 855-56.

<sup>117</sup> See *infra* Part II.

<sup>118</sup> See *infra* Part II.

<sup>119</sup> 529 U.S. 598 (2000). See *infra* Part II (discussing *United States v. Morrison*).

<sup>120</sup> NATIONAL TASK FORCE TO END SEXUAL AND DOMESTIC VIOLENCE AGAINST WOMEN, THE VIOLENCE AGAINST WOMEN ACT: 10 YEARS OF PROGRESS AND MOVING FORWARD [hereinafter *Task Force*], <http://www.ncadv.org/files/OverviewFormatted1.pdf>

<sup>121</sup> See *id.* Highlights of VAWA since it was first passed in 1994 include: the passing of more than 660 laws to combat domestic violence, sexual assault, and stalking; success of the National Domestic Violence Hotline, which has answered over 1 million calls since its creation in 1996; and the establishment of Employee Assistance Programs that help victims of domestic violence by hundreds of companies,

further expand on the progress it had achieved in the 10 years since its inception.<sup>122</sup>

Probably the most innovative aspect of VAWA (and the most controversial) was its development of a civil rights remedy for gender violence.<sup>123</sup> The birth of the VAWA civil rights remedy can be traced back to the 1970s and the 1980s, which saw great advances in equality for women in employment, education, family and criminal law.<sup>124</sup> Despite the increase in opportunities, women were still vulnerable to acts of domestic violence. The advances women had already made could still be effectively neutralized by continued acts of domestic violence against them.<sup>125</sup> There was also a concern that the state was not adequately protecting women against such violence.<sup>126</sup> Recognizing these concerns, VAWA's proponents included within the Act the federal civil rights remedy for victims of gender-motivated violence.<sup>127</sup> This made the Act the first law to ever explicitly link violence with equality.<sup>128</sup> The crux of the civil rights remedy is that "crimes [that are] motivated by the

including Polaroid, Liz Claiborne, and DuPont. *Id.* Additionally, since the inception of VAWA more victims have been reporting domestic violence—in 1998, up to 59 percent of women who were victims of violence by a domestic partner reported the crime, an increase from 48 percent in 1993. *Id.*

<sup>122</sup> The goals VAWA 2005 sought to achieve included improving the response to violence against Native American women, and the elimination of domestic violence and dating violence against teens and children. *Id.*

<sup>123</sup> See SCHNEIDER, *supra* note 9, at 188–96.

<sup>124</sup> See Victoria F. Nourse, *Where Violence, Relationship, and Equality Meet: The Violence Against Women Act's Civil Rights Remedy*, 11 WIS. WOMEN'S L.J. 1, 5 (1996).

<sup>125</sup> See *id.* As Nourse explains:

Would a law guaranteeing equal pay mean much to a woman whose husband beat her when she tried to leave the house for a job interview? Would a sex-neutral divorce law help a woman who, when she tried to leave her husband, was stalked and threatened into returning? Would a gender-neutral rape law mean much to a woman, raped by a date, if the prosecutor refused to bring her case? In a sense, violence against women was the ultimate weapon against gender equality—it could wipe out in a single blow any and every advance in opportunity created by over twenty years of law reform.

*Id.* at 5.

<sup>126</sup> See Siegel, *supra* note 73, at 2196; see also SCHNEIDER, *supra* note 9, at 192 ("The deeply gendered nature of domestic violence . . . is something that is easy for judges to deny without substantial education, particularly in the light of the new move toward seeing intimate violence in the context of gender neutrality.").

<sup>127</sup> See Siegel, *supra* note 73, at 2196.

<sup>128</sup> See SCHNEIDER, *supra* note 9, at 188.

victim's gender constitute bias crimes in violation of the victim's right to be free from discrimination on the basis of gender."<sup>129</sup>

VAWA states that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender."<sup>130</sup> The statute was supported by findings that "gender-motivated violence affects interstate commerce 'by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce . . . .'"<sup>131</sup> Gender based violence has an impact on gender equality, which is the underlying premise of the VAWA. Also, because female victims of domestic violence have been treated less-than-fairly by state courts in the past, a remedy declaring all crimes motivated by gender a violation of a person's civil rights is necessary to ensure justice for female victims of domestic violence.<sup>132</sup>

While the VAWA civil rights remedy provided female domestic violence victims with a level of protection they had never been afforded before,<sup>133</sup> its addition to the Act drew a great deal of criticism.<sup>134</sup> Critics of VAWA questioned whether "domestic" matters were deserving of federal jurisdiction.<sup>135</sup> One argument answering such critics is that because women are afforded a right to be free from gender-motivated violence, violence against women should be redefined as the violation of a federally protected civil right.<sup>136</sup> Other legislators took the position that because other forms of discrimination against women—in the employment context, for example—are already prohibited, that protecting a woman's civil right to be free from gender violence is simply an embodiment of the prohibition of more violent forms of discrimination against women.<sup>137</sup> Finally, critics argued that VAWA's civil rights remedy was that the creation of a federal cause

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<sup>129</sup> Siegel, *supra* note 73, at 2197.

<sup>130</sup> 42 U.S.C. § 13981(b) (2000).

<sup>131</sup> *United States v. Morrison*, 529 U.S. 598, 615 (2000) (citing H.R. Conf. Rep. No. 103-711, at 385).

<sup>132</sup> See SCHNEIDER, *supra* note 9, at 190.

<sup>133</sup> See Siegel, *supra* note 73, at 2197.

<sup>134</sup> See Nourse, *supra* note 124, at 5.

<sup>135</sup> SCHNEIDER, *supra* note 9, at 188.

<sup>136</sup> *Id.*

<sup>137</sup> See *id.* at 189.

of action to protect women from domestic violence would “flood the federal courts with cases the federal judiciary was ill-equipped to handle.”<sup>138</sup>

*Brzonkala v. VP* examined the constitutionality of the VAWA’s civil rights remedy.<sup>139</sup> The Fourth Circuit held that the civil rights remedy was unconstitutional on the grounds that Congress had overreached its power under the Commerce Clause and under the Fourteenth Amendment.<sup>140</sup> The Supreme Court affirmed the Fourth Circuit’s decision on certiorari in *United States v. Morrison*, and invalidated VAWA’s civil rights provision on two grounds: that gender-motivated domestic violence crimes are not considered economic activity, and therefore Congress did not have the authority to enact a civil rights provision such as VAWA’s under

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<sup>138</sup> Siegel, *supra* note 73, at 2197.

<sup>139</sup> Christy Brzonkala brought an action under VAWA in federal district court against Virginia Tech football players Antonio Morrison and James Crawford. Brzonkala met Morrison and Crawford in the dormitory she resided in. Not even a half hour after they met, Brzonkala was raped, first by Morrison and then by Crawford. When Crawford finished, Morrison raped her again, afterwards warning her that she “better not have any fucking diseases.” Brzonkala suffered severe distress in the months following the rape, attempted suicide, and later sought a retroactive withdrawal from Virginia Tech. Months later, she filed a complaint against Morrison and Crawford under the school’s sexual harassment policy. The judicial committee did not find sufficient evidence against Crawford, but did find Morrison guilty of sexual assault, and suspended him for one school year. Morrison appealed the decision, claiming his due process rights had been denied, and that he had been dealt an unduly harsh punishment. The judicial committee again found Morrison guilty. Morrison appealed a second time and was successful, as the Senior Vice President of the university found the punishment excessive when compared with other cases. Morrison was allowed to return to the school on a full athletic scholarship. Brzonkala then filed this action against Morrison, Crawford, and Virginia Tech, alleging, among other claims, that Morrison and Crawford’s gang rape was a violation of VAWA. *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 169 F.3d 820 (4th Cir. 1999).

<sup>140</sup> See SCHNEIDER, *supra* note 5, at 193. The Commerce Clause of the Constitution covers congressional power to regulate interstate commerce. U.S. CONST. art. I, § 8, cl. 3. Because VAWA does not regulate a commercial economic activity, the Fourth Circuit held that the civil rights remedy of the Act exceeded Congress’s authority “to regulate Commerce . . . among the several states . . . .” *Brzonkala*, 169 F.3d at 836 (citing *United States v. Lopez*, 514 U.S. 549, 551 (U.S. 1995)). The enforcement clause of the Fourteenth Amendment provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1.

the Commerce Clause; and that the provision exceeded Congress's power under § 5 of the Fourteenth Amendment.<sup>141</sup>

Although VAWA's civil rights remedy was declared unconstitutional, the provisions of the statute providing program funding remain unaffected. The statute has still made significant contributions to the fight against domestic violence by continuing to provide funding for women's shelters and creating a number of rape education and prevention programs.<sup>142</sup> These programs, along with a number of new services created to assist domestic violence victims, were reauthorized in 2005.<sup>143</sup> Arguments have been made that VAWA's provisions are excessively feministic—so much, in fact, that they actually discriminate against men.<sup>144</sup> It has been claimed that many of the programs initiated under VAWA operate on the presumption that men are the perpetrators in domestic violence disputes, when in fact men and women initiate such disputes at an almost equal rate.<sup>145</sup> Some say that by operating on this false presumption, the court ignores separate, but equally important, problems that may exist; such as cases of mutual abuse, or perhaps an addiction to violence by one of the partners.<sup>146</sup> It is also alleged that the only solution that many programs under VAWA offer is to isolate the husband from the rest of the family, effectively destroying any chance at rehabilitating the family unit.<sup>147</sup> Jailing the husband and not offering a woman any other choice but to leave him may actually worsen the family situation because

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<sup>141</sup> See *Morrison*, 529 U.S. 598. Holding that VAWA's civil rights provision violated § 5 because it applied to private individuals, and not to state officials.

<sup>142</sup> See SCHNEIDER, *supra* note 9, at 188.

<sup>143</sup> See NATIONAL TASK FORCE TO END SEXUAL AND DOMESTIC VIOLENCE AGAINST WOMEN, THE VIOLENCE AGAINST WOMEN ACT: REAUTHORIZATION 2005, <http://www.ncadv.org/files/VAWAreauthFormatted.pdf>.

<sup>144</sup> See Gordon E. Finley, *Fatal Flaws: VAWA 2005*, WASH. TIMES, July 19, 2005, at A14. Finley claims that VAWA could not be permitted under Title IX of the Education Amendments of 1972, which prohibits sexual discrimination in educational programs. *Id.* Finley writes: "VAWA application forms explicitly state programs providing services for men need not apply. Nor are there requirements that women (who initiate one-half of the [domestic violence] disputes) take anger management classes to work out their differences equitably with men." *Id.*

<sup>145</sup> Research has shown that both men and women initiate domestic violence disputes at near equal rates. See *id.*

<sup>146</sup> See Trudy W. Schuett, *Betrayal of Women—VAWA 2005*, June 15, 2005, <http://www.ifeminists.net/introduction/editorials/2005/0615schuett.html>.

<sup>147</sup> Finley, *supra* note 144.

of the possibility that the husband may return to the family from jail even angrier and more abusive than he was before.<sup>148</sup>

Since VAWA's inception, there can be no doubt that society has become more aware of issues regarding domestic violence, dating violence, sexual assault, and stalking.<sup>149</sup> There can also be little doubt as to the continued validity of criticism regarding VAWA's civil rights remedy, its highly feminist approach, and its potential to tear apart the family unit in less serious cases. As long as these issues continue to linger, the unlikely possibility that Congress will not reauthorize VAWA in 2010 will still exist.

Women trapped in abusive relationships need additional legislation to further protect them against domestic violence. When the federal civil rights remedy providing for harsher criminal sanctions against abusers was declared unconstitutional, the real teeth of the statute were, for all intents and purposes, removed. The provisions of VAWA that provide program funding could be used in tandem with law that criminalizes the restriction of communication and broadens the scope of what could be classified as domestic violence; this would effectively restore the criminalization of domestic violence that VAWA attempted with its civil rights remedy, without the constitutionality issues.

#### ***IV. HOW THE PROPOSED LEGISLATION CAN ASSIST DOMESTIC VIOLENCE VICTIMS IN JURISDICTIONS WHERE TESTIMONY REGARDING BATTERED WOMAN'S SYNDROME IS INADMISSIBLE***

As discussed earlier, enacting A. 431 and providing criminal penalties for the restriction of communication would make New Jersey the first state in the country that explicitly punishes such restrictions as domestic violence acts. By proposing such legislation, New Jersey lawmakers are taking a more proactive stance on preventing domestic violence crimes.

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<sup>148</sup> See Schuett, *supra* note 146. Arguing that there is no positive impact made on intimate partner abuse by removing women from their homes and throwing the husbands in jail. *Id.* Such presumptions ignore opportunities for men and women who wish to live together and raise their families, and, as a result, families are destroyed instead of saved. *See id.*

<sup>149</sup> See Task Force, *supra* note 120.

In 1984 the New Jersey Supreme Court became the first court to hold that testimony of battered woman's syndrome was admissible to help explain the mental state of a woman who had been subject to years of domestic abuse.<sup>150</sup> Some courts have been hesitant to follow in New Jersey's footsteps, resulting in some domestic violence victims being deprived of the right to use battered woman's syndrome when pleading self-defense.<sup>151</sup> Legislation criminalizing the restriction of communication will aid victims in such jurisdictions, by providing those courts with another means of finding that the abuser has committed an act of domestic violence. Also, in these jurisdictions, the legislation would allow law enforcement to intervene and interrupt the cycle of abuse in domestic violence relationships, which would likely prevent any need for the use of testimony of battered woman's syndrome. The development of the syndrome would already have been interrupted by not allowing the abuser to isolate his victim by cutting off her communication.

#### A. *State v. Kelly*: Testimony Regarding Battered Woman's Syndrome is Allowed for the First Time

In a domestic violence situation a battered woman may sometimes resort to the use of physical force in order to defend herself against the batterer, which may result in criminal charges being brought against her.<sup>152</sup> When a battered woman faces assault or even homicide charges, she often pleads self-defense, thereby raising the issue as to what extent evidence of the psychological impact of the battering can be used to show that the battered woman acted reasonably.<sup>153</sup>

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<sup>150</sup> *State v. Kelly*, 478 A.2d 364 (N.J. 1984).

<sup>151</sup> This Note will discuss three cases in particular: *United States v. Willis*, 38 F.3d 170 (5th Cir. 1994); *McMaugh v. State*, 612 A.2d 725 (R.I. 1992); and *People v. White*, 70 N.Y.S.2d 727 (N.Y. Misc. 2004).

<sup>152</sup> Mary Ann Dutton, U.S. DEPARTMENT OF JUSTICE, VALIDITY OF "BATTERED WOMAN SYNDROME" IN CRIMINAL CASES INVOLVING BATTERED WOMEN, (Malcolm Gordon ed. 1996), reprinted in *LEMON*, *supra* note 59, at 667.

<sup>153</sup> SCHNEIDER, *supra* note 9, at 79. Reasonableness is one of the premises of a valid self-defense claim—"a battered woman who claims that she acted in self-defense must show that she acted reasonably." *Id.* Mary Ann Dutton delves further into the elements of a self defense claim in situations involving battered women:

The elements of self-defense in situations where the effects of battering are particularly relevant require that the defendant reasonably believed

An early problem facing women bringing self-defense claims was that women were not seen as behaving reasonably in such situations—in fact, they were viewed as inherently unreasonable;<sup>154</sup> for instance, the battered woman sometimes retaliates against her abuser at a time when danger of physical harm is no longer imminent, or when retaliation by force may no longer be immediately necessary.<sup>155</sup> The common law view in self-defense cases was based on the idea that only men behaved reasonably in domestic violence incidents,<sup>156</sup> therefore, a woman's self defense claim was less likely to be successful, and in many cases they would be forced to plead temporary insanity or manslaughter.<sup>157</sup>

Feminist lawyers responded to this dilemma by arguing for the admission of expert testimony regarding the psychological effects of battering on women—battered woman's syndrome—to show that the battered woman's belief that she was at risk of imminent harm was reasonable and the use of force was necessary, even if her abuser was not attacking her at the precise moment of the incident in question.<sup>158</sup> The New Jersey Supreme Court concluded that the introduction of such evidence was necessary and would be admissible,<sup>159</sup> in the landmark case *State v. Kelly*.

Gladys Kelly was convicted of reckless manslaughter after stabbing her husband to death with a pair of scissors.<sup>160</sup> One of the

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(a) that deadly force was necessary to protect herself or others against death or serious bodily harm used or threatened by the batterer and (b) that the use of force was immediately necessary to protect against death or serious bodily injury . . . . [E]vidence and testimony may be introduced to assist the triers of fact in deliberations concerning the specific elements of self-defense.

Dutton, *supra* note 152, at 667.

<sup>154</sup> See SCHNEIDER, *supra* note 9, at 79.

<sup>155</sup> See Dutton, *supra* note 152, at 670–71 (discussing how a battered woman's appraisal of possible violence is based on a pattern of exposure to violence by her abuser on previous occasions).

<sup>156</sup> See SCHNEIDER, *supra* note 9, at 79.

<sup>157</sup> *Id.*

<sup>158</sup> See *id.* at 80, 125.

<sup>159</sup> *Id.* at 80.

<sup>160</sup> *State v. Kelly*, 478 A.2d 364, 368 (N.J. 1984). Domestic violence was prominent in the Kellys' marriage almost immediately after they exchanged vows. *Id.* at 369. Throughout the duration of their seven-year marriage, Ms. Kelly was subject to her husband's beatings almost once a week. *Id.* Often, the beatings took place when Mr. Kelly was under the influence of alcohol, and were accompanied by threats that he would kill her or cut off parts of her body. *Id.* One day, Mr. Kelly began to beat Ms.



issues raised by Ms. Kelly's counsel on appeal was that "the trial court erred in excluding expert testimony on . . . battered-woman's syndrome."<sup>161</sup> At trial, the judge conducted an in-depth and lengthy examination of an expert who offered testimony on how the effects of battered woman's syndrome could be used to explain Ms. Kelly's state of mind during the stabbing incident.<sup>162</sup> The trial judge ultimately concluded, however, that the testimony on battered woman's syndrome did not meet New Jersey's standards for scientific testimony, and therefore was not relevant to Ms. Kelly's self defense claim.<sup>163</sup>

The New Jersey Supreme Court disagreed, holding that expert testimony regarding battered woman's syndrome would be admissible in determining the relevance of Ms. Kelly's self-defense claim.<sup>164</sup> First, the court found that the testimony was necessary in determining Ms. Kelly's credibility:

Dr. Veronen [the expert witness] would have bolstered Gladys Kelly's credibility. Specifically, by showing that her experience, although concededly difficult to comprehend, was common to that of other women who had been in similarly abusive relationships, Dr. Veronen would have helped the jury understand that Gladys Kelly could have honestly feared that she would suffer serious bodily harm from her husband's attacks, yet still remain with him. This, in turn, would support Ms. Kelly's testimony about her state of mind (that is, that she honestly feared serious bodily harm) at the time of the stabbing.<sup>165</sup>

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Kelly in public. *Id.* The court's account of what took place was Ms. Kelly's version of what happened, which the court believed the jury could have accepted:

After walking past several houses, Mr. Kelly, who was drunk, angrily asked [Mrs. Kelly,] "What the hell did you come around here for?" He then grabbed the collar of her dress, and the two fell to the ground. He choked her by pushing his fingers against her throat, punched or hit her face, and bit her leg.

*Id.* Out of fear that her husband was going to kill her, Ms. Kelly pulled a pair of scissors out of her pocketbook and stabbed him. *Id.* Mr. Kelly soon afterwards died from the stab wounds. *Id.* at 368.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 368, 372-73.

<sup>163</sup> *Id.* at 368.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 375.

The court also found the expert testimony to be critical in determining the reasonableness of Ms. Kelly's belief that she was facing death or serious injury.<sup>166</sup>

But perhaps the most important reason, according to the Supreme Court, for the admission of testimony on battered woman's syndrome was to address the myth that a battered woman is free to leave the abusive relationship at any time; that the abuse could not have been that bad because she remained in the relationship; or that she even enjoyed the beatings.<sup>167</sup> Testimony on battered woman's syndrome would serve to debunk these myths:

The expert could clear up these myths, by explaining that one of the common characteristics of a battered wife is her *inability* to leave despite such constant beatings; her "learned helplessness"; her lack of anywhere to go; her feeling that if she tried to leave, she would be subjected to even more merciless treatment; her belief in the omnipotence of her battering husband; and sometimes her hope that the husband will change his ways.<sup>168</sup>

The Supreme Court felt that it was important to dispel the widespread belief of these myths at the time of trial, which had even taken hold of the prosecution in the case.<sup>169</sup>

Since that decision, numerous courts have followed *State v. Kelly* and have held that testimony regarding battered woman's

<sup>166</sup> *Kelly*, 478 A.2d at 377.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> The court discusses how the prosecution attempted to reinforce these myths about battered women:

On cross-examination, when discussing an occasion when Mr. Kelly temporarily moved out of the house, the State repeatedly asked Ms. Kelly: "You wanted him back, didn't you?" The implication was clear: domestic life could not have been too bad if she wanted him back. In its closing argument, the State trivialized the severity of the beatings, saying:

I'm not going to say they happened or they didn't happen, but life isn't pretty. Life is not a bowl of cherries. We each and every person who takes a breath has problems. Defense counsel says bruised and battered. Is there anyone of us who hasn't been battered by life in some manner or means?

Even had the State not taken this approach, however, expert testimony would be essential to rebut the general misconceptions regarding battered women.

*Id.* at 377-78.

syndrome should or will be admissible in issues involving domestic violence.<sup>170</sup>

*B. The Proposed Legislation Would Further Assist Domestic Violence Victims who are not Protected by the Holding in State v. Kelly*

Despite the holding of *State v. Kelly*, many courts in other states still do not always allow admission of testimony regarding battered woman's syndrome in self-defense or duress claims. In *United States v. Willis*,<sup>171</sup> for example, a Texas woman was arrested after selling marijuana to an undercover police officer, and being found in possession of a semi-automatic pistol.<sup>172</sup> She raised a claim of duress at her trial, alleging that her boyfriend had forced her to carry out the drug transaction and carry the pistol, and that she did as she was told because she feared her boyfriend based on a history of beatings.<sup>173</sup> Her defense council sought to introduce testimony regarding battered woman's syndrome, but the court disallowed it, finding that evidence of the syndrome in this case was irrelevant.<sup>174</sup>

Courts before the *Willis* decision have stated that evidence of battered woman's syndrome was relevant to a duress claim.<sup>175</sup> The

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<sup>170</sup> See, e.g., *State v. Townsend*, 186 N.J. 473 (N.J. 2006) (finding that characteristics of battered women who either have or have not been diagnosed with battered woman's syndrome are reliable to support expert testimony of the syndrome to the jury); *State v. Koss*, 551 N.E.2d 970 (Ohio 1990) (finding that expert testimony regarding battered woman's syndrome should be admitted); *United States v. Brown*, 891 F. Supp. 1501 (D. Kan. 1995) (finding that evidence of battered woman's syndrome would assist the jury in determining defendant's state of mind when considering her conviction for drug trafficking); *People v. Wilson*, 487 N.W.2d 822 (Mich. Ct. App. 1992) (finding that testimony of defendant's battered woman's syndrome relevant in considering her self-defense claim); *State v. Wilkins*, 407 S.E.2d 670 (S.C. Ct. App. 1991) (reversing defendant's conviction of voluntary manslaughter because the trial court refused to allow evidence of defendant's battered woman's syndrome).

<sup>171</sup> 38 F.3d 170 (5th Cir. 1994).

<sup>172</sup> *Id.* at 173.

<sup>173</sup> *Id.* at 174.

<sup>174</sup> *Id.* at 177.

<sup>175</sup> See *People v. Romero*, 26 Cal. App. 4th 315, 326 (Cal. Ct. App. 1992) (stating that "a rule permitting expert testimony about [battered woman's syndrome] in a self-defense case must necessarily permit it in a case where duress is claimed as a defense.").

*Willis* court found such evidence to be irrelevant because “the expert testimony . . . dealt with . . . subjective perceptions stemming from the battered woman’s syndrome.”<sup>176</sup> Because the jury was allowed to hear all of the objective evidence that was permitted by the defendant’s duress claim, the *Willis* court believed the jury had all the evidence necessary to find the defendant guilty, and upheld her conviction.<sup>177</sup>

It is evident that domestic violence victims suffer abuses that go beyond mere physical harm. Analysis of battered woman’s syndrome makes it clear that the psychological abuse the victim suffers is often just as damaging as any physical abuse.<sup>178</sup> However, because current domestic violence law offers no remedy for the psychological abuses, a domestic violence victim currently cannot benefit from the protections of such laws unless the abuse proceeds to the point of inflicting physical harm. Additionally, domestic violence victims cannot rely on the courts for protection against the psychological harms suffered from isolation, because differences may always exist among the courts regarding expert testimony on battered woman’s syndrome. While a battered woman in one jurisdiction may benefit from a court’s judgment allowing such testimony to explain her mental state as the result of domestic violence abuse, another court may not allow the same type of testimony, placing a victim under that court’s jurisdiction at a distinct disadvantage in presenting a legitimate self-defense claim.

Legislation impairing another’s means of communication is the next logical step in the deterrence of domestic violence, and could drastically minimize the psychological harms resulting from such violence. Such legislation may be necessary in order to protect the domestic violence victim against the harms of both physical and mental abuse. If there were laws in place that declared the restriction of communication an act of domestic violence, in some cases the abuse could be halted before the victim suffers from further harm, and other consequences that may result from prolonged involvement in an abusive relationship.

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<sup>176</sup> *Willis*, 38 F.3d at 177.

<sup>177</sup> *Id.*

<sup>178</sup> See SCHNEIDER, *supra* note 9, at 65.

1. *McMaugh v. State*<sup>179</sup>

In *McMaugh v. State*, a Rhode Island man was shot and killed outside of a restaurant, and defendant *McMaugh* and her husband were subsequently both found guilty of first-degree murder and sentenced to life in prison.<sup>180</sup> After the court denied the appeal of their convictions,<sup>181</sup> *McMaugh* filed an application for postconviction relief, claiming that she was the victim of battered woman's syndrome.<sup>182</sup> The defendant alleged she suffered physical and mental abuse at the hands of her husband, and that as a result of such abuse, she was coerced into giving false testimony before and at trial that portrayed the events of the murder in a way that was favorable to the husband, but prejudicial to her interests.<sup>183</sup>

Originally, only *McMaugh's* husband had been charged with first-degree murder.<sup>184</sup> *McMaugh* alleged that after her husband was released on bail after the murder, he accused her of the shooting; and night after night, often until 2 A.M., he forced her to rehearse a version of the events which depicted the defendant as the shooter.<sup>185</sup> The rehearsals went on for several months, until the defendant became numb from exhaustion.<sup>186</sup> *McMaugh* testified before the grand jury, reciting her husband's descriptions of the events, and the case was resubmitted and indictments were returned against both the defendant and her husband.<sup>187</sup> The husband blamed *McMaugh* for the indictments, and the forced rehearsals continued to the point where *McMaugh* was so

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<sup>179</sup> 612 A.2d 725 (R.I. 1992).

<sup>180</sup> *Id.* at 726. The defendant's husband had gotten into an argument with a man, Gregory Dube, who had been speaking with the defendant. *Id.* After the argument, defendant and her husband left for home, and later returned to the restaurant with two handguns. *Id.* There was another argument between the husband and Dube, and two shots were fired from the car defendant and her husband had been sitting in. *Id.* The second shot killed Dube. *Id.* In addition to murder in the first degree, defendant and her husband were also found guilty of conspiracy and carrying a pistol without a license. *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 727.

<sup>183</sup> *Id.*

<sup>184</sup> *McMaugh*, 612 A.2d at 727-28.

<sup>185</sup> *Id.* at 728.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

exhausted she “would react [to the rehearsals] by sitting and staring at her husband.”<sup>188</sup> After McMaugh’s testimony at trial, both she and her husband were convicted.<sup>189</sup>

During the rehearsals, the husband restricted McMaugh’s use of the telephone, and often prevented her from communicating with anyone else.<sup>190</sup> Now reconsider the events of the case if a law restricting communication had been in place. Such law would have two main effects upon the case. First, every instance that McMaugh’s husband restricted her use of the phone would be considered an act of domestic violence. The husband could have been charged with committing such an act and penalized, either by some form of restraining order or possibly jail time. The night-after-night rehearsals would have been interrupted, which is important in this particular case because it was precisely the repeated pattern of non-stop rehearsals which contributed to the defendant’s mental abuse, forcing her into a numbed state of mind where she would have testified as to anything her husband told her to recite.<sup>191</sup> McMaugh could have possibly avoided being charged and convicted of first-degree murder along with her husband. Unfortunately, the abuse resulting from the rehearsals was allowed to continue, which contributed to the development of McMaugh’s battered woman’s syndrome.<sup>192</sup> This ultimately resulted in her testifying to whatever her husband told her to repeat, leading to her murder conviction.<sup>193</sup>

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<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 726.

<sup>190</sup> *McMaugh*, 612 A.2d at 728 (“One time [during the rehearsals] she attempted to call the police, but he grabbed the telephone away from her and smashed it to pieces.”). Also, the husband often refused to allow their own attorney to speak to the defendant when he was not present. *Id.* at 730 (“Once he was released on bail, he insisted on being present at every meeting Attorney Cicilline had with McMaugh. The husband would refuse to leave the room when asked to do so, he did all the talking and McMaugh, said very little other than to agree with him . . . Cicilline advised McMaugh not to come forward with the accident story because it did not make sense and because the forensic expert evidence would wholly discredit the story.”).

<sup>191</sup> *See id.* at 728.

<sup>192</sup> *See id.* at 729.

<sup>193</sup> McMaugh also suffered physical abuse at the hands of her husband. *Id.* at 728 (“If McMaugh did not answer a question to the satisfaction of her husband, he would verbally berate her or hit her.”). Of course, the physical abuse described in the *McMaugh* case would be considered acts of domestic violence.

Fortunately for McMaugh, the court considered expert testimony that she had suffered from battered woman's syndrome and was forced to give the false testimony; her appeal was sustained and the case was remanded for a new trial.<sup>194</sup> In jurisdictions that do not allow the admittance of such evidence, a law that includes impairing another person's means of communication as an act of domestic violence could help persuade a court to allow admission of such expert testimony in cases where the court would otherwise find the testimony inadmissible.

## 2. *People v. White*<sup>195</sup>

*People v. White* involved a New York man charged with assault, and the prosecution sought an expert's testimony regarding battered woman's syndrome.<sup>196</sup> The defendant was alleged to have caused the complainant to suffer bruised ribs and a fractured coccyx after he had stomped on her groin.<sup>197</sup> A number of other incidents were before the court, including a complaint where the defendant refused to allow complainant to use her own cell phone.<sup>198</sup> The prosecution sought the introduction of expert testimony on battered woman's syndrome in order to explain the complainant's behavior; particularly why she waited three months before reporting the assault, and why she believed the defendant's threats to kill her if she were ever to report him to the police.<sup>199</sup> The court, however, disallowed such testimony, saying that it would only be proper "'to explain behavior on the part of the [complainant] that might seem unusual to a lay jury unfamiliar with the patterns of response exhibited' by a person who has been physically and sexually abused over a period of time[.]"<sup>200</sup> The court did not find any of the facts alleged in the complainant's assault claim to be "outside of a jury's common sense and logic,

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<sup>194</sup> *Id.* at 733–34.

<sup>195</sup> 70 N.Y.S.2d 727 (N.Y. Misc. 2004).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 798.

<sup>198</sup> *Id.* at 798 n.1 (“[D]efendant is alleged to have made numerous telephone calls to the complainant, removed her cell phone, and threatened to slash her face . . .”).

<sup>199</sup> *Id.* at 801.

<sup>200</sup> *Id.*

and therefore . . . [saw] . . . no reason for permitting . . . testimony on [battered woman's syndrome] . . . ."<sup>201</sup> Perhaps more importantly, the court found that the admission of testimony on battered woman's syndrome would bear no relevance to the complainant's assault charge, stating that the complainant's state of mind was not an issue.<sup>202</sup> In fact, the court found that admission of the testimony would have a prejudicial effect on the jury, and that there was no proof that a battering relationship had existed, or that the defendant was in fact a batterer.<sup>203</sup>

It is on this particular point where criminalizing the restriction of another's means of communication could come to the aid of the complainant in *White*. One of the incidents pending before the court was removal of the complainant's cell phone. If legislation similar to A. 431 was law in this particular jurisdiction, restricting the complainant's access to an electronic communications device such as a cellular phone would have afforded the complainant the protections of domestic violence law that includes the restriction of communication as an act of domestic violence. The complainant would then have been able to bring a domestic violence claim against the defendant at that time; and when the assault claim in *White* was later brought by the complainant, the prosecution would then have evidence that the defendant had a history of committing acts of domestic violence (or at least that defendant had at one time been charged with domestic violence). The prosecution may have even been able to bring a domestic violence claim instead of or in addition to the assault charge. Either way, the court would likely no longer foreclose the admission of testimony regarding battered woman's syndrome because the prosecution would have had the ability to establish a pattern of domestic violence by the defendant.

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<sup>201</sup> *White*, 70 N.Y.S.2d at 801.

<sup>202</sup> *Id.* at 802.

<sup>203</sup> *Id.*

Expert testimony regarding the symptoms of a battered person leads to the unavoidable conclusion that the complainant suffers from BWS, which presupposes and speculates on the existence of a batterer. Since there is no evidence that any other person other than the defendant was involved in a relationship with the complainant during the relevant time period, such testimony amounts to an opinion that the defendant was and is in fact a batterer.

*Id.* at 802-03.



C *The Proposed Legislation Would Have a Deterrent Effect on Potential Abusers*

Adding the restriction of communication to the list of acts that constitute domestic violence would reduce the number of abusive relationships and their duration. First, criminalizing such acts is likely to have a deterrence effect on potential abusers. As Dr. Walker indicates, the battering relationship often involves a man who is insecure: "Men who are insecure often need a great amount of nurturance and are very possessive of the women's time. These men are at high risk for violence, especially if they report a history of other abusive incidents."<sup>204</sup> A potential batterer's insecurity is often the key that leads to the battered woman's isolation in the abusive relationship.<sup>205</sup> However, if the potential batterer is aware that any attempt that he makes to cut his partner off from family or friends could possibly be punished as an act of domestic violence under a communication-restriction provision, he may likely be deterred from making any attempts at forcing his partner into isolation.

Insight into the reasoning of the sponsors of A. 431 lends further support to this theory. Assemblywoman Voss explained that when developing the proposed legislation, one of the recurring themes that was drawn upon from many domestic violence cases was the fact that the abuser will often use the telephone cord to strangle the victim; even if the phone is cordless, the abuser can still employ it as a weapon by striking the

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<sup>204</sup> WALKER, *supra* note 8, at 13.

<sup>205</sup> *Id.* at 20. Walker describes some of the threats made by batterers who are consumed with insecurity and/or jealousy:

Threats of retaliation made by the batterer also raise the risk for lethality. Women commonly reported phrases such as, 'If I can't have you, no one will'; 'If you leave, I'll find you wherever you go'; 'Just do that and you'll see how mean I can really be.' Threats of bodily mutilation such as cutting up her face, sewing up her vagina, breaking her kneecaps, and knocking her unconscious also served to terrify women and confirm their fears of receiving lethal blows. They often isolate themselves from family and friends who could help because of the batterer's threats to hurt, mutilate, and/or kill them . . . . The more isolation, however, the higher the risk for a lethal incident.

*Id.* at 52.

victim with the actual phone itself.<sup>206</sup> The theme behind the proposed legislation is that it is imperative that a victim of domestic violence be able to obtain assistance through some form of communication. If the bill is to become law in New Jersey, then not only will potential abusers be held criminally liable for physical abuse if they use the telephone as a weapon against their victim, but they will be just as criminally liable if they keep the victim from using the telephone altogether. Of course, the use of the telephone as a weapon implies that the abuser is also denying his victim use of the telephone as well. A potential abuser aware of such a law is likely to refrain from using the telephone at all in a dispute if he has knowledge that any use of the phone by him (including use as a weapon) that can be construed as restricting the victim's use of the telephone would be a criminal penalty.

Without the possibility of isolation, the chance of physical violence occurring in the relationship would most likely be reduced; the relationship may even come to an end before it reaches a stage where physical violence is likely to erupt. Thus, it follows that the number of battered women forced to kill their abusers in self-defense would also be minimized. *State v. Kelly* tells us that a battered woman is justified in her self-defense because of the physical and psychological abuse she has been exposed to. However, a battered woman who has killed in self-defense, and is not in a jurisdiction that follows *State v. Kelly*'s reasoning, is placed in a difficult position. Because the admission of expert testimony regarding battered woman's syndrome is not an option in preparing a defense for victims in such jurisdictions, the argument has been made that they should be acquitted on the basis that they are morally justified vigilantes.<sup>207</sup> However, vigilantism is often associated with "taking the law into one's own hands,"<sup>208</sup> and is often not considered an acceptable method of justice.

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<sup>206</sup> Telephone Interview with New Jersey Assemb. Joan M. Voss, 38th District (D) 2004–present (Feb. 27, 2007).

<sup>207</sup> See Elisabeth Ayyildiz, *When Battered Woman's Syndrome Does Not Go Far Enough: The Battered Woman as Vigilante*, 4 AM. U.J. GENDER & L. 141 (1995).

<sup>208</sup> *Id.* at 147 (citing J. Paul Grayson, *Vigilantism in Canada and the United States*, 16 LEGAL STUD. FORUM 21, 22 (1992)).

## ***V. CONCLUSION***

A. 431 is an excellent blueprint for future legislation that should provide for the criminalization of impairing another's communication as an act of domestic violence. It is imperative that victims of domestic violence have a means of communication in order to obtain outside assistance to help stop the abuse. Mandatory arrest law recognizes the existence of domestic violence as a problem that has long existed throughout our society; but inefficiencies prevent mandatory arrest law from being a sufficient remedy for battered women and other victims of domestic violence. VAWA has also taken landmark steps toward the prevention of violence against women; but one day the remedies VAWA offers may cease to be available. By criminalizing the restriction of communication, potential abusers will be deterred from isolating their victims, which contributes to psychological trauma of the domestic violence victim which can often lead to battered woman's syndrome. Given the successes and shortcomings of past legislation designed to combat domestic violence, adding the restriction of communication to the list of acts that constitute an act of domestic violence is the next logical step.