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## For Better or Worse: The Federalization of Domestic Violence

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## FOR BETTER OR WORSE: THE FEDERALIZATION OF DOMESTIC VIOLENCE

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### I. INTRODUCTION

On December 1, 1994, Christopher Jarett Bailey carried his comatose wife Sonya into a Corbin, Kentucky emergency room. The Kentucky physicians discovered a large open wound on Sonya's forehead, two black eyes, bruises on her neck, chin, and forearms, as well as signs of rope burns on her wrists and ankles.<sup>1</sup> Upon inspection of the couple's car, police discovered that the trunk lid was dented on the inside, there were scratch marks around the lock, and there was a pool of blood and urine.<sup>2</sup> The couple had been last seen arguing in a bar on November

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1. *Bailey Faces Sentence in Wife Beating Today*, CHARLESTON GAZETTE, Sept. 1, 1995, at 12A.

2. *Man Faces Term Under Young Law*, CHARLESTON DAILY MAIL, Sept. 1, 1995, at

25, 1994.<sup>3</sup> Bailey had beaten his wife into unconsciousness at their home in St. Albans, West Virginia. Bailey then began an aimless six-day drive in and out of West Virginia and Kentucky. Sonya had spent at least part of that journey in the trunk.<sup>4</sup> When Bailey finally carried Sonya into a Kentucky hospital, doctors discovered that she had suffered a severe head injury and was near death from the loss of blood, fluids, and oxygen.<sup>5</sup> Sonya Bailey's doctors predict that she will spend the remainder of a normal life expectancy comatose in a nursing home.<sup>6</sup> Christopher Bailey, convicted of kidnapping and interstate domestic violence, will spend the remainder of his life in a federal prison.<sup>7</sup> On May 23, 1995, after only two and one-half hours of deliberations, Bailey became the first person convicted under a new Interstate Domestic Violence law, which is a part of the Federal Violence Against Women Act of 1994.<sup>8</sup>

The Federal Violence Against Women Act (VAWA) was enacted as Title IV of the Violent Crime Control and Law Enforcement Act of 1994.<sup>9</sup> Chapter 110-A, dealing with domestic violence, created two

9A.

3. *Id.*

4. Maryclaire Dale, *Bailey Sentenced to Life in Prison*, CHARLESTON GAZETTE, Sept. 2, 1995, at 1A [hereinafter Dale]. According to Bailey, he had experienced an alcoholic blackout, could not recall exactly what had happened, and awoke to find his bloody wife in the backseat of their car. During his six day drive he had been trying to make his wife better. Trial Transcript at 665-73, *United States v. Bailey* (No. 95-2). The defense contended that Mrs. Bailey could not have spent more than a few hours in the trunk of the car. Telephone Interview with H. Gerard Kelley, Defense Counsel (Dec. 27, 1995).

5. Dale, *supra* note 4, at 7A.

6. *Id.* at 1A.

7. *Id.* Bailey received life in prison because he was convicted of both kidnapping and interstate domestic violence. Had he been convicted of interstate domestic violence only, he would have received up to 20 years in prison. Martha Bryson Hodel, *Bizarre Odyssey of Domestic Violence*, SUNDAY GAZETTE MAIL, Feb. 28, 1995, at 1A.

8. Stacey Ruckle, *No Further Charges to be Filed on Bailey*, CHARLESTON DAILY MAIL, May 24, 1995, at 1A [hereinafter Ruckle, *No Further Charges*]. The Bailey family's legal battles are far from over. With Christopher imprisoned for life, and Sonya hospitalized for life, their families are now engaged in an ugly property battle over the home they lived in and its contents. Stacey Ruckle, *Fight Over Bailey Property Upsets Teen*, CHARLESTON DAILY MAIL, Sept. 14, 1995, at 1A. Bailey also has an appeal pending in the Fourth Circuit Court of Appeals. Telephone Interview with H. Gerard Kelley, Defense Counsel (Dec. 27, 1995).

9. The Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-

new federal criminal offenses: interstate domestic violence and interstate violation of a protection order.<sup>10</sup> This Note will focus on interstate domestic violence.<sup>11</sup>

This new offense allows for the federal prosecution of a person who travels across a state line with the intent to injure, harass, or intimidate his or her spouse<sup>12</sup> and who intentionally commits a crime

322, 108 Stat. 1796 (codified as amended in scattered sections of 42 U.S.C.).

10. 18 U.S.C. §§ 2261 to 2262 (1994). The Bailey case was the first test of the Interstate Domestic Violence statute. Notably, Wayne Hayes, an Ohio man, has become the first to be charged with Interstate Violation of a Protection Order. Hayes allegedly harassed his ex-wife and sent her 615 threatening letters after she fled with their son to New Jersey. Jan Hoffman, *Man is First Charged in Spouse Abuse Law*, N.Y. TIMES, Dec. 22, 1995, at B6.

11. The statute reads:

§2261. Interstate domestic violence

(a) OFFENSES.—

(1) CROSSING A STATE LINE.—A person who travels across a State line or enters or leaves Indian country with the intent to injure, harass, or intimidate that person's spouse or intimate partner, and who, in the course of or as a result of such travel, intentionally commits a crime of violence and thereby causes bodily injury to such spouse or intimate partner, shall be punished as provided in subsection (b).

(2) CAUSING THE CROSSING OF A STATE LINE.—A person who causes a spouse or intimate partner to cross a State line or to enter or leave Indian country by force, coercion, duress, or fraud, and in the course or as a result of that conduct, intentionally commits a crime of violence and thereby causes bodily injury to the person's spouse or intimate partner, shall be punished as provided in subsection (b).

(b) PENALTIES.—A person who violates this section shall be fined under this title, imprisoned—

(1) for life or any term of years, if death of the offender's spouse or intimate partner results;

(2) for not more than 20 years if permanent disfigurement or life threatening bodily injury to the offender's spouse or intimate partner results;

(3) for not more than 10 years, if serious bodily injury to the offender's spouse or intimate partner results or if the offender uses a dangerous weapon during the offense;

(4) as provided for the applicable conduct under chapter 109A if the offense would constitute an offense under 109A (without regard to whether the offense was committed in the special maritime and territorial jurisdiction of the United States or in a Federal prison); and

(5) for not more than 5 years, in any other case, or both fined and imprisoned.

18 U.S.C. § 2261(a) (1994).

12. Under the statute a "spouse or intimate partner" includes:

of violence causing bodily injury to that spouse.<sup>13</sup> One is also subject to federal prosecution if he or she, like Bailey, causes a spouse to cross a state line by force, coercion, duress, or fraud and in the course or as a result of that conduct intentionally commits a crime of violence causing injury to his or her spouse.<sup>14</sup> The Act calls for the defendants convicted of interstate domestic violence to be sentenced as according to the extent of injuries to the victim.<sup>15</sup> If the victim dies, the offender can be sentenced to life or any term of years.<sup>16</sup> If permanent disfigurement or life threatening bodily injury results, the offender may be sentenced to a maximum of twenty years in prison.<sup>17</sup> If the victim suffers serious bodily injury, or if the offender uses a dangerous weapon when committing the offense, imprisonment can not exceed ten years.<sup>18</sup> Otherwise, sentencing is allowed as provided under chapter 109A or for not more than five years.<sup>19</sup> The VAWA also directs the court to order restitution to be paid to the victim of the domestic violence.<sup>20</sup> Other provisions of the VAWA call for law enforcement and prosecution grants to aid in the reduction of violent crimes against women.<sup>21</sup> Section 2263 allows the victim of domestic violence an opportunity to be heard about the danger posed by the defendant when determining pre-trial release conditions.<sup>22</sup>

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(A) a spouse, a former spouse, a person who shares a child in common with the abuser, and a person who cohabits or has cohabited with the abuser as a spouse; and

(B) any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the State in which the injury occurred or where the victim resides.

18 U.S.C. § 2266 (1994).

13. 18 U.S.C. § 2261(a)(1) (1994).

14. 18 U.S.C. § 2261(a)(2) (1994).

15. 18 U.S.C. § 2261(b) (1994).

16. 18 U.S.C. § 2261(b)(1) (1994).

17. 18 U.S.C. § 2261(b)(2) (1994).

18. 18 U.S.C. § 2261(b)(3) (1994).

19. 18 U.S.C. § 2261(b)(5) (1994).

20. 18 U.S.C. § 2264(a) (1994).

21. The Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 42 U.S.C.); Arthur L. Burnett, Sr., *Dispensing Justice in Domestic Violence Cases: Pretrial Release and Sentencing of Offenders*, 9 CRIM. JUST. 8, 9 (1995).

22. 18 U.S.C. § 2263 (1994).

Cases like Sonya Bailey's had been gaining national attention, outrage, and debate.<sup>23</sup> Congress responded by promulgating the Violence Against Women Act; however, the VAWA did not end the debate about how to best combat domestic violence. In fact, the new laws have added sparks to another controversy — the federalization of criminal law. As Congress makes more and more traditional state law crimes federal offenses, several questions are raised regarding concurrent jurisdiction, prosecutorial discretion, sentencing disparity, states' rights, and the purposes of the federal judiciary.<sup>24</sup>

This Note explores some of the issues raised by the federalization debate. In order to provide insight into Congress' view on the federalization of criminal domestic violence, Part II examines the history and development of the VAWA. Because little has been written analyzing the criminal offenses of the VAWA specifically, Part III presents the arguments for and against the federalization of criminal law in general. Part IV discusses the problems inherent in the interstate domestic violence offenses of the VAWA. Ultimately, this Note describes solutions to the problems of federalization and contains a proposal to quiet the federalization conflict with regards to crimes of domestic violence by eliminating the criminal offenses and creating conditional Congressional funding instead.

## II. HISTORY AND DEVELOPMENT OF THE VIOLENCE AGAINST WOMEN ACT

The Violence Against Women Act of 1994 had its origins several years ago;<sup>25</sup> however, it was only enacted after extensive Congressio-

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23. See, e.g., Aimee Green, *House Panel Urged to Get Tough Against Family Violence — Murder Victim's Family Seeks Harsher Punishment*, SEATTLE TIMES, Feb. 21, 1996 at B1; Tony Mauro, *Moon Prosecutor: 'No Apologies' Acquittal Stirs Debate Over Prosecutions*, USA TODAY, Feb. 23, 1996, at 3A; Basil Talbott, *Abuse Hotline Gives Victims a New Option*, CHICAGO SUN-TIMES, Feb. 22, 1996, at 23.

24. The author recognizes that there is also a Commerce Clause issue following the *United States v. Lopez* decision. This Note will not discuss the possible effects of *Lopez* on the VAWA.

25. Birgit Schmidt Am Busch, *Domestic Violence and Title III of the Violence Against Women Act of 1993: A Feminist Critique*, 6 HASTINGS WOMEN'S L.J. 1, 4 (1995) [hereinafter Am Busch].

nal hearings concerning domestic violence statistics and testimonials about domestic abuse. The resulting Act was intended to be a comprehensive piece of legislation in order to prevent, punish, and deter spousal abusers.<sup>26</sup>

### A. Background of the Act

In September of 1994, Congress finally<sup>27</sup> passed the VAWA as Title IV of the Violent Crime Control and Law Enforcement Act of 1994.<sup>28</sup> Although it is but a small portion of the federal Omnibus Crime Package, the VAWA gained a great deal of attention on both the House and Senate floors.<sup>29</sup> The comments of the various Senators and Representatives, as well as others that were given time to speak, provide some insight as to why Congress felt the need to make some forms of domestic violence federal offenses.

#### 1. Statistics and Testimonials

During her testimony before a house subcommittee, Sally Goldfarb, senior staff attorney of the NOW Legal Defense And Education Fund revealed some startling statistics. "Every 15 seconds, a woman is beaten by her husband or boyfriend. Every six minutes, a woman is forcibly raped."<sup>30</sup> She also stated that "[s]ince 1974, the rates for assault and many other violent crimes against women have increased dramatically, while the rates for the same crimes against men have actually

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26. *Developments in the Law: Legal Responses To Domestic Violence III. NEW STATE AND FEDERAL RESPONSES TO DOMESTIC VIOLENCE*, 106 HARV. L. REV. 1528 (1993) [hereinafter *Legal Responses*].

27. The VAWA originated in 1991 when Senator Biden introduced a bill on crimes of domestic violence. Representative Barbara Boxer then followed suit with a companion bill in the House of Representatives. Although the original bill was never acted upon by the Congress, several Senators joined Senator Biden in reintroducing the bill in 1993. The VAWA was passed in September of 1994. Am Busch, *supra* note 25, at 4-5.

28. The Violent Crime Control And Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 42 U.S.C.).

29. See *infra* notes 30-41, 43-49, 51-53 and accompanying text.

30. 139 CONG. REC. H10,363 (daily ed. Nov. 20, 1993) (statement of Sally Goldfarb) (citations omitted).

declined."<sup>31</sup> Sally Goldfarb, on behalf of the NOW Legal Defense And Education Fund, strongly endorsed and urged support of the VAWA.<sup>32</sup>

Several members of Congress also offered statistics in support of the VAWA. Representative Fowler of Florida noted that three to four million women are battered by their husbands or partners every year.<sup>33</sup> Also rising in support of the VAWA was Representative Snowe, who offered the following statistics:

Violence occurs at least once in two-thirds of all marriages. Ninety-five percent of victims of domestic violence are women. It is estimated that 2,000 to 4,000 women are beaten to death each year. The Surgeon General says that battering "is the single largest cause of injury to women in the United States."<sup>34</sup>

Both Representatives urged the passage of the VAWA.<sup>35</sup>

The Senate was also influenced by the overwhelming incidents of domestic abuse. Senator Boxer, long affiliated with the Act, told the Senate floor, "[a]s many as one-fifth to one-third of all women who visit emergency rooms are victims of spousal abuse. In 1992, approximately 30 percent of all women murdered — nearly 1,400 wives and girlfriends — were slain by their husbands or boyfriends."<sup>36</sup> Senator Biden, who had been introducing this Act repeatedly for years, spoke of the need for a change in attitudes,

one of the States in the Nation in 1987 surveyed all of their seventh, eighth, and ninth grade students and asked the following question, . . . If a man spends \$10 on a woman on a date and then demands to have sex with her and she refuses, is he entitled to use force? Somewhere around 34 percent of young men in this State said yes, and an astounding 24 percent of the young women said yes.<sup>37</sup>

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31. *Id.*

32. *Id.*

33. *Id.* at H10,368.

34. *Id.* at H10,369 (citations omitted).

35. *Id.* at H10,368-69.

36. 140 CONG. REC. S7218 (daily ed. June 21, 1994) (statement of Senator Boxer).

37. *Id.*



Both Senators asked Congress to pass the Act that they had first sponsored years before.<sup>38</sup>

Congress also heard testimony of several specific instances of abuse. Representative Oliver read to the House a disturbing letter written by an abused woman from Massachusetts who had suffered five years of physical and psychological abuse from her husband. While her husband is finally in prison, he could be released in two years.<sup>39</sup> Representative Morella spoke of Kristin Lardner, a young woman who's former boyfriend stalked and murdered her.<sup>40</sup> Representative Moakley of Massachusetts described his 21-year-old neighbor who was fatally stabbed and had her apartment set afire by her estranged husband.<sup>41</sup> These are but a few examples of the incidents mentioned during debate over the VAWA, justifying the need for federal response.<sup>42</sup>

## 2. State Prosecutions

Congress, alarmed by the startling statistics, was apparently convinced that the states were not solving the domestic violence problem, and that the federal government's involvement was needed. Senator Kennedy said that "the bill provides funds to train and educate police, prosecutors and judges so that violence within the family will be *taken seriously and treated as the crime that it is.*"<sup>43</sup> Representative Moakley urged the House that "[d]omestic violence is no longer an

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38. *Id.*

39. 139 CONG. REC. H10,360 (daily ed. Nov. 20, 1993) (statement of Representative Oliver).

40. 140 CONG. REC. H2526 (daily ed. April 20, 1994) (statement of Representative Morella).

41. 139 CONG. REC. H10,359 (daily ed. Nov. 20, 1993) (statement of Representative Moakley).

42. It is interesting to note that few of these instances of abuse would be covered by the VAWA offenses because in order to fall under the federal Act there must be travel across state lines.

43. 140 CONG. REC. S12,526 (daily ed. Aug. 25, 1994) (statement of Senator Kennedy) (emphasis added).

issue that we, in society, can ignore or simply dismiss as a lover's quarrel."<sup>44</sup>

Sally Goldfarb of the NOW Legal Defense And Education Fund told a House Subcommittee that gender-motivated crimes are not currently being addressed in the state courts.<sup>45</sup> She further explained that in some states husbands are immune from prosecution for raping their wives and seven states have interspousal immunity doctrines preventing wives from suing their husbands for medical expenses, pain, and suffering following an assault.<sup>46</sup>

Perhaps the most straightforward remarks were made by Representative Schumer from New York,

[t]here is a dirty little secret hidden here, and that secret is that our legal system is all too indifferent to this violence. Our legal system looks the other way, tolerating the daily battering and abuse of women . . . . A woman is raped; she goes to the police and is told, "You aren't really hurt. Just try and forget about it." Another victim is told by the prosecutor, "I won't bring this case because you were wearing a short skirt." A woman has her nose broken by her husband. When the police finally come, they say, "You two work out your problems together." A woman goes before a judge asking for a protection order from a husband she has tried to leave, and the judge says, "Why are you two wasting our time with marital squabbles?"<sup>47</sup>

Representative Snowe recognized that the states have made some progress in domestic abuse areas but conceded that police often hesitate to respond to these incidents because they do not want to interfere in domestic disputes.<sup>48</sup> After articulating the abuse problem on the floor and in committee, Congress was ready to provide the prevention and protection they felt was needed for women.

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44. 139 CONG. REC. H10,359 (daily ed. Nov. 20, 1993) (statement of Representative Moakley).

45. *Id.* at H10,364.

46. *Id.*

47. *Id.* at H10,366 (citations omitted).

48. *Id.* at H10,369.

### B. Congressional Response

Congress responded to the terrifying testimonials and statistics with the VAWA. The Act was intended to be a comprehensive arsenal to fight a war against gender-motivated violence.<sup>49</sup> The VAWA was designed to deter, punish, and rehabilitate offenders in order to prevent domestic abuse.<sup>50</sup> Senator Biden explained that the bill would make women substantially safer because of the increased number of battered women's shelters, the education of prosecutors and judges, and the creation of both criminal and civil causes of actions.<sup>51</sup> Grants were included to train and educate police, prosecutors, and judges so that domestic violence "would be taken seriously."<sup>52</sup> Funds were also allotted to assist law enforcement, support counselors and shelters, and restore a national toll-free domestic violence hotline.<sup>53</sup>

As passed, the VAWA provided for \$1.62 billion to be given to the states over the next six years for funding community programs to battle violence against women and provide battered women with support.<sup>54</sup> Each state was to receive \$500,000 a year, with additional funds to be provided to states with higher populations.<sup>55</sup> In 1995, Congress allotted \$426,000 for each state. After the states submitted plans to the Department of Justice, the government planned to release the remainder of the funds.<sup>56</sup> For example, West Virginia's general plan includes training and cross-training between law enforcement, courts, and those who provide direct services to abuse victims.<sup>57</sup> The plan also contains more legal advocates to aid victims and a computerized system to allow officers to track protective orders across county lines.<sup>58</sup> It extends direct services to all fifty-five West Virginia coun-

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49. 140 CONG. REC. S7218 (daily ed. June 21, 1994) (statement of Senator Boxer).

50. *Legal Responses*, *supra* note 26, at 1544.

51. 140 CONG. REC. S7218 (daily ed. June 21, 1994) (statement of Senator Biden).

52. 140 CONG. REC. S1526 (daily ed. Aug. 25, 1994) (statement of Senator Kennedy).

53. *Id.*

54. *Domestic Violence Law Allots W.Va. \$426,000*, CHARLESTON GAZETTE, Aug. 14, 1995, at 5A.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

ties and provides awareness about local resources which would help women in abusive situations.<sup>59</sup>

Finally, the VAWA also called for several studies to be conducted by various branches of government to examine gender bias in courts, campus sexual assaults, battered women's syndrome, the confidentiality of victim's addresses, and domestic violence related recordkeeping.<sup>60</sup> These studies were designed to gain a clear understanding of the origins and extent of women's issues and to provide recommendations for further reform.<sup>61</sup>

### III. PROS AND CONS OF THE FEDERALIZATION OF CRIMINAL LAW

Before discussing the Interstate Domestic Violence statute specifically, it is helpful to look at the arguments for and against the federalization of criminal law generally. Those opposing federalization typically call for either the repeal of federal offenses or for Congress to stop creating new federal crimes.<sup>62</sup> These opponents of federalization contend that the new offenses do more harm than good.<sup>63</sup> The crimes congest federal court dockets, show little regard for the states, and create inequality.<sup>64</sup> Supporters of federalization, and particularly the VAWA, argue that these new offenses were needed, they will not necessarily congest federal court dockets, and that the opponents of the VAWA simply continue to disregard the seriousness of domestic violence.<sup>65</sup>

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59. *Domestic Violence Law Allots W.Va. \$426,000*, CHARLESTON GAZETTE, Aug. 14, 1995, at 5A.

60. The Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 42 U.S.C.).

61. *Id.*

62. See *infra* text accompanying notes 125-128.

63. See Stephen Chippendale, *More Harm Than Good: Assessing Federalization of Criminal Law*, 79 MINN. L. REV. 455 (1994) [hereinafter Chippendale].

64. See Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 981 (1995) [hereinafter Beale].

65. *Legal Responses*, *supra* note 26, at 1547.

### A. *Anti-Federalization Arguments*

The primary argument against the federalization of criminal offenses is that it would swell the federal judicial docket.<sup>66</sup> The increased workload is said to reduce the quality of adjudication by decreasing the time and attention judges spend on each individual case.<sup>67</sup> Expanding the federal docket with cases that can be handled effectively by the states is considered a misallocation of resources.<sup>68</sup> Many of these problems are blamed on the Speedy Trial Act<sup>69</sup> requirements, which are accused of pushing “civil cases off the docket altogether” or causing “such severe backlogs as to result in dismissals of serious criminal cases.”<sup>70</sup> With more than 3,000 federal crimes now on the books, many of those sharing jurisdiction with nearly identical state crimes, the concern for overwhelming the federal courts is widespread.<sup>71</sup> The federal criminal offenses are blamed for many problems found in federal courts today, as well as problems that are anticipated.

Another prevalent de-federalization argument is that the federalization of criminal statutes is a blatant usurpation of states’ rights.<sup>72</sup> The states traditionally were left with primary jurisdiction over criminal problems because they were largely of local interest and impact.<sup>73</sup> As Congress creates more and more federal criminal offenses, it shows less and less regard for the states.<sup>74</sup> For example, by enacting the death penalty for dozens of federal crimes, Congress has encroached

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66. Chippendale, *supra* note 63, at 471.

67. The Honorable Robert E. Cowen, *The Thirteenth Annual Chief Justice Joseph Weintraub Lecture Federalization of State Law Questions: Upheaval Ahead*, 47 RUTGERS L. REV. 1371, 1373 (1995) [hereinafter Cowen].

68. Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1169 (1995).

69. 18 U.S.C. § 3161 (1994).

70. H. Scott Wallace, *The Drive to Federalize is a Road to Ruin*, 8 CRIM. JUST. 8, 12 (1993) [hereinafter Wallace].

71. As stated previously, this Note will not address another possible anti-federalization argument, that is the “stretching” of the Commerce Clause.

72. See sources cited *infra* notes 73-75.

73. Brickey, *supra* note 68, at 1138.

74. *Id.* at 1166.

upon the will of several states and the District of Columbia which have banned capital punishment.<sup>75</sup>

One reason proffered for federalization is that it achieves uniformity in the law.<sup>76</sup> This uniformity ordinarily involves stiffer sentencing, often ten to twenty times higher.<sup>77</sup> However, criminal offenders committing identical crimes can now receive radically different treatment depending on who prosecutes them.<sup>78</sup> For example, Christopher Bailey, convicted of kidnapping and interstate domestic violence, received life in prison and cannot seek parole for thirty-five years (when he reaches age 70).<sup>79</sup> If he had been prosecuted and convicted for his crimes against Sonya by the state of West Virginia, he would have been sentenced to between two and ten years in prison for malicious assault.<sup>80</sup> Even more alarming than the sentencing disparity is that in some cases double jeopardy does not bar an offender being tried by both federal and state prosecutors.<sup>81</sup>

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75. *Id.*

76. Cowen, *supra* note 67, at 1385.

77. Beale, *supra* note 64, at 998.

78. *Id.* at 981-82.

79. Maryclaire Dale, *Bailey Sentenced to Life in Prison*, CHARLESTON GAZETTE, Sep. 2, 1995, at 1A. As noted previously, if convicted of the interstate domestic violence offense alone, Bailey would have received up to 20 years in prison, again harsher than the alternative sentence for the state crime. Also, the offense that Bailey committed involved transporting his spouse across state lines which was virtually a second kidnapping offense. Interview with H. Gerard Kelley, Defense Counsel (Mar. 20, 1996). For further examples of disparate sentencing *see* Beale, *supra* note 64, at 998.

80. Although conceivably Bailey could have been charged with various other criminal offenses, commentators have focused on the likelihood of his being charged with malicious assault. Martha Bryson Hodel, *Bizarre Odyssey of Domestic Violence*, SUNDAY GAZETTE MAIL, Feb. 28, 1995, at 1A; Ruckle, *No Further Charges*, *supra* note 8, at 1A; W. VA. CODE § 61-2-9 (1992).

81. Wallace, *supra* note 70, at 52. For a recent analysis of the "dual sovereignty" exception to the Double Jeopardy Clause *see* Susan N. Herman, *Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU*, 41 UCLA L. REV. 609 (1994). It should also be noted that the U.S. Department of Justice currently follows the "Petite Policy" which states that absent unusual circumstances or compelling reasons, no one should be punished twice for crimes arising out of the same criminal act even if the successive prosecutions would be Constitutional. *Id.* at 619 n.33 (citing U.S. DEP'T OF JUSTICE, U.S. ATTORNEY'S MANUAL, tit. 9, § 2.142 (1992) and *Petite v. United States*, 361 U.S. 529 (1960)).

The primary problem with the stiffer sentencing is the arbitrariness by which a defendant is subjected to federal criminal prosecution, so arbitrary in fact that it has been called a "cruel lottery."<sup>82</sup> While the United States attorney's manual contains general guidelines to aid in the decision of whether to prosecute, the manual does not mandate that the federal prosecutors try the case.<sup>83</sup> The lack of set guidelines has given rise to unusual forms of prosecutorial discretion such as "Federal Day" in the Southern District of New York.<sup>84</sup> "Federal Day" is one random day each week on which all street-level drug offenders apprehended by police are tried in federal court, with the stiffer federal penalties, in an attempt to create a Russian-Roulette type of deterrence.<sup>85</sup> Much of the prosecutorial discretion in federal cases is exercised with a similar motive, prosecute a small percentage of the cases that fall in federal jurisdiction to "set an example."<sup>86</sup>

After being convicted in federal court, the offenders have no equal protection challenge to the disparity in sentencing, even if the prosecutor's decision to try the case was motivated by the harsher sentence itself.<sup>87</sup> Those opposed to federalization note that the sentencing disparity between identical federal and state crimes is contrary to federal sentencing policy.<sup>88</sup> The Sentencing Reform Act of 1984 states that one of the factors to be considered in sentencing is the avoidance of disparities among similar defendants with similar records found guilty of similar conduct.<sup>89</sup> In some cases, rather than promoting uniformity, prosecutors have seized the disparity and used the tougher federal sentence as a threat so that a defendant will take a plea bargain and sentence from state court.<sup>90</sup> The disparate treatment of offenders, as well as the arbitrariness in choosing a forum, lead many to criticize the federalization of criminal law.<sup>91</sup>

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82. Beale, *supra* note 64, at 997.

83. *Id.* at 999.

84. *Id.* at 1000.

85. *Id.*

86. Wallace, *supra* note 70, at 52.

87. Beale, *supra* note 64, at 1001.

88. *Id.* at 1002.

89. *Id.*

90. *See* Wallace, *supra* note 70, at 52.

91. *Id.*

### B. *Pro-Federalization Arguments*

The proponents of the federalization of criminal law, and the VAWA, contend that the new provisions will not necessarily clog the federal courts.<sup>92</sup> One commentator pointed out that the VAWA would not federalize all violent crimes against women.<sup>93</sup> Deputy Attorneys General have stated that federal offenses will not crowd the dockets because of highly selective prosecutorial discretion.<sup>94</sup> They stress that federal prosecutors should exercise that discretion to prosecute those “few cases” in which a federal trial would be the most effective way to apply the resources to the nation’s problem.<sup>95</sup> Even if there are a large amount of these cases, then this means there is an obvious need for greater federal response.<sup>96</sup>

The Department of Justice (DOJ), in supporting the recent federalization, describes the 1994 Omnibus Crime Package “[b]y focusing on four ‘p’ words — partnership, prevention, policing and punishment.”<sup>97</sup> The DOJ contends that it is not possible to fix appropriate federal and state jurisdiction into spheres because it is not possible to adequately describe a federal mission where values and concerns change with time.<sup>98</sup> The focus is DOJ lawyers working with state prosecutors to determine how best to use law enforcement resources in cases of concurrent jurisdiction.<sup>99</sup> “Where federal jurisdiction would not enhance local capacity to handle problems, attempts at federalization are inappropriate.”<sup>100</sup> The DOJ views federal criminal jurisdiction appropriate in particular criminal areas when:

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92. *Legal Responses*, *supra* note 26, at 1546.

93. *Id.* at 1546.

94. Jamie S. Gorelick & Harry Litman, *Prosecutorial Discretion and the Federalization Debate*, 46 HASTINGS L.J. 967, 978 (1995) [hereinafter Gorelick & Litman].

95. *Id.*

96. *Legal Responses*, *supra* note 26, at 1546.

97. Renee M. Landers, *Federalization of State Law: Enhancing Opportunities for Three-Branch and Federal-State Cooperation*, 44 DEPAUL L. REV. 811, 816 (1995) [hereinafter Landers].

98. *Id.* at 813-14.

99. *Id.* at 821.

100. *Id.* at 822.



1) there is a pressing problem of national concern; 2) state criminal jurisdiction is inadequate to solve significant aspects of the problem; and 3) the federal government — by virtue of its investigative, prosecutorial, or legal resources — is positioned to make a qualitative difference to the solution of the problem, i.e., a difference that could not be produced by the state's dedicating a similar amount of resources to the problem.<sup>101</sup>

To summarize, Congress will respond to national concern with federal criminal offenses,<sup>102</sup> the DOJ will then make a “cooperative” decision with state officials whether to prosecute federally,<sup>103</sup> and to avoid clogging the federal courts this decision will be highly selective<sup>104</sup> — partnership, prevention, policing, and punishment.<sup>105</sup>

#### IV. ANALYSIS

The DOJ's focus on federalization emphasizes the many criticisms of federalization. Congress initially responds to a national concern, which means that the shifting political winds can play a huge part in creating new criminal law.<sup>106</sup> The DOJ then makes a cooperative decision with state prosecutors about the most appropriate forum for the trial.<sup>107</sup> The highly selective prosecutorial discretion used in these decisions is by definition arbitrary, amounting to the “cruel lottery” mentioned previously.<sup>108</sup> The arbitrariness of discretion can then lead to sentencing disparity — in Christopher Bailey's case, life in prison for federal convictions of kidnapping and interstate domestic violence versus two to ten years for the state crime of malicious assault.<sup>109</sup>

These criticisms are inherent in the VAWA's interstate domestic violence offenses. The statute's primary problems are: 1) the criminal

101. Gorelick & Litman, *supra* note 94, at 972.

102. Landers, *supra* note 97, at 819.

103. *Id.* at 821.

104. Gorelick & Litman, *supra* note 94, at 978.

105. Landers, *supra* note 97, at 816.

106. *See* Brickey, *supra* note 68, at 1161 (citing LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 71 (1994)).

107. Landers, *supra* note 97, at 819.

108. Beale, *supra* note 64, at 997.

109. *Id.*; *see supra* notes 7 and 79.

provisions will not reach the overwhelming majority of domestic violence crimes; 2) the discretion given to federal prosecutors is entirely too arbitrary; and 3) the disparity in the sentencing between federal and state law is not fair to defendants or victims.

First, as already presented, Congress responded to a national outcry with the VAWA.<sup>110</sup> It held extensive hearings in which terrifying statistics and stories of domestic abuse were presented.<sup>111</sup> The problem is, from a prosecutorial position, most of these cases occurred entirely within one state. In order to invoke federal jurisdiction, there has to be travel across state lines.<sup>112</sup> To illustrate, Christopher Bailey beat his wife, placed her in the trunk of a car, drove in and out of Kentucky and West Virginia for six days, and received life in a federal prison for kidnapping and interstate domestic violence.<sup>113</sup> Had Bailey beat Sonya, placed her in the trunk of their car, and drove around West Virginia for six days he would have received between two and ten years for malicious assault.<sup>114</sup> By covering relatively few abuse offenses, the criminal provisions of the VAWA are merely a small bandaid on a massive wound.<sup>115</sup>

A second problem with the Act, and this reaches the scope of the entire federalization argument, is that the prosecutorial discretion is entirely too arbitrary.<sup>116</sup> As discussed previously, the decision to prosecute federally can occur because an offender is arrested on "federal day", because the penalties are much harsher, because the defendant refuses to plead down to a lesser state offense, or because a federal prosecutor decides to make an example out of you.<sup>117</sup> With no set standards to determine jurisdiction, and no recourse when convicted,

110. *See supra* note 23 and accompanying text.

111. *See supra* notes 30-41, 43-49, 51-53 and accompanying text.

112. 18 U.S.C. § 2261 (1994).

113. Maryclaire Dale, *Bailey Sentenced to Life in Prison*, CHARLESTON GAZETTE, Sep. 2, 1995, at 1A; *see supra* notes 7 and 79.

114. Ruckle, *No Further Charges*, *supra* note 8, at 1A.

115. The response to this argument is that the act can serve as a gap filler for when you can't prove what happened in a given state. Martha Bryson Hodel, *Bizarre Odyssey of Domestic Violence*, SUNDAY GAZETTE MAIL, Feb. 28, 1995, at 1A.

116. *See supra* notes 82-86 and accompanying text.

117. *Id.*

you may be prosecuted by the state government, by the federal government, or both.<sup>118</sup>

This arbitrariness brings us to the final problem with the Act, the harsher sentencing. At first glance, it appears that the life sentence Bailey received from a federal court was appropriate. When you take a second look, you can see that while the sentence may have been proper, the forum was not. The disparity is not fair to either the defendant or the victim. Sonya Bailey's abuser is in prison for life. The next victim may not be so lucky. Using the prior illustration, if the next abusive husband beats his wife, puts her in the trunk of a car, and drives around West Virginia for six days, that victim may see her husband released from state prison in two years.<sup>119</sup> No one will argue that domestic violence has not deservedly become a matter of national concern. The VAWA takes a step in the right direction by recognizing that existing state law is not adequately handling the problem. It also recognizes that protecting women can be accomplished by providing financial solutions to local problems.

However, the federalization of domestic violence offenses does little to protect women from their abusers and much to create inequality. Rather than give a few offenders stiff sentencing in federal court to "set an example," Congress needs to ensure that all domestic violence offenders receive stiff sentencing in state court in order to protect all American women.

#### V. PROPOSALS TO MEET THE GOALS OF FEDERALIZATION WITHOUT CREATING FEDERAL OFFENSES

The Honorable William H. Rehnquist, Chief Justice of the United States Supreme Court, has stated that the primary expansion of federal jurisdiction under the 1994 Crime Act came in its Violence Against Women provisions.<sup>120</sup> As discussed previously, this expansion of pow-

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118. *See supra* notes 81, 83.

119. *See supra* note 80. Another factor to consider is that West Virginia is a relatively small state with quickly and easily accessible state lines. Even with days-long random driving, the probability of crossing state lines is reduced in a larger state. Telephone interview with H. Gerard Kelley, Defense Attorney (Dec. 27, 1995).

120. The Honorable William H. Rehnquist, *Convocation Address, Wake Forest Universi-*

er has sparked many criticisms.<sup>121</sup> To combat these problems, many federalization opponents have offered possible solutions. Some opposing federalization see the “cooperative” aspects and concurrent jurisdiction as blurring the two systems together.<sup>122</sup> If the distinctions between the federal and state systems are eliminated, there is no justification for both systems.<sup>123</sup> The expansion of federal jurisdiction to take on cases that traditionally belonged in the broad state jurisdiction can lower the effectiveness of trying cases of true federal concern.<sup>124</sup> To those who see this as the end result of federalization, unification of the two court systems seems logical.<sup>125</sup> Unification would remove uncertainty about the choice of forum and eliminate wasteful duplicative jurisdiction.<sup>126</sup>

Others commentators, who see this as a bit drastic, opt for a more pragmatic approach of narrowing the existing federalization. “What Congress can do, Congress can undo.”<sup>127</sup> Congress could de-federalize existing crimes and slow the creation of new offenses by only federalizing crimes that genuinely need to be federal; those crimes that cannot properly be dealt with by the states even with federal financial assistance.<sup>128</sup>

Conditional congressional spending is a practical alternative that would promote all of the goals of the comprehensive act, and achieve the goal of uniformity amongst the states, without the arbitrariness of a “cruel lottery” and the disparity in sentencing.

Congress should use the available monetary resources to insure implementation of their ideal laws in the states, under state jurisdiction. Much in the way of funding is already being done with the existing VAWA. The Act provides for studies to be conducted by various branches of government to examine gender bias in courts, campus

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ty, 29 WAKE FOREST L. REV. 999, 1004 (1994),

121. *See supra* notes 66-91.

122. Beale, *supra* note 64, at 992.

123. *Id.*

124. *Id.*

125. *Id.*

126. Daniel J. Meador, *Transformation of the American Judiciary*, 46 ALA. L. REV. 763, 779 (1995).

127. Cowen, *supra* note 67, at 1381.

128. *Id.*

sexual assaults, battered women's syndrome, the confidentiality of victim's addresses, and domestic violence related recordkeeping.<sup>129</sup> The VAWA allocates funds so that every state can respond locally with whatever is necessary to support women and battle domestic violence.<sup>130</sup> The VAWA also restored a national toll-free domestic violence hotline, administered by the Department of Health and Human Services, which would enable victims to place a free call and get advice from trained counselors on what to do and where to go when in trouble.<sup>131</sup>

Congress can do more with money alone, without federalizing criminal law. Congress can allocate money to the states on the condition that they enact stricter penalties for crimes of violence against women. Congress has previously done this by granting funds on the condition that the states have specific laws in effect relating to child abuse and neglect.<sup>132</sup> It has also been pointed out that Congress has done this in the past with traffic regulations.<sup>133</sup> Congress provides funding to the states if they impose certain uniform regulations, hence achieving the federal goals without federalizing traffic violations.<sup>134</sup> If it can be done to prevent speeding and child abuse, why can't it be done to prevent violence against women? In fact, it is done within the VAWA.<sup>135</sup> In order to encourage states to "treat domestic violence as a serious violation of criminal law," the Attorney General is authorized to make grants to the states if they certify that their laws have or encourage mandatory arrest procedures when dealing with domestic violence offenses.<sup>136</sup>

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129. The Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 42 U.S.C.).

130. *Domestic Violence Law Allots W.Va. \$426,000*, CHARLESTON GAZETTE, Aug. 14, 1995, at 5A.

131. 141 CONG. REC. S4210 (daily ed. March 21, 1995) (statement of Senator Kennedy).

132. The Child Abuse and Prevention Treatment and Reform Act, 42 U.S.C. § 5106(a) (1994).

133. Cowen, *supra* note 67, at 1386 (citing *South Dakota v. Dole*, 483 U.S. 203 (1987)).

134. *Id.*

135. 42 U.S.C. § 3796hh (1994).

136. 42 U.S.C. § 3796hh(c) (1994).

While conditional spending is still showing little regard for the states and their ability to determine what crimes are deserving of stiffer penalties in their jurisdiction, it prevents arbitrariness and inequality, and ensures that all violence against women is handled adequately. Because acts like the VAWA are already on the books, this would have to be done in conjunction with previous proposals such as slowed federalization of new crimes and de-federalization of the existing crimes. However, this practical use of a congressional power would accomplish more with fewer problems.

## V. CONCLUSION

The VAWA was enacted in response to the horrific statistics and stories of domestic violence in the United States. The Act creates a new federal criminal offense entitled "interstate domestic violence." While the new provision is important in that it begins to bring domestic violence to the attention of law enforcement and prosecutors, the offense is also problematic and unnecessary. The federal crime is arbitrary, it promotes the disparate treatment of offenders, and it will only affect a small portion of domestic violence offenses. A better method, which was utilized in portions of the Act, would be to encourage the states to create laws to combat domestic abuse, with stiffer sentences, by allotting grants if the provisions are enacted. Instead of giving a few offenders life in prison in federal court, all offenders could be sentenced to life in state court.

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