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Protecting Victims by Working around the System and within the System: Statutory Protection for Emotional Abuse in the Domestic Violence Context

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PROTECTING VICTIMS BY WORKING
AROUND THE SYSTEM AND WITHIN THE SYSTEM:
STATUTORY PROTECTION FOR EMOTIONAL ABUSE
IN THE DOMESTIC VIOLENCE CONTEXT

I. INTRODUCTION

Domestic violence perpetrated against a woman or man is often part of
a systematic pattern of dominance and control.1 The intimate relationship
between the perpetrator and the victim accommodates the "continual vic-
timization" characteristic of domestic violence, which may include stalking,
harassment, intimidation, nonphysical offenses, and less serious crimes.2
While victims whose partners are emotionally or verbally abusive, jealous,
or controlling are significantly more likely to report being raped and/or
physically assaulted by their partners,3 domestic violence can also be
inflicted through purely psychological methods.4

In the United States during the past fifty years, there have been
substantial transformations regarding both the quantity and types of legal
actions available to domestic violence victims, and society's level of aware-
ness and acceptance for such behavior.5 However, there is little consensus
on how to define domestic violence, which acts the offense includes, and
what the relationship between the perpetrator and the victim must be.6 This
note examines the legal realities and substance of state statutes that either

1. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, EXTENT, NATURE, AND
CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NAT'L VIOLENCE
2. WAYNE STENEHJEM, OFF. OF ATT'Y GEN., DOMESTIC VIOLENCE IN NORTH DAKOTA 1
3. TJADEN & THOENNES, supra note 1, at iv.
that domestic violence can be purely psychological and committed in the form of forced social and
economic isolation, verbal harassment, threats of future violence, or destruction of personal
property).
5. See Sharon M. Grosfeld, Protecting Victims of Domestic Violence, M.D. B.J. May–June
2005, at 25, 26 (tracing women's legal identities from the Married Women’s Property Act of 1882
to modern statutes and the 1994 Violence Against Women Act); Arthur L. Rizer III, Mandatory
Arrest: Do We Need to Take a Closer Look?, 36 UWLA L. REV. 1, 3-10 (2005) (summarizing the
history of domestic violence in society, from biblical text to modern day mandatory arrest
statutes).
6. TJADEN & THOENNES, supra note 1, at 5.
include or exclude emotional abuse? in the definition of domestic violence. Part II provides an analysis of statutory definitions of domestic violence. Additionally, the effects of the two predominant categories of domestic abuse statutes, those broadly defined and those narrowly defined, will be explored. Furthermore, the effectiveness of the common law tort of intentional infliction of emotional distress will be examined as an alternative for victims who are not provided statutory protection against emotional abuse. Part III concentrates on the lack of statutory protection for victims of emotional abuse in North Dakota. In conclusion, Part IV proposes amendments to the current North Dakota statute and provides model statutory language for redefining the offense of domestic violence in the state.

II. STATE RECOGNITION OF EMOTIONAL ABUSE

Domestic violence is defined differently among states’ civil and criminal codes. Some states define the offense broadly, providing specific

7. The term “emotional abuse” will be used throughout this article in reference to any type of psychological violence or abuse. Individual state statutes and judicial decisions may recognize the offense in any of the following ways: “emotional/mental abuse,” “emotional/mental harm,” “emotional/mental harm,” or “psychological abuse.” See, e.g., N.Y. SOC. SERV. LAW § 459-a(1)(i) (McKinney 2005) (using the terminology of “emotional injury” and “emotional harm” in defining domestic violence); UTAH CODE ANN. § 62A-4a-101(1)(a), (8) (2005) (including “mental harm” as a type of abuse); W. VA. CODE ANN. § 48-27-202 (West 2005) (recognizing the creation of fear of physical harm by psychological abuse as a type of domestic violence).

8. The term “domestic violence” will be used interchangeably with “domestic abuse” throughout this article. Some statutes identify the offense as “family violence.” See, e.g., GA. CODE ANN. § 19-13-10(5) (2005) (defining “family violence” as “the commission of the offenses of battery . . . assault, stalking, criminal damage to property, or criminal trespass between family or household members”). Additionally, some states define “domestic violence,” as well as subsections of the offense like “intimate partner battering” or general “abuse.” See, e.g., CAL. EVID. CODE § 1107 (West 2005) (providing that expert testimony is admissible in a criminal action to establish the effect of physical, emotional, or mental abuse on the victim); CAL. FAM. CODE § 6203 (West 2005) (defining “abuse” as causing or attempting to cause bodily injury, sexual assault, or placing another in reasonable apprehension of imminent bodily injury). Many government reports identify the offense as “intimate partner violence.” E.g., CALLIE MARIE RENNISON, U.S. DEP’T OF JUSTICE, INTIMATE PARTNER VIOLENCE, 1993-2001 1 (2003), available at http://www.ojp.usdoj.gov/bjs/abstract/ipv10.htm (recognizing intimate partner violence as “nonfatal violent victimizations committed by current or former spouses, boyfriends, or girlfriends . . .”). Moreover, the federal government has defined “domestic violence” to include “felony or misdemeanor crimes of violence . . . under the domestic or family violence laws of the jurisdiction receiving grant monies . . .” 42 U.S.C. § 3796gg-2(1) (2000).

9. See, e.g., IDAHO CODE ANN. §§ 18-918, 39-6303 (2005) (providing protection against domestic violence in the state’s criminal and civil codes); N.D. CENT. CODE § 14-07.1-02 (2005) (providing that a petition for a domestic abuse protection order is a civil action in which the petitioner must prove by a preponderance of the evidence that a household member inflicted domestic violence); see also Pamela Saperstein, Note, Teen Dating Violence: Eliminating Statutory Barriers to Civil Protection Orders, 39 FAM. L.Q. 181, 190 (2005) (discussing the different ways states define domestic violence).
statutory protection against emotional abuse. Other statutes attempt to cover emotional abuse through provisions protecting against harassment or stalking. Still other statutes are drafted narrowly and are significantly


11. Harassment is often defined similarly to the language provided by the Illinois Domestic Violence Act. 750 ILL. COMP. STAT. ANN. 60/103(7) (West 2005).

"Harassment" means knowing conduct which is not necessary to accomplish a purpose that is reasonable under the circumstances; would cause a reasonable person emotional distress; and does cause emotional distress to the petitioner. Unless the presumption is rebutted by a preponderance of the evidence, the following types of conduct shall be presumed to cause emotional distress:

(i) creating a disturbance at petitioner's place of employment or school;
(ii) repeatedly telephoning petitioner's place of employment, home or residence;
(iii) repeatedly following petitioner about in a public place or places;
(iv) repeatedly keeping petitioner under surveillance by remaining present outside his or her home, school, place of employment, vehicle or other place occupied by petitioner or by peering in petitioner's windows;

(v) . . . or

(vi) threatening physical force, confinement or restraint on one or more occasions.

Id.


[When an adult purposely and repeatedly engages in an unwanted course of conduct that causes alarm to another person when it is reasonable in that person's situation to have been alarmed by the conduct.

(a) "Course of conduct" means a pattern of conduct composed of repeated acts over a period of time, however short, that serves no legitimate purpose. Such conduct may include, but is not limited to, following the other person or unwanted communication or unwanted contact;

(b) "Repeated" means two or more incidents evidencing a continuity of purpose; and

(c) "Alarm" means to cause fear of danger of physical harm.

MO. ANN. STAT. § 455.010(10); see also 18 U.S.C. § 2261 (2000) (providing federal criminal sanctions for interstate domestic violence and stalking). Interestingly, a state might not provide protection from stalking or harassment in the domestic violence statute; however, protection may
more restrictive regarding what constitutes domestic violence. Such statutes may provide protection against "the infliction of fear of imminent physical harm, bodily injury, [or] sexual activity" but not against emotional harm independent of such physical abuse or habitual conduct. Regardless of the breadth of a state's statutory protection, legislatures intend such domestic violence laws "to fill the void in existing laws in order to protect victims . . . from further harm."15

A. STATUTORY INCLUSION OF EMOTIONAL ABUSE

1. Addressing Emotional Abuse

States that provide statutory protection against emotional abuse effectively recognize that many people in violent relationships are victims of "systematic terrorism." That is to say, many victims experience "multiple forms of abuse and control at the hands of their partners," not just physical violence. Common nonphysical abuses include: controlling the victim's access to finances, isolating the victim from family and friends, damaging or destroying the victim's personal property, physically hitting or

be extended to potential victims in the specific "stalking" or "harassment" laws of the state. E.g., N.D. CENT. CODE § 12.1-17-07.1(1)(b) (2003) (providing criminal sanctions for stalking a spouse, parent, child, sibling, or housemate).

13. ARK. CODE ANN. § 9-15-103(2) (West 2005); CONN. GEN. STAT. ANN. § 46b-15(a) (West 2005); DEL. CODE ANN. tit. 13, § 703A(a) (2005); IDAHO CODE ANN. §§ 18-918, 39-6303; IND. CODE ANN. § 31-9-2-42 (West 2005); IOWA CODE ANN. § 236.2(2) (West 2005); KAN. CRIM. CODE ANN. § 21-3412a (West 2005); KY. REV. STAT. ANN. § 403.720(1) (West 2005); LA. REV. STAT. ANN. § 9:362(3) (2005); MASS. GEN. LAWS ANN. ch. 209A, § 1 (West 2005); MISS. CODE ANN. §§ 93-21-3(a) (West 2005); NEB. REV. STAT. § 42-903(1) (2005); N.D. CENT. CODE § 14-07.1-01(2); OKLA. STAT. ANN. tit. 21, § 644(c) (West 2005); OR. REV. STAT. § 107.705 (1)(a)-(c) (2003); R.I. GEN. LAWS § 15-15-1 (2004); S.C. CODE ANN. § 20-4-20 (2004); TENN. CODE ANN. §§ 36-3-601(1), 39-13-111(b) (West 2005); TEX. FAM. CODE ANN. §§ 71.0021, 71.004 (Vernon 2005); VT. STAT. ANN. tit 15, § 1101 (2004); VA. CODE ANN. §§ 18.2-57.2 (West 2005); WIS. STAT. ANN. § 813.12(1)(a) (West 2005); WYO. STAT. ANN. § 35-21-102(a)(ii) (2004). The statutes listed above represent most, if not all, of the states that do not provide protection for emotional abuse in the domestic violence context.

14. E.g., N.D. CENT. CODE § 14-07.1-01(2) (providing protection against only actual physical harm or the imminent fear of physical harm). "The use of the phrase 'infliction of fear' in the statute implies that the legislature intended that there be some overt action to indicate that [the perpetrator] intended to put [the victim] in fear of imminent physical harm." Kass v. Kass, 355 N.W.2d 335, 337 (Minn. Ct. App. 1984) (emphasis in original).

15. Gaab v. Ochsner, 2001 ND 195, ¶ 5, 636 N.W.2d 669, 671; see also FLA. STAT. ANN. § 741.2901(2) (stating that it is the legislature's intent that "domestic violence be treated as a criminal act rather than a private matter"); therefore, criminal prosecution is the favored method of enforcing compliance of protective orders); Heck v. Reed, 529 N.W.2d 155, 164 (N.D. 1995) (articulating that domestic violence statutes are "intended to counteract the myths that: domestic violence is not a serious crime; victims provoke or deserve the violence; victims habitually lie or exaggerate the extent of violence; and domestic violence is a private family matter").

16. TIADEN & THOENNES, supra note 1, at 56.

17. Id.
throwing objects at a surface nearby the victim, or conducting surveillance of the victim.\textsuperscript{18} To adequately address the reality that such activities commonly occur within abusive relationships, lawmakers may draft a domestic violence statute broadly, such as the following:

"[D]omestic abuse" means any incident by a household member against another household member resulting in: (1) physical harm; (2) severe emotional distress; (3) bodily injury or assault; (4) a threat causing imminent fear of bodily injury by any household member; (5) criminal trespass; (6) criminal damage to property; (7) repeatedly driving by a residence or work place; (8) telephone harassment; (9) stalking; (10) harassment; or (11) harm or threatened harm to children . . . \textsuperscript{19}

This statute effectively enumerates certain acts that could be treated as domestic abuse.\textsuperscript{20} Additionally, the logistical effect of such a statute is that a victim is not required to seek legal protection under a variety of laws, but may succinctly petition for judicial intervention by necessarily satisfying only one or two provisions.\textsuperscript{21}


\textsuperscript{19} N.M. STAT. ANN. § 40-13-2 (LexisNexis 2005). Where a state’s definition of "domestic violence" is not expansive, an additional statute defining who constitutes a victim of domestic violence may have the same effect. For example:

"Victim of domestic violence" means any person over the age of sixteen, any married person or any parent accompanied by his or her minor child or children in situations in which such person or such person’s child is a victim of an act which would constitute a violation of the penal law, including, but not limited to acts constituting disorderly conduct, harassment, menacing, reckless endangerment, kidnapping, assault, attempted assault, or attempted murder; and

(i) such act or acts have resulted in actual physical or emotional injury or have created a substantial risk of physical or emotional harm to such person or such person’s child; and

(ii) such act or acts are or are alleged to have been committed by a family or household member.

N.Y. SOC. SERV. LAW § 459-a (McKinney 2005).

\textsuperscript{20} See N.M. STAT. ANN. § 40-13-2 (enumerating eleven offenses that are punishable as domestic violence in New Mexico).

\textsuperscript{21} See id. (providing domestic violence victims with broad statutory protection against emotional abuse). Often, petitioners for a domestic violence protection order get the “run around” when dealing with community organizations, the police department, and the judiciary because one organization informs them of certain options and then another directs them differently. Interview with Joel Medd, Dist. Judge, Grand Forks Dist. Court, in Grand Forks, N.D. (Oct. 4, 2005) (on file with N.D. Law Review). Judge Joel Medd has concluded that it would be useful to have all available statutory protections for emotional abuse stated in one place. \textit{Id}. However, not all judges think such consolidations are necessary, and some observe that domestic violence victims generally receive relief, even if it is through an action in tort or an amended order for a disorderly conduct restraining order, instead of a domestic violence protection order. Interview with Sonja Clapp, Dist. Judge, Grand Forks Dist. Court, in Grand Forks, N.D. (Oct. 3, 2005) (on file with N.D. Law Review).
2. Defining Emotional Abuse

When a state includes emotional abuse in its domestic violence statute, difficulties arise in whether to define it, and if so, how to define it. Most states have not defined emotional abuse in their adult abuse statutes. Additionally, when a court is presented with an opportunity to define such abuse, it likely will not do so. Rather, the court may find that enough evidence exists "if there is more than a scintilla of evidence" that emotional abuse has occurred or will occur. Alternatively, a court may rely on its experience and subjective discretion and invoke some sort of threshold in order to weed out false claims. The court may also rely on a definition of emotional abuse provided by an expert in the field of domestic violence. However, expert testimony is not normally provided because most petitioners come before the court pro se; therefore, the only testimony

22. See RESTATEMENT (SECOND) OF Torts § 46 cmt. j (1965) (providing that mental suffering "includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea"). Judge Debbie Kleven suggests that emotional abuse should not be defined as "psychological harm or abuse" because then a victim might be required to present expert testimony, which would make it more difficult for a victim to satisfy her or his burden of proof. Interview with Judge Debbie Kleven, supra note 18.

23. See, e.g., MONT. CODE ANN. § 41-3-102 (2005) (defining "psychological abuse" in a child abuse statute). A definition of emotional abuse is more likely to be found in a state's child abuse statute. Id. For example, in Montana, "[p]sychological abuse or neglect" means severe maltreatment through acts or omissions that are injurious to the child's emotional, intellectual, or psychological capacity to function, including the commission of acts of violence against another person residing in the child's home." Id. (emphasis added). Additionally, a state may define emotional abuse under a separate statute as, "the infliction of or allowing another person to cause serious emotional damage as evidenced by severe anxiety, depression, withdrawal or aggressive behavior and which emotional damage is diagnosed by a medical doctor or psychologist." In re Appeal in Pima County Juvenile Severance Action No. S113432, 872 P.2d 1240, 1244 (Ariz. Ct. App. 1994) (citing ARIZ. REV. STAT. ANN. § 8-531(1) (2003)).

24. See In re N.H., 155 S.W.3d 820, 822 (Mo. Ct. App. 2005) (declining to define "emotional abuse" where the statute and state supreme court had been silent); In re Jane Doe 10, 78 S.W.3d 338, 342 (Tex. 2002) (recognizing that neither the statute nor the court had yet defined "emotional abuse," and again declining to define it).


26. See In re Taylor, 731 A.2d 35, 43 (N.J. 1999) (concluding that "sufficient credible evidence" existed to support the findings of fact that abuse did not exist); In re N.H., 155 S.W.3d at 823 (recognizing a threshold of "competent and substantial evidence" that abuse existed). The courts must require petitioners to prove a certain degree of emotional abuse, because otherwise the judiciary would become involved in any civil or domestic dispute. Interview with Judge Joel Medd, supra note 21.

27. Dean v. Dean, 579 So. 2d 1124, 1127 (La. Ct. App. 1991). In Dean, an expert testified that mental abuse could be defined as "a form of domestic violence in that it is a method of controlling the actions and thoughts of one person for the purpose of controlling the [relationship]." Id.
presented is usually that of the lay petitioner and respondent. Fundamentally, one of the most challenging aspects of legal protection against emotional violence is the simple difficulty of defining the abuse.

3. Use of Subjectivity in Detecting Emotional Abuse

Regardless of the form of abuse, whether domestic violence exists in any particular civil dispute is an issue of fact to be determined by the trier of fact. In most jurisdictions, the judge must utilize substantial subjective discretion in weighing the effects of the abuse in light of all other circumstances. In reaching a conclusion, this subjective understanding may be exemplified as simply a knowledge that severe emotional abuse exists, versus a jaded "victim" going through a divorce or bad times who is attempting to misuse the judicial system. Ultimately, upon finding that actual or imminent domestic violence has occurred, a trial court may grant a protection order providing injunctive relief to the victim. Unfortunately, however, many victims still do not report incidents of domestic abuse to the police, nor do most seek protection orders.

28. See Morton County Soc. Serv. Bd. v. Schumacher, 2004 ND 31, ¶25, 674 N.W.2d 505, 509 (finding that the district court is in the best position to evaluate testimony because "it observes the demeanor and credibility of the witnesses").

29. See Tjaden & Thoennes, supra note 1, at 5 (reporting that when organizations or state legislatures limit the definition of intimate partner violence to "acts carried out with the intention of, or perceived intention of, causing physical pain or injury to another person," that the "myriad behaviors that persons may use to control, intimidate, and otherwise dominate another person" are ignored).


31. See, e.g., State v. Barnett, 16 P.3d 74, 80-82 (Wash. Ct. App. 2001) (examining four circumstances in determining the defendant's sentence, including the period of time over which the abuse occurred, whether the offenses were committed almost immediately after the defendant was served with a restraining order, the age and vulnerability of the victim, and whether the defendant acted with deliberate cruelty in repeatedly threatening to kill the victim and her family). In North Dakota, Judge Debbie Kleven has almost always recognized emotional abuse and will grant domestic violence protection orders without the existence of physical abuse when the victim is honestly fearful for her or his safety or health. Interview with Judge Debbie Kleven, supra note 18. Moreover, through use of such subjective discretion, a judge is able to "tell when someone is fraised" and rule accordingly. Id.

32. See Interview with Judge Debbie Kleven, supra note 18 (explaining that some judges are able to work around the current legislation in North Dakota, and are very willing to do so when the victim's emotional abuse is real and extreme).


34. Tjaden & Thoennes, supra note 1, at 5. In fact, "most victims of intimate partner violence do not consider the justice system an appropriate vehicle for resolving conflicts with intimates." Id.
B. STATUTORY EXCLUSION OF EMOTIONAL ABUSE

Overall, the law has developed slowly in affording independent protection to the interest of freedom from emotional abuse, primarily because of the "fear of fictitious or trivial claims, distrust of the proof offered, and the difficulty of setting up any satisfactory boundaries." Consequently, states that do not provide statutory protection for emotional abuse have established the threshold of judicial protection at physical abuse or the imminent threat thereof. A typical statute that excludes emotional abuse may define "domestic violence" as the following:

[T]he occurrence of one or more of the following acts between family or household members: a) Attempting to cause or intentionally and knowingly causing bodily injury with or without a dangerous instrument; b) Placing, by physical menace, another person in fear of imminent bodily injury; or c) Engaging in sexual contact or sexual penetration without consent . . . Other than the fear specifically defined in such statutes, mental harm is not within the statutory definition of domestic violence, and therefore it will not be a definitive part of a court's analysis in determining the presence of domestic violence in a particular relationship.

1. Use of Circumstantial Evidence in Identifying Domestic Violence

Courts will weigh the degree and effect of abuses enumerated in the statute, as well as some circumstances that may not be listed. For example, a court may consider credible evidence of any incident of domestic violence that resulted in serious bodily injury, any incident that involved the use of a dangerous weapon, or whether a pattern of abuse existed within a

35. RESTATEMENT (SECOND) OF TORTS § 46 cmt. b (1965).
36. See, e.g., OR. REV. STAT. § 107.705 (2003) (setting the threshold for abuse prevention at acts that intentionally, knowingly, or recklessly cause bodily injury or the fear of imminent bodily injury to another person); R.I. GEN. LAWS § 15-15-1 (2004) (setting the threshold for domestic abuse prevention at offenses that attempt to cause or do cause physical harm, or place another "in fear of imminent serious physical harm").
39. See Gaab v. Oehsner, 2001 ND 195, ¶ 7, 636 N.W.2d 669, 672 (holding that the trial court did not abuse its discretion in extending a domestic violence protection order where the extension was based on evidence of the perpetrator's violation of the order, the victim remained fearful of the perpetrator due to continuing acts of domestic violence, and the original protection order was issued less than one year prior to the petition to extend the order).
reasonable time proximate to the proceedings. However, courts have substantial discretion in determining whether domestic violence has occurred, and consequently, a court might be unwilling to find that abuse has occurred in circumstances other than those put forth in the statute. For example, when the perpetrator’s conduct involves destruction of property, a court is unlikely to consider such destructive conduct as an act of domestic violence when the statute is silent in regard to such conduct. To ensure that judges must consider certain types of conduct in finding domestic violence, lawmakers should be clear and concise regarding what constitutes the abuse.

2. **Legislative Intervention Within the Family Unit**

A distinct issue that some legislators continue to grapple with is the law’s place within the family unit. “Intimacies of family life” involve intentional physical and emotional interactions that “would be actionable between strangers but may be commonplace and expected within the family.” Prior to the creation of domestic violence laws, many law enforcement agencies would provide few protections to victims, or would not respond to domestic disturbances because they were considered “civil matters” that were beyond the scope of perceived authority. However, in effectuating domestic violence statutes, sufficient authority must be given to law enforcement agencies in order for such protection to be at all meaningful. As a result, statutes may establish guidelines for law enforcement officers to follow while investigating domestic disputes, and may also set forth the proper procedures for arresting the perpetrator.

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40. DesLauriers, ¶ 14, 642 N.W.2d at 897. However, the use of a dangerous weapon or instrument, by itself, might not constitute domestic violence. Id. ¶ 19, 642 N.W.2d at 898.

41. See Morton County Soc. Serv. Bd. v. Schumacher, 2004 ND 31, ¶ 19, 674 N.W.2d 505, 509 (upholding the trial court’s ruling that smashing a computer with an ax, but without the intention to harm or frighten the petitioner, was not domestic violence).

42. See id. ¶ 18 (citing various cases where courts found no domestic violence, such as breaking a flower pot, pulling a phone off the wall, and slashing car tires with a knife).

43. See id. ¶ 8, 674 N.W.2d at 507 (citing Lawrence v. Delkamp, 2000 ND 214, ¶ 7, 620 N.W.2d 151, 154) (stating that “a district court’s finding on domestic violence is a factual determination that will not be reversed unless clearly erroneous”; however, “[a] statutory interpretation . . . is a matter of law, fully reviewable on appeal”).

44. See Grosfeld, supra note 5, at 30-31 (discussing state legislative enhancements designed to assist victims of domestic violence, but noting that additional refinements are warranted).


47. Id.

Currently, most domestic violence statutes have been expanded to cover more people than just wives and husbands. By expanding who may be considered a victim, legislatures appear to be coming to terms with their ability to exercise police power over the domestic sphere. Additionally, in creating these statutes, lawmakers have effectively acknowledged that domestic violence may be prevalent in any intimate relationship. As indicated in national data, "domestic violence cuts across all class, racial, ethnic, and socioeconomic lines." Consequently, at a minimum, for a

49. See, e.g., id. § 14-07.1-01(4) (extending protection to all family members and intimate partners). North Dakota extends its domestic violence laws to include "family or household member[s]," which means:

(1) a spouse, family member, former spouse, parent, child, persons related by blood or

(2) marriage, persons who are in a dating relationship, persons who are presently residing together or who have resided together in the past, persons who have a child in common . . . , and . . . any other person with a sufficient relationship to the abusing person as determined by the court . . .

Id. Oregon also extends its domestic violence laws to "family or household members," meaning any of the following:

(a) Spouses.

(b) Former spouses.

(c) Adult persons related by blood, marriage or adoption.

(d) Persons who are cohabiting or who have cohabited with each other.

(e) Persons who have been involved in a sexually intimate relationship with each other within two years immediately preceding the filing by one of them of a petition order . . .

(f) Unmarried parents of a child.


50. See 750 ILL. COMP. STAT. ANN. 60/102(3) (West 2005) (stating that in 1986, the Illinois legislature finally awoke to the reality that "the legal system has ineffectively dealt with family violence in the past, allowing abusers to escape effective prosecution or financial liability, and has not adequately acknowledged the criminal nature of domestic violence"); Domestic Violence Victim Assistance: Hearing on H.R. 1313 Before the H. Social Services and Veterans' Affairs Comm., 1981 Leg., 47th Sess., at 2 (N.D. 1981) [hereinafter Hearing on H.R. 1313] (testimony of Officer Dick Peck, Burleigh County Sheriff Dep't) (testifying that had the Domestic Violence Victim Assistance Act been passed years ago, the department "could have saved a lot of good marriages and a lot of people being damaged for life because of the emotions they have to go through").

51. See CALLIE MARIE RENNISON & SARAH WELCHANS, U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE 8 (2000), available at http://www.ojp.usdoj.gov/bjs/ pub/pdf/ipv.pdf (defining intimate relationships as those involving "current spouses, former spouses, current boy/girlfriends, or former boy/girlfriends," and providing that "[i]ndividuals involved in an intimate partner relationship may be of the same gender"); TJADEN & THOENNES, supra note 1, at 4 (reporting that controversy exists regarding whether to limit the definition of intimate partner violence to marital or heterosexual cohabiting relationships, or to expand it to include couples who are dating but live in separate domiciles, or same-sex cohabiting or dating relationships).

52. STENEHJEM, supra note 2, at 13.
crime to be considered domestic violence, the victim must simply know her or his assailant.\textsuperscript{53}

C. AN ALTERNATIVE CAUSE OF ACTION IN TORT

In states that do not provide statutory protection against emotional abuse, victims of such domestic violence may have an alternative cause of action in the tort of intentional infliction of emotional distress (IIED).\textsuperscript{54} Generally, recovery for mental anguish or emotional distress does not need to be accompanied by physical injury.\textsuperscript{55} Therefore, IIED is a proper cause of action for victims of nonphysical domestic violence.\textsuperscript{56} Courts that have extended such legal relief in domestic situations effectively recognize that "[e]motional distress is as real and tormenting as physical pain, and psychological well-being deserves as much legal protection as physical well-being."\textsuperscript{57}

Where a court finds that the abuse inflicted on a victim satisfies the rigorous threshold of proof required for IIED, it is appropriate to conclude that, had the state incorporated emotional abuse in its domestic violence statute, the victim would necessarily possess an interest in such legal

\textsuperscript{53} Id. at 1; see also RENNISON & WELCHANS, supra note 51, at 8 (reporting that the victim's and offender's relationship may fit into any of "four relationship groups: intimate, friend/acquaintance, other family, and stranger").

\textsuperscript{54} See Feltmeier v. Feltmeier, 777 N.E.2d 1032, 1039-40 (Ill. App. Ct. 2002) (holding that the pattern of domestic abuse, combined with its duration and the psychological impacts on the victim, "clearly articulates a pattern of conduct that satisfies the standard necessary to state a cause of action for the intentional infliction of emotional distress").

\textsuperscript{55} George L. Blum, Annotation, Intentional Infliction of Distress in Marital Context, 110 A.L.R. 5TH 371, 384 (2003). To recover in an IIED action in jurisdictions not requiring bodily injury, the victim must show that: (1) the perpetrator's conduct was intentional or in reckless disregard of the victim; (2) the conduct was extreme and outrageous; (3) there was a causal connection between the perpetrator's conduct and the victim's mental distress; and (4) the victim's mental distress was extreme and severe. RESTATEMENT (SECOND) OF TORTS § 46(1) (1965).

\textsuperscript{56} See Feltmeier, 777 N.E.2d at 1039 (holding that a pattern of domestic abuse over an eleven-year period may constitute one continuous tort, and that abuse "cannot be trivialized below the threshold of outrageousness that is actionable, by calculating the annual number of abusive events and arguing that there were not enough of them per year to matter"). But see Hakkila v. Hakkila, 812 P.2d 1320, 1326 (N.M. Ct. App. 1991) (concluding that in the marital setting, the "threshold of outrageousness should be set high enough—or the circumstances in which the tort is recognized should be described precisely enough... that the social good from recognizing the tort will not be outweighed by unseemly and invasive litigation of meritless claims").

\textsuperscript{57} McCulloh v. Drake, 24 P.3d 1162, 1169 (Wyo. 2001); see also Christians v. Christians, 2001 SD 142, ¶ 22, 637 N.W.2d 377, 382 (stating that the court was not "injecting a tort recovery for [IIED] into every domestic suit, but rather, that it was "only providing a remedy to an aggrieved party...[that is] available to every other citizen of the state"); Henry v. Henry, 2000 SD 4, ¶ 6, 604 N.W.2d 285, 289 (instructing that "one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability" for the injury which results); Behringer v. Behringer, 884 S.W.2d 839, 844 (Tex. Ct. App. 1994) (instructing that the law intervenes where emotional distress is so severe that "no reasonable person should be expected to endure it").
protection. The conduct required to form IIED must be “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” Such a situation would be “one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, ‘Outrageous!’”

When an IIED claim encompasses a domestic situation, the abuse is generally required to be of a habitual nature. Habitually cruel and inhuman treatment will be established by a continuous course of conduct on the part of the offending domestic perpetrator, which is “so unkind, unfeeling or brutal as to endanger, or put one in reasonable apprehension of danger to life, limb or health . . . .” Finally, the emotional distress the victim suffers must be extreme and severe. Often, the extreme and outrageous character of the perpetrator’s conduct is “in itself important

58. See Feltmeier, 777 N.E.2d at 1040 (recognizing that “domestic violence presents sufficient problems to warrant its own legislative act,” and consequently, the “legislature is saying that such behavior is unacceptable, and from that finding it can be inferred that violent behavior in the domestic setting is outrageous” as required in an IIED claim); Blum, supra note 55, at 384 (noting that “freedom from mental distress is considered a protected interest” in most courts).

59. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965). The South Dakota Supreme Court in Christians found the husband had committed IIED against his wife by repeatedly accusing her of child abuse, having their child repeatedly examined by law enforcement, repeatedly reporting abuse to the Department of Social Services, disclosing financial records to her clients, causing her to ultimately be fired from her job, and acting on a “prolonged policy of sabotage, seeking to destroy his wife’s future.” Christians, ¶¶ 24-25, 637 N.W.2d at 382-83, 385. In Toles v. Toles, 45 S.W.3d 252, 260-61 (Tex. Ct. App. 2001), a Texas appellate court found that the perpetrator’s acts satisfied the threshold for IIED, including the following: threatening to smear the victim, threatening to snap her neck, destroying numerous items of her personal property, destroying college papers, cutting the victim’s clothes with scissors, calling her names, and yelling obscenities at her. An Illinois appellate court in Feltmeier v. Feltmeier, 777 N.E.2d 1032, 1035, 1040 (Ill. App. Ct. 2002), found that the perpetrator’s acts of verbal abuse, stalking, and systematically isolating the victim from her family and friends, in addition to physical abuse, satisfied the threshold for IIED. In Holladay v. Holladay, 1999-CA-00291-SCT ¶¶ 12, 64 (Miss. 2001), 776 So. 2d 662, 666, 677, the Mississippi Supreme Court found that the perpetrator’s actions, which included closing the victim’s bank account, taking her checkbook, requiring her to ask for money to buy clothes and personal items, refusing to pay for repairs to her vehicle, repeatedly calling her vile names, and physically restraining the victim on two separate occasions, exceeded the threshold for IIED. But see Hakkila 812 P.2d at 1324 (warning that an individual still has the “liberty to express an unflattering opinion of another, however wounding it may be to his feelings”) (citation omitted).

60. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

61. See McGrath v. Fahey, 533 N.E.2d 806, 809 (Ill. 1988) (finding the duration of abusive behavior to be one factor to consider in determining whether that behavior is outrageous in an IIED claim); Toles, 45 S.W.3d at 262 (observing that when abusive conduct becomes a regular pattern in a relationship, “it should not be accepted in a civilized society”).

62. Holladay, ¶ 64, 776 So. 2d at 677. For conduct to be considered “habitual,” it must be done “often enough or so continuously that it may reasonably be said to be a permanent condition.” Id.

63. Blum, supra note 55, at 385.
evidence that the distress exist[s].”64 However, no proof is as strong as the personal testimony of the victim.65

Ultimately, IIED may be the only action under which a domestic violence victim can bring a claim.66 Courts and legislatures should be mindful that even though abusive events may occur only a few times within a year, it is this repeated pattern of abuse that inflicts psychological torment.67 Such victims may “live in a constant state of silent fear, generated by the knowledge that their [family member or domestic partner] . . . harbors the capacity to hurt them.”68 Moreover, the victim begins to realize that the “abuse is certain to come again” and fears the “intensity of the next episode.”69

III. DEFINING DOMESTIC VIOLENCE IN NORTH DAKOTA

“There has always been abuse for years back, what we are trying to do . . . is alleviate the suffering.”70 Prior to the enactment of North Dakota’s first domestic violence statute in 1979, the only recognition of domestic offenses was as a cause for divorce.71 In 1965, a spouse could be granted a divorce upon proving “extreme cruelty” or “habitual intemperance.”72 However, domestic violence, in and of itself, did not become an offense for another fourteen years.73 This section follows the legislative

65. See Vance v. Chandler, 597 N.E.2d 233, 235 (Ill. Ct. App. 1992) (accepting that the victim was unable to perform her regular duties and activities; became fearful for her life, health, and safety; “went into hiding”; and remained in fear of being killed); Holladay, ¶¶ 32, 64, 776 So. 2d at 670, 677 (finding the victim had become very nervous, anxious, withdrawn, and depressed; cried often; had an extreme fear of the perpetrator; and could not erase violent incidents from her mind); Behringer, 884 S.W.2d at 844 (finding that the victim was in fear for his life all the time, slept on the couch in order to have access to both the front and back doors, did not leave his house at night for over a year, cried in front of other people, or slept with a pistol beside his bed); see also United States v. Whitetail, 956 F.2d 857, 859 (8th Cir. 1992) (producing expert witness testimony that when a victim is continuously subjected to severe, long-term abuse, she or he will experience feelings of desperation, isolation, shame, hopelessness, and low self-esteem, and become submissive and passive).
66. See Grosfeld, supra note 5, at 29 (noting that after the United States Supreme Court struck down the section of the Violence Against Women Act that granted a federal civil remedy to domestic violence victims, victims were left only with a state remedy to bring an action in tort).
67. See Feltmeier v. Feltmeier, 777 N.E.2d 1032, 1039 (Ill. App. Ct. 2002) (describing an abuse situation where the perpetrator of the violence admitted “extreme and outrageous” behavior, but argued that his former spouse “could have endured” abuse only a few times per year).
68. Id.
69. Id.
70. Hearing on H.R. 1313, supra note 50, at 6 (testimony of Chairman Haugland).
and judicial development of domestic violence laws in North Dakota, from their inception in 1979 to the present.74

A. THE INCEPTION OF LEGISLATIVE ACTION

In North Dakota, the increase and prevalence of domestic violence prompted new statewide legislation in 1979.75 Prior to this initial domestic violence law, victims had little, if any, legal protection against domestic abuse. 76 Defining the offense as "adult abuse,"77 the statute was enacted due to the recognition that many incidents of abuse were not being reported, that victims did not know where to seek assistance, and that victims likely had concerns as to their rights under the law.78 Both the House of Representatitives and the Senate heard testimony and researched statistical data provided by police departments, county courts, physicians, psychiatrists, domestic abuse programs, and clergy members from around the state.79 Moreover, legislators were informed that such statistics likely revealed only ten percent of the actual domestic assaults committed, and urged members to multiply the figures by ten in order to have a "clearer idea of the scope of the problem in . . . the state."80

1. Modernization of the Adult Abuse Statute

At its inception, "adult abuse" was defined as the "physical harm, bodily injury, or assault on the complaining adult, or the imminent threat thereof."81 In addition to defining the offense, the legislation addressed specific legal alternatives that were not previously available.82 First, it

74. See N.D. CENT. CODE § 14-07.1-02 (2005) (providing the current domestic violence protection order law); 1979 N.D. Laws at 419-22 (developing the first domestic violence law in North Dakota).
76. STENEHIEM, supra note 2, at 30. "Early protection orders, when available, were weak, could not be obtained in emergency situations, and applied only to married women." Id.
77. 1979 N.D. Laws at 419.
78. H.R. 46–1621, Reg. Sess., at 2 (N.D. 1979). Section 5 of the bill addressed a common fear among abused women that once they left their homes, they gave up all their rights and might even have faced a charge of desertion. Id. at 5.
80. H.R. 46–1621, Reg. Sess., at 4 (N.D. 1979). FBI estimates revealed that less than one in ten domestic assaults were reported. Id.
81. 1979 N.D. Laws at 419, § 1.
82. Id. §§ 2-9.
provided that a protection order could be sought by any spouse, family member, or cohabiting adult "regardless of whether or not a petition for legal separation, annulment, or divorce has been filed." Second, it authorized judicial intervention to provide protection from domestic violence perpetrators. Judges were given the authority to act on behalf of a domestic violence victim, by issuing restraining orders preventing the abuser from "threatening, molesting, or injuring" the victim; excluding the abuser from the home or shelter facility; awarding immediate temporary custody of minor children to the nonabusive party; and requiring that either or both parties undergo counseling. Finally, the bill provided the victim a cause of action for the "imminent threat" of a battery or assault against them. That is to say, the victim would no longer have to actually experience physical assault or injury.

2. The North Dakota Supreme Court's Interpretation of the New Statute

When construing a statute, the court must ascertain the legislature's intent. Words are to be given their "plain, ordinary and commonly understood meaning, with consideration of the ordinary sense of statutory words, the context in which they were enacted, and the purpose which prompted the enactment." The general intent of the North Dakota legislature in defining domestic abuse was to provide legal protection to the women and men who were, and would be, victims of "this particular

83. Id. § 2(1).
84. See id. (providing that an action for a protection order may be brought in the district court).
85. Id. § 2.
86. Id. § 1.
87. See id. (emphasis added) (broadening the protection afforded to domestic violence victims in North Dakota). The House Judiciary Committee concluded its recommendation of House Bill 1621 with the following statements:

Assault is a serious crime. To be confronted by the fear of continued assault because a person is in a "domestic situation" is tragic. Victims of adult abuse must be offered a legal recourse when faced with bodily harm. Availability of this legal order for protection will offer an avenue of just judicial intervention to hundreds of victims of abuse in North Dakota.

Testimony on H.R. 1621, supra note 79, at 4.
89. Id. at 160 (citing N.D. CENT. CODE § 1-02-05 (2003)). The North Dakota Supreme Court perceived the adult abuse statute to be "an innovative, unique effort to provide an alternative remedy in domestic violence matters." Lucke v. Lucke, 300 N.W.2d 231, 233 (N.D. 1980).
However, the plain language of the statute did not make clear which specific types of assault were to be afforded protection.91

The sole interpretation of North Dakota’s first domestic violence law was an expansive one.92 In Lucke v. Lucke,93 the North Dakota Supreme Court construed the adult abuse law “liberally, with a view to effecting its objects and to promoting justice.”94 The petitioner instituted an action under the statute, claiming that she and other members of her family were being abused by her father.95 Pertinent findings of fact provided that: (1) the defendant had been having sexual intercourse with three of his daughters for a period of ten years; (2) the defendant had attempted to establish incestuous relations with the petitioner, his daughter; and (3) the defendant had committed adult abuse upon the petitioner and other members of the family.96 The defendant argued that the only adult abuse that could be involved in a proceeding under the statute was physical abuse.97 The North Dakota Supreme Court disagreed and concluded that, as a matter of law, “adult abuse is not limited to physical harm, bodily injury and assault or the imminent threat thereof, but includes all forms of abuse, including mental harm.”98 Through its interpretation, the court expanded statutory protection against domestic violence to include sexual assault and mental harm.99 However, the legislature would soon depart from the court’s interpretation as it redefined domestic abuse in North Dakota.100

91. Lucke, 300 N.W.2d at 233-34. The North Dakota Supreme Court stated that when the adult abuse statute was enacted, minimal legislative history was left regarding the legislature’s intent. Id.
92. Id. at 234.
93. 300 N.W.2d 231 (N.D. 1980).
94. Lucke, 300 N.W.2d at 234 (citing N.D. CENT. CODE § 1-02-01 (2003)). The court focused on the word “includes” and interpreted it to be a word of enlargement, not a word of limitation, meaning that “‘includes’ should be read as if the phrase ‘but is not limited to’ were set forth.” Id. This construction caused the statute to read: “‘adult abuse’ includes [ , but is not limited to, ] physical harm, bodily injury, or assault on the complaining adult, or the imminent threat thereof.” Act of Apr. 7, 1979, ch. 193, sec. 29-01-15, §1, 1979 N.D. Laws 419.
95. Lucke, 300 N.W.2d at 232.
96. Id. at 232-33.
97. Id. at 233.
98. Id. at 234. The court alluded to the fact that in order to “make all provisions of the adult abuse law fully operative,” the legislature would need to correct the language of the bill. Id.
99. Id.
3. Amendments Excluding Emotional Abuse

In 1981, during the following legislative session, the legislature revisited the issue of domestic violence in North Dakota.101 "When the legislature amends an existing statute, it indicates its intent to change the statute's meaning in accord with its new terms."102 The offense was amended to read: "'Domestic violence' means any act or threatened act which results or threatens to result in bodily injury, and which is committed by a person against another person to whom such person is married or has been married, or with whom such person is residing or has resided lawfully."103 By providing protection only for actual or threatened physical harm, the legislature acutely proclaimed its divergence from the North Dakota Supreme Court's interpretation of the prior statute.104 Because the statute was amended after the court construed the predecessor statute in Lucke, it may be presumed that the legislature was responding to that construction.105 If the legislature had intended mental harm to be a protected form of abuse, it would not have defined "domestic violence" using solely the limiting phrase of "bodily injury."106

101. See id. §§ 3-4 (providing for state funding of domestic violence victim assistance organizations); Act of Mar. 19, 1981, ch. 167, sec. 14-07.1-02, 14-07.1-03, 1981 N.D. Laws 393, 393-95 (amending the North Dakota Century Code relating to adult abuse protection orders). Specifically, the legislature allotted grant monies to nonprofit organizations designed to assist victims of domestic violence and their dependents. 1981 N.D. Laws at 396, § 1. Additionally, it amended the requirements for securing an adult abuse protection order. 1981 N.D. Laws at 393, § 1. Most importantly, a provision allowing temporary protection orders to be granted upon "an allegation of a recent incident of actual abuse or threat of abuse" was added. Id. § 2(1) (emphasis added). This amendment seems to have been included due to the lingering concern that some sort of protection should be available for nonphysical abuse. A Bill Relating to Protection Orders and Abuse: Hearing on S. 2339 Before the H. Judiciary Comm., 1981 Leg., 47th Sess. 1 (N.D. 1981) (statement of Sen. Wayne Stenehjem, bill sponsor, North Dakota Senate). While the original statute gave some authority in cases of immediate and present danger of abuse, a predilection for protection in cases of abuse where there is "a threat and not actual laying on of hands on [the] victim" existed amongst legislators. A Bill Relating to Protection Orders and Abuse: Hearing on S. 2339 Before the S. Judiciary Comm., 1981 Leg., 47th Sess. 1 (N.D. 1981) (statement of Pat Seaworth, attorney, Legal Assistance for North Dakota).


103. 1981 N.D. Laws at 396, § 2(2) (emphasis added).

104. See 1981 N.D. Laws at 393-95 (providing for adult abuse protection orders only upon a showing of actual or imminent adult abuse).

105. Heck, 529 N.W.2d at 161. The court further noted that: The legislature is presumed to know the prior construction of terms in the original act, and an amendment substituting a new term or phrase for one previously construed indicates that the judicial . . . construction of the former term or phrase did not correspond with the legislative intent and a different interpretation should be given the new term or phrase.

Id.

106. Cf. id. at 163 (acknowledging the use of limiting or expanding phrases).
By excluding emotional abuse from the definition of "domestic violence," the legislature set the tone for future amendments. In 1989, the statute was amended to enumerate the possible abuses as "physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm . . . ." Later, in 1995, the statute was again amended to include "sexual activity compelled by physical force . . . ." No changes have been made to the definition of "domestic violence" since the 1995 amendment. Aside from proving the existence of threatened imminent bodily harm, victims of nonphysical domestic abuse have not been able to invoke statutory protection.

B. CURRENT STATUS OF DOMESTIC VIOLENCE IN NORTH DAKOTA LAW

In North Dakota, a claim involving domestic abuse is considered "a civil action in which a party must prove by a preponderance of the evidence" that an allegedly violent family or household member inflicted domestic violence upon another family or household member. While the statute provides a broad definition of who the perpetrator and the victim may be, the specific actions that the statute safeguards against are limited. Currently, "domestic violence" is defined as: "physical harm, bodily injury, sexual activity compelled by physical force, assault, or the infliction of fear of imminent physical harm, bodily injury, sexual activity compelled by physical force, or assault, not committed in self-defense, on the complaining family or household members."

109. 1995 N.D. Laws at 482.
111. See Lovcik v. Ellingson, 1997 ND 201, ¶ 11, 569 N.W.2d 697, 699 (stating that a trial court may only provide injunctive relief from domestic violence through a protection order upon "a showing of actual or imminent domestic violence" per section 14-07.1-02(4)); see also STENEHJEM, supra note 2, at 8 (recognizing that state law enforcement statistics only reflect domestic violence of a physical nature, compared to state advocacy organizations that recognize both physical and nonphysical domestic violence).
113. See Dinius v. Dinius, 1997 ND 115, ¶ 16, 564 N.W.2d 300, 303 (stating that section 14-07.1-01(2) of the North Dakota Century Code is very broad in defining who a victim may be).
Under the statute, nonphysical abuse can only constitute domestic violence if it inflicts the fear of imminent physical harm upon the victim.115 To satisfy this standard, the petitioner must prove that the abuse did, in fact, have such an effect.116 A significant aspect of the imminence of a threat is the uncertainty of what the perpetrator will do.117 Consequently, in proving that such fear of imminent bodily harm existed, a victim may use testimony about the specific circumstances that instilled the fear, the perpetrator’s character, past abusive disputes, or any attempted injury.118 “Although past abusive behavior is not dispositive, it is relevant in determining whether domestic violence is actual or imminent.”119 Since the court “need not await a more tragic event to take action” where a history of allegations of abuse exists, the court may consider events that happened previously as “relevant evidence of what might occur in the future.”120 Upon weighing all the circumstances of a situation, the court will determine whether the threats of bodily harm were severe and imminent enough to satisfy the statutory requirements.121

IV. CONCLUSION

In North Dakota, judges are able to sufficiently protect victims of emotional abuse even in the absence of inclusive statutory language.122

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115. Lawrence v. Delkamp, 2000 ND 214, ¶ 6, 620 N.W.2d 151, 154. “Imminent” may be construed as meaning “immediate” or “soon to be inflicted.” Id. ¶ 10, 620 N.W.2d at 155. If the perpetrator is speaking of an action anticipated to occur in the future, or if the perpetrator is leaving the scene, or does not have the current ability to fulfill the threats, no aspect of immediacy may be inferred. Id. ¶ 11.

116. Id. ¶ 10.

117. Interview with Judge Joel Medd, supra note 21.


119. Id. ¶ 16, 569 N.W.2d at 700.

120. Id.

121. See id. ¶¶ 13-14, 569 N.W.2d at 699 (upholding the trial court’s finding of fact that based on the totality of the circumstances domestic violence existed).

122. See N.D. CENT. CODE § 14-07.1-02 (2005) (providing statutory protection for domestic violence victims in North Dakota through domestic violence protection orders). Each judge interviewed for this article consciously recognizes emotional abuse in the domestic violence context; however, each goes about such recognition in a slightly different way. See Interview with Judge Sonja Clapp, supra note 21 (noting the number of nonphysically abused petitioners who claim property damage or stalking); Interview with Judge Debbie Kleven, supra note 18 (discussing the lack of control and imposed isolation that many nonphysically abused petitioners experience); Interview with Judge Joel Medd, supra note 21 (recognizing the abusive language and verbal threats made toward nonphysically abused domestic violence victims). Judge Sonja Clapp utilizes disorderly conduct restraining orders, under North Dakota Century Code section 12.1-31.2-01, as an “umbrella to put emotional abuse under.” Interview with Judge Sonja Clapp, supra note 21. Judge Debbie Kleven employs her subjective discretion, and at times considers the holding in Lucke when determining the presence of severe emotional abuse. Interview with Judge Debbie Kleven, supra note 18. However, Judge Kleven does not grant protection orders freely when no physical abuse exists, but rather establishes a threshold of proof requiring a petitioner to
Courts may grant protection through satisfaction of the imminent fear clause; the invocation of separate statutes, such as stalking or harassment laws; the issuance of a disorderly conduct protection order; or by working around the system and citing the North Dakota Supreme Court in Lucke.123 Regardless, some local judges have concluded that it would be beneficial for the North Dakota legislature to further develop the offense of domestic violence by providing statutory protection against emotional abuse in the definition.124 Such an amendment could read: “Domestic violence” includes physical harm; bodily injury; assault; sexual activity compelled by physical force or assault; the infliction of fear of imminent physical harm, assault, or sexual activity compelled by physical force or assault; severe emotional abuse adversely effecting feelings of safety or security; stalking; or harassment, not committed in self-defense, on the complaining family or household members.125 This definition concisely combines current North Dakota statutes and adds emotional abuse as a recognizable element of domestic violence.126

Regardless of the offense’s definition, it is crucial for judges and lawmakers to acknowledge the reasons emotional abuse occurs and the impact it has on a domestic violence victim.127 As the North Dakota Supreme

be honestly fearful. Id. Judge Joel Medd combines his subjective discretion with a comprehensive interpretation of the statute by looking at the infliction of fear of violence within a situation. Interview with Judge Joel Medd, supra note 21.


124. See Interview with Judge Debbie Kleven, supra note 18 (stating that simply listing emotional abuse in the definition would be helpful, and that no further definition would likely be necessary because judges see emotional abuse enough to know when it exists and when a petitioner’s claims are false or exaggerated); Interview with Judge Joel Medd, supra note 21 (articulating that inclusion of emotional abuse in the statute would be useful because all rights available to the victim would be succinctly stated in one place within the code). But see Interview with Judge Sonja Clapp, supra note 21 (asserting a preference for the narrow definition because it provides a bright-line standard of law, and thus limits the necessary witness testimony and reduces the subjective discretion required of the finder of fact).

125. See N.D. CENT. CODE § 14-07.1-01(2) (providing the foundation language for the proposed amendment). To create ease for the reader of this statute, the section numbers of the stalking and harassment laws may be included. Consequently, that part of the statute would read: “... stalking, as defined in section 12.1-17-07.1; or harassment, as defined in section 12.1-17-07...”


Court has stated, "Domestic violence is not caused by stress in the perpetrator's life, alcohol consumption, or a particular victim's propensity to push a perpetrator's buttons. Rather, domestic violence is a learned pattern of behavior aimed at gaining a victim's compliance." For the perpetrator to get what he or she wants, domestic abuse may take on many forms. Ultimately, the level of abuse is immaterial and should not be measured simply by physical injury, but rather by the intimidation and fear invoked in the victim.

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Violence Against Women, U.S. Dep't of Justice, available at http://www.usdoj.gov/ovw/docs/testimony/07192005.pdf (presenting findings that "a coordinated community response is the only way to eradicate the brutal crimes of domestic violence, dating violence, sexual assault, and stalking").


129. Hearing on H.R. 1313, supra note 50, at 5 (statement of Donald Becker, Director, Community Action Center).

130. Id.

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