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Ignorance of the Law: Should it Excuse Violations of Certain Federal Restrictions on the Possession of Firearms?

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IGNORANCE OF THE LAW: SHOULD IT EXCUSE VIOLATIONS OF CERTAIN FEDERAL RESTRICTIONS ON THE POSSESSION OF FIREARMS?

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Are thousands of North Carolinians violating federal criminal law every day without knowing it even though such violations may subject them to imprisonment for up to ten years and a fine of up to $250,000?[2] Ignorance of the law is generally held not to excuse criminal conduct,[3] but can such ignorance ever be so reasonable[4] and predictable as to constitute a legitimate excuse? Are some laws so obscure, technical, counter-intuitive,[5] or hard to discover[6] that ignorance of the law will be a defense?

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2. 18 U.S.C. § 924(a)(2).

3. "The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system." Cheek v. United States, 498 U.S. 192, 199 (1991). "[I]t is axiomatic that 'ignorance or mistake of law will not excuse an act in violation of the criminal laws.' 21 Am.Jur.2d, Criminal Law 142, p. 278 (1981). *See also* 22 C.J.S., Criminal Law 48 (1961). Therefore, defendant's claim is legally without basis (as well as being utterly preposterous) because ignorance of the law is not a valid defense." State v. Rogers, 68 N.C. App. 358, 385, 315 S.E.2d 492, *cert. denied*, 311 N.C. 767, 319 S.E.2d 284 (1984).

4. "Thus, although ignorance of the law is no excuse, and the statute at issue does not require the State to prove intent, due process requires that defendant have knowledge, actual or constructive, of the statutory requirements before he can be charged with its violation." State v. Young, 140 N.C. App. 1, 12, 535 S.E.2d 380 (2000).

5. "[A] law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear." Oliver Wendell Holmes, Jr., *The Common Law*, at 50 (1881). *See also* Bruce R. Grace, *Ignorance of the Law as an Excuse*, 86 Colum. L. Rev. 1392 (November, 1986): "The principle that ignorance of the law is no excuse, long thought to be basic to criminal law, is no longer appropriate when criminal law applies in surprising ways to otherwise ordinary behavior."

I. SECTION 922(G) OF THE FEDERAL GUN CONTROL ACT

18 U.S.C. Section 922(g) makes it unlawful for certain designated classes of individuals "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." Among the classes of prohibited firearms possessors are persons who have been convicted of a crime punishable by imprisonment for a term exceeding one year.[7] It may be widely known that convicted felons are barred from possessing firearms.[8] Also barred, however, are the following classes of individuals: (1) persons who have been convicted of a misdemeanor crime of domestic violence;[9] (2) persons who are subject to certain domestic violence protective orders,[10] and (3) persons who have been committed to a mental institution.[11] Persons in these classes may be less likely to know that they are subject to federal firearms disabilities.[12]

A. *Section 922(g)(9): Possession of firearm by person who has been convicted of a misdemeanor crime of domestic violence*

Known as the Lautenberg Amendment,[13] this provision defines a "misdemeanor crime of domestic violence" to mean an offense that is a

6. "While it is generally said that ignorance of the law is no excuse for a failure to comply with the law, such a rule does not apply where the citizen is, as a matter of practicality, denied a reasonable means for finding out what the law is in the first place." Orange County v. Dept. of Trans., 46 N.C. App. 350, 377, 265 S.E.2d 890, *disc. rev. denied*, 301 N.C. 94 (1980).

7. 18 U.S.C. § 922(g)(1).

8. The Gun Control Act of 1968's prohibition of convicted felons, and others, from buying or owning a gun, was the first federal legislation to limit an individual's Second Amendment right to bear arms. *See* discussion *in* Jodi L. Nelson, *The Lautenberg Amendment: An Essential Tool For Combatting Domestic Violence*, 74 N.D. L. Rev. 365, 370-71 (1999).

9. 18 U.S.C. § 922(g)(9). This provision is generally known as the *Lautenberg Amendment* to the Federal Gun Control Act of 1968. It was contained in the Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-52 (1996).

10. 18 U.S.C. § 922(g)(8). This provision was enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 (1994).

11. 18 U.S.C. § 922(g)(4). This provision was included in the original Gun Control Act of 1968.

12. Section 922(g)(8) and (9) had their genesis in protecting women from domestic violence. For a general discussion of the federal laws affecting domestic violence matters, e.g. The Gun Control Act of 1968, The Violence Against Women Act, and the purpose of the Lautenberg Amendment, *see* Jodi L. Nelson, *The Lautenberg Amendment: An Essential Tool For Combatting Domestic Violence*, 74 N.D. L. Rev. 365 (1999).

13. See footnote 9, supra.

misdemeanor under federal or state law and has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.[14] Case law has held that the predicate misdemeanor crime need not be explicitly identified as related to domestic violence.[15] Thus while proof of a domestic relationship is required to successfully prosecute a Section 922(g)(9) action, the predicate misdemeanor must have only one element: the use or attempted use of physical force or the threatened use of a deadly weapon. Simple assault and disorderly conduct convictions might, with additional proof, suffice as misdemeanor crimes of domestic violence under the Lautenberg Amendment.[16]

A person shall not be considered to have been convicted of a misdemeanor crime of domestic violence unless the person was represented by counsel (or knowingly and intelligently waived counsel), the case was tried by a jury (if entitled to a jury trial), or unless the person knowingly and intelligently waived the right to have the case tried by a

14. 18 U.S.C. § 921(a)(33)(A).

15. United States v. Smith, 171 F.3d 617, 619-21 (8th Cir. 1999). *See also* United States v. Ball, an unpublished *per curiam* opinion of the U.S. Court of Appeals, 4th Circuit, 2001 WL 324624, 246 F.3d 668 (Table) (No. 00-4582, decided April 4, 2001): "Finally, defendant argued that he had not committed the requisite predicate offense—a "misdemeanor crime of domestic violence," as defined in Section 921(a)(33)(A) because he was convicted under a West Virginia statute that did not require the battery to be against a current or former spouse. The Court held that even if defendant was convicted of simple battery rather than domestic battery as defined by West Virginia statutes, "we find that his conviction for simple battery meets the § 921 definition. Section 921(a)(33)(A) requires the predicate offense to have only one element—the use or attempted use of physical force; the relationship between perpetrator and victim need not appear in the formal definition of the predicate offense. United States v. Chavez, 204 F.3d 1305, 1313-14 (11th Cir.2000); United States v. Meade, 175 F.3d 215, 218-21 (1st Cir.1999); United States v. Smith, 171 F.3d 617, 619-21 (8th Cir.1999). Because [defendant] committed a battery against his wife, the district court did not err in finding, as a matter of law, that [defendant] had been convicted of a misdemeanor crime of domestic violence."

16. "Did you know that if your client faces charges of misdemeanor battery or disorderly conduct in a domestic violence situation, a conviction may mean that he or she may never legally possess a firearm?" Assistant U.S. Attorney Laura A. Przybylinski Finn, *Those Convicted of Domestic Violence Cannot Possess Firearms*, Wisconsin Lawyer (August, 1999). United States v. Meade, 175 F.3d 215 (1st Cir. 1999) (defendant's state misdemeanor conviction for assaulting his spouse, under general assault and battery statute, was misdemeanor crime of domestic violence).

jury, by guilty plea or otherwise.[17] The prohibition applies to persons convicted of such misdemeanors at any time, *even if the conviction occurred prior to the new law's effective date of September 30, 1996.*[18] There is no ex post facto violation because the Lautenberg Amendment does not provide for additional punishment for the misdemeanor crime of domestic violence. Instead Section 922(g)(9) creates a new crime, *i.e.*, the crime of being a domestic violence misdemeanant *in possession of a firearm* after the 1996 effective date of the Lautenberg Amendment.[19]

Does a guilty plea to a misdemeanor crime of domestic violence followed by entry of a prayer for judgment continued (PJC) constitute a "conviction" as that term is used in Section 922(g)(9)? I have located no case law that answers this question. North Carolina courts have found, however, that, at least for certain statutes, a guilty plea followed by a PJC can constitute a "conviction."[20] This interpretation also appears to be supported by the position of the Bureau of Alcohol,

17. 18 U.S.C. § 921(a)(33)(B)(i).

18. *See* Robert F. Nicolais, *State and Federal Statutes Affecting Domestic Violence Cases Recognize Dangers of Firearms*, New York State Bar Journal (November, 1999). *See also* the Bureau of Alcohol, Tobacco and Firearms home page (http://www.atf.treas.gov/); Misdemeanor Crime of Domestic Violence: Questions and Answers Section (http://www.atf.treas.gov/firearms/domestic/qa.htm): "2. What is the effective date of this disability? The law was effective September 30, 1996. However, the prohibition applies to persons convicted of such misdemeanors at any time, even if the conviction occurred prior to the new law's effective date."

19. United States v. Mitchell, 209 F.3d 319, 322 (4th Cir. 1999), *cert denied*, 121 S. Ct. 123 (2000); United States v. Hicks, 992 F. Supp. 1244 (D. Kansas, 1997).

20. *See* State v. Hatcher, 136 N.C. App. 524, 527, 524 S.E.2d 815 (2000) ("Defendant next contends the court erred in computing his prior record level points by assessing points for an offense to which he pled no contest and for which prayer for judgment was continued. "A person has a prior conviction when, on the date a criminal judgment is entered, the person being sentenced has been previously convicted of a crime . . . ." N.C. Gen. Stat. § 15A-1340.11 (7) (1997). "For the purpose of imposing sentence, a person has been convicted when he has been adjudged guilty or has entered a plea of guilty or no contest." N.C. Gen. Stat. § 15A-1331(b) (1997). We have interpreted N.C. Gen. Stat. § 15A-1331(b) to mean that formal entry of judgment is not required in order to have a conviction. State v. Fuller, 48 N.C. App. 418, 268 S.E.2d 879, disc. review denied, 301 N.C. 403, 273 S.E.2d 448 (1980). Consequently, we conclude that defendant was convicted of the prior offense when he entered the plea of no contest even though no final judgment had been entered. This assignment of error is overruled."); *see also* State v. Hasty, 133 N.C. App. 563, 572, 516 S.E.2d 428 (1999) ("Our Supreme Court has also held that an entry of "prayer for judgment continued" following a plea of guilty by a criminal defendant may amount to a "conviction." State v. Sidberry, 337 N.C. 779, 782, 448 S.E.2d 798, 800-01 (1994). *See also* Britt v. North Carolina Sheriffs' Educ. And Training Stds. Comm'n, 348 N.C. 573, 576-77, 501 S.E.2d 75, 77 (1998) (holding that plea of no contest followed by

Tobacco and Firearms, as revealed in its "*Misdemeanor Crime of Domestic Violence: Questions and Answers*" Section on its home page on the Internet.[21]

In federal prosecutions under Section 922(g)(9), defendants have based defenses on many grounds, including: (1) unconstitutional exercise of Commerce Clause; (2) unconstitutional interference with Second Amendment right to bear arms; and (3) unconstitutional invasion of state sovereignty under the Tenth Amendment (by forcing states to enforce a federal regulatory program). For the most part, these arguments have been rejected by federal case law—but the arguments are not implausible and have received some judicial support. Further discussion of these matters is, however, beyond the scope of this article.[22]

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issuance of a prayer for judgment was a "conviction" for purposes of provisions of the North Carolina Administrative Code governing the certification of police officers).").

21. Bureau of Alcohol, Tobacco and Firearms home page (http://www.atf.treas.gov/); Misdemeanor Crime of Domestic Violence: Questions and Answers Section (http://www.atf.treas.gov/firearms/domestic/qa.htm): "12. In determining whether a conviction in a State court is a "conviction" of a misdemeanor crime of domestic violence, does Federal or State law apply? State law applies. If a conviction for a qualifying misdemeanor does not occur under State law, the person has not been "convicted" of a misdemeanor crime of domestic violence. The law states that a person must be *convicted* of a State misdemeanor to be under firearms disabilities. Therefore, if the State does not consider the person to be convicted, the person would not have Federal firearms disabilities. 13. Is a person who received "probation before judgment" or some other type of deferred adjudication subject to this disability? *What is a conviction is determined by the law of the jurisdiction in which the proceedings were held. If the State law where the proceedings were held does not consider probation before judgement or deferred adjudication to be a conviction, the person would not be subject to Federal firearms disabilities.*" (emphasis added).

22. For a detailed discussion of the Commerce Clause analysis, see Polly McCann Prundea, *The Lautenberg Amendment: Congress Hit The Mark By Banning Firearms From Domestic Violence Offenders*, 30 St. Mary's L.J. 801 (1999). For a federal judge's opinion that Section 922(g)(9) violates the Second Amendment, see United States v. Emerson, 46 F. Supp.2d 598 (N.D. Tex. 1999); *but see contra* United States v. Napier, 233 F.3d 394 (6th Cir. 2000). In an opinion filed as this article was going to print, the Fifth Circuit U.S. Court of Appeals held, *inter alia*, that the Second Amendment does protect individual's right to keep and bear arms, but that the rights protected by the Second Amendment are subject to reasonable restrictions. The Court of Appeals held that the prosecution of Emerson for possessing the firearm while subject to the order entered in the Texas divorce action did not violate the Second Amendment. United States v. Emerson, __ F. 3d __ (5th Cir., Oct. 16, 2001). For a case that finds no federal mandate that states assist in the regulation and enforcement of § 922(g)(9), see Gillespie v. City of Indianapolis, 13 F. Supp. 811 (S.D. Ind. 1998). For a discussion of all these issues, see Comment, *Closing The Loopholes In Domestic Violence Laws: The Constitutionality of 18 U.S.C. Section 922(g)(9)*, 19 Pace L. Rev. 445 (1999).

This article will focus on the due process and notice issue, i.e., whether ignorance of the law can constitute an excuse.

B. *Section 922(g)(8): Possession of Firearm While Subject to Order of Protection*

Section 922(g)(8) prohibits persons subject to certain state protection orders from possessing firearms.[23] For this section to apply, the state protection order: (1) must have been issued after an evidentiary hearing of which such person received actual notice, and at which such person had an opportunity to participate; (2) must have ordered such person restrained from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and (3) must have included a finding that such person represents a credible threat to the physical safety of such intimate partner or child; *or* by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury.[24] The term "intimate partner" means, with respect to a person, the spouse of the person, a former spouse of the person, an individual who cohabits or has cohabited with the person (as long as the parties cohabited as spouses) and an individual who is the parent of a child of the person.[25] Compare these provisions with those findings and conclusions on AOC Form 306, "Domestic Violence Protective Order." Does a North Carolina DVPO qualify as a Section 922(g)(8) order of protection?[26] The penalty for a

23. The term "firearm" means (1) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive, (2) the frame or receiver of any such weapon, (3) any firearm muffler or firearm silencer or (4) any destructive device. 18 U.S.C. § 921(a)(3).

24. 18 U.S.C. § 922(g)(8).

25. 18 U.S.C. § 921(a)(32).

26. One expert recommends that court officials review their state's domestic violence protection order to determine "if it conforms with the federal requirements" as stated in § 922(g)(8). She continues: "Please note if your jurisdiction's protection order contains a discretionary firearm ban. If so, even if the order complies with the federal law, failure of the state court to preclude possession and to put the defendant on notice of a possible violation for possessing a firearm while the order is in effect, may make federal prosecution difficult. . . . [P]lease refer any questions about the applicability of this statute to the United States Attorney's Office in your district." Margaret S. Groban, Violence Against Women Act Specialist, Executive Office for U.S. Attorneys, Department of Justice, "*The Federal Domestic Violence Laws and the Enforcement of These Laws*" (November 2000).

violation of Section 922(g)(8) is a maximum prison term of ten years, a $250,000 fine, or both.[27]

C. *Section 922(g)(4): Possession of firearm by person who has been committed to a mental institution.*

Federal regulations define the term "committed to a mental institution" to mean a "formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily. The term includes a commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution."[28]

In *United States v. Midgett*,[29] the defendant entered a conditional guilty plea to possession of a firearm by a person previously committed to a mental institution, a violation of Section 922(g)(4). On appeal, defendant argued that his previous confinement at a state mental hospital was not a commitment as contemplated by Section 922(g)(4). The previous confinement was not an involuntary civil commitment but an inquiry ordered by a judge into defendant's competency to stand trial on criminal charges and whether defendant could be restored to competency. After a two month stay at the mental hospital, the physicians concluded that defendant was mentally ill, not restorable to competency but also not dangerous to himself or others, and capable of taking care of himself. Defendant was released from the hospital.[30] The federal Court of Appeals held that Section 922(g)(4) was not limited to formal involuntary civil commitment procedures

27. 18 U.S.C. § 924(a)(2).

28. 27 C.F.R. 178.11.

29. 198 F.3d 143 (4th Cir., 1999). *Compare* United States v. Chamberlain, 159 F.3d 656 (First Circuit, decided Nov. 3, 1998): "Determination of whether defendant was "committed," within meaning of federal statute proscribing possession of firearm by person who has been "committed to a mental institution," is question of federal law." "Defendant's preliminary five-day emergency "involuntary admission" to mental hospital pursuant to Maine law, after he had put loaded gun to his head and threatened his wife, was a "commitment" sufficient to support defendant's subsequent federal conviction for possession of firearm by person who had been "committed to a mental institution"; "commitment" did not require provision of counsel, full-blown adversary hearing, finding by clear and convincing evidence that person suffered from mental illness, or judicial order of commitment."

30. As a consequence of the psychiatrist's report, the criminal charges against the defendant were not pursued. At a later date, the defendant contacted the Secret Service to inform them that he was the target of a conspiracy by the Masons. During an interview with defendant, agents discovered various weapons in defendant's

but included defendant's confinement at the hospital even though he was found not dangerous to himself or others. The Court noted that defendant had been examined by a competent mental health practitioner and had been represented by counsel, factual findings were made by a judge who heard evidence, the judge concluded defendant was in need of inpatient hospital care and issued an order committing defendant to a mental institution, and defendant was actually confined there. The Court concluded: "We are confident that our interpretation of the term 'commitment' is consistent with federal policy relating to the possession of firearms as contemplated in 18 U.S.C.A. § 922(g)(4). Given [defendant's] proven history of mental instability, he is undoubtedly in that class of person 'who by reason of their status,' Congress considered too dangerous to possess guns."

II. *U.S. v. HANCOCK, U.S. v. NAPIER, AND U.S. v. BEAVERS*

Consider the case of Gary Hancock, a resident of Arizona. Hancock legally purchased several firearms in the early 1980's and kept them in his home "solely for sporting or collection purposes."[31] In the early 1990's Hancock was convicted of several state misdemeanors involving violence or threats of violence against his wife. Hancock's sentences for these convictions included fines and probation but he was never required to surrender possession of his firearms and such surrender was not required by the applicable laws in effect at that time. But in 1998 the government charged Hancock[32] with violating Section 922(g)(9) because he had been convicted of a misdemeanor crime of domestic violence and was in possession of firearms after September 30, 1996. At trial, Hancock was convicted.

On appeal, Hancock argued that he had not knowingly violated Section 922(g)(9) because he had legally purchased the firearms, he had legally possessed the firearms up until 1996, he was unaware of Section 922(g)(9) until he was arrested for violating it (this was not disputed by the government), and the government had failed in its duty to inform citizens individually of this change in the law. The Court of Appeals rejected Hancock's arguments.

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possession. The weapons were seized and defendant charged with violations of § 922(g)(4). *Id.*

31. United States v. Hancock, 231 F.3d 557, 560 (9th Cir. 2000).

32. Hancock's possession of firearms came to the attention of the authorities only after Hancock's wife, in July of 1998, obtained a domestic violence protective order specifying that Hancock was not permitted to possess firearms. *Id.*, at 560.

The Court stated that the "knowing" requirement in Section 922(g)(9)[33] referred to knowledge of possession rather than the legal consequences of such possession, i.e., the statute did not require actual knowledge of the law. The Court also noted that by owning firearms and by having committed an act or acts of domestic violence, Hancock had removed himself from the class of ordinary and innocent citizens who would not expect any special restrictions on their possession of a firearm. According to the Court, Hancock had "at least some reason to know that his behavior might, in the future, be subject to additional regulation relating to such weapons."[34] Finally the Court held that, as a general proposition, "Congress is not required to inform citizens individually of a change in the law," and that it is enough to enact and publish the law.[35] Furthermore, the Court noted that Section 922(g)(9) had received extensive publicity in newspapers across the state, citing several examples. Hancock's conviction was upheld.

In *United States v. Napier*,[36] the defendant challenged Section 922(g)(8) on due process grounds on its face because it fails to require notice of its prohibitions, and as applied because he contended he did not in fact receive notice that his conduct violated federal law. The defendant argued that Section 922(g)(8) "is a technical, obscure statute which punishes conduct that a reasonable person ordinarily would not consider to be criminal."[37] The Court rejected this challenge stating that even if the domestic violence order entered against defendant did not feature a bold print warning that he could not lawfully possess firearms, the mere fact that defendant had been made subject to a domestic violence protection order provided him with notice that his conduct was subject to increased government scrutiny and it was "not reasonable for someone in his position to expect to possess dangerous

33. The statutory reference to defendant's knowledge is actually found in the penalty provision, Section 924(a)(2), which requires that the defendant have "knowingly" violated Section 922(g).

34. *Id.*, at 564-65.

35. *Id.*, at 565.

36. 233 F.3d 394 (U.S. Court of Appeals, Sixth Circuit, Decided: Nov. 21, 2000).

37. In support of this contention, defendant relied on Judge Posner's dissent in United States v. Wilson, 159 F.3d 280 (7th Cir.1998), *cert. denied*, 527 U.S. 1024, 119 S. Ct. 2371, 144 L.Ed.2d 774 (1999), and the determination in United States v. Emerson, 46 F. Supp. 2d 598 (N.D. Tex. 1999) that § 922(g)(8) violates the Fifth Amendment because it is an obscure, highly technical statute with no mens rea requirement that renders a person subject to prosecution without proof of knowledge that he was violating the statute. The district court's ruling in *Emerson* was reversed on 16 October 2001 by the 5th Circuit Court of Appeals. United States v. Emerson, __ F.3d __ (5th Cir., 2001).

weapons free from extensive regulation."[38] The Court also found that actual notice was not required.

In *United States v. Beavers*,[39] the defendant argued that he should not be convicted of a Section 922(g)(9) violation not only because he was unaware of the law but also because the state had authorized the return of his pistol to his possession after his conviction of a misdemeanor crime of domestic violence. The *Beavers* court rejected the first argument and also held that this state action in returning the pistol did not render the federal prosecution of Beavers unconstitutional as applied. The Court stated that "the state of Michigan is under no obligation to update state-law violators on recent additions to federal law."[40]

III. CHIEF JUDGE RICHARD POSNER WEIGHS IN

But some question may remain as to whether the due process/notice issue is finally resolved—largely because of the weighty opinion of a highly respected[41] federal Court of Appeals judge.[42] In *U.S. v.*

38. The *Napier* court also stated: "Every circuit court which has considered a due process challenge similar to Napier's has rejected it. *See, e.g.*, United States v. Kafka, 222 F.3d 1129, 1131-32 (9th Cir.2000) (no departure from rule that ignorance of the law is no excuse was warranted because the restraining order transformed the otherwise "innocent" nature of the defendant's gun possession); United States v. Reddick, 203 F.3d 767, 769-71 (10th Cir.2000) ("We agree with every circuit court that has considered due process challenges to § 922(g)(8) and conclude that due process does not require actual knowledge of the federal statute."); United States v. Meade, 175 F.3d 215, 225-26 (1st Cir.1999) (individual under domestic violence protection order "would not be sanguine about the legal consequences of possessing a firearm"); United States v. Bostic, 168 F.3d 718, 722-23 (4th Cir.1999) ("Like a felon, a person [subject to a domestic violence protection order] cannot reasonably expect to be free from regulation when possessing a firearm"); United States v. Wilson, 159 F.3d 280, 288-89 (7th Cir.1998), *cert. denied*, 527 U.S. 1024, 119 S. Ct. 2371, 144 L.Ed.2d 774 (1999).

39. 206 F.3d 706 (6th Cir. 2000) *cert. denied*, 529 U.S. 1121 (2000). .

40. *Id.* at 710.

41. Judge Richard Posner has been described as the modern successor of Oliver Wendell Holmes Jr.: "if you can imagine a kinder, gentler, much less restrained, and even more widely educated Holmes." Robert Henry, *The Value(s) of Oliver Wendell Holmes, Jr.*, The Green Bag, No. 1, Autumn 2001, at page 107. *See also* Daniel T. Ostas, *Postmodern Economic Analysis of Law: Extending the Pragmatic Visions of Richard A. Posner*, 36 Am. Bus. L.J. 193 (Fall, 1998); Peter F. Lake, *Posner's Pragmatist Jurisprudence*, 73 Neb. L. Rev. 545 (1994); Jeffrey Rosen, *Overcoming Posner*, 105 Yale L.J. 581 (November 1995) (review of "*Overcoming Law*," by Richard A. Posner).

42. And to be fair, Judge Posner's analysis also finds support in a string of U.S. Supreme Court cases: Lambert v. California, 355 U.S. 225 (1957); Liparota v. United States, 471 U.S. 419 (1985); Ratzlof v. United States, 510 U.S. 135 (1994); Staples v.

Wilson[43] the defendant legally possessed several firearms at the time his wife sought an order of protection from Wilson. A hearing was held in the judge's chambers that "lasted no more than ten minutes," during which time the judge explained the proposed order of protection to Wilson (who was appearing pro se) and the parties discussed child support and visitation. Wilson indicated "he did not have a problem" with any of the terms of the proposed order. Wilson had not threatened his wife with his firearms, and although state law allowed the judge to order Wilson to give up his firearms as a part of the protective order, the judge had not done so.[44] The judge also did not inform Wilson of 18 U.S.C. § 922(g)(8) which made it illegal for those subject to a protective order to possess firearms.[45] Wilson was charged and convicted of violating Section 922(g)(8). The Court of Appeals rejected Wilson's due process arguments along the lines of the *Hancock* and *Napier* opinions. The Chief Judge of the Seventh Circuit Court of Appeals filed a dissenting opinion.

Chief Judge Posner stated:

> It is wrong to convict a person of a crime if he had no reason to believe that the act for which he was convicted *was* a crime, or even that it was wrongful. . . . Congress created, and the Department of Justice sprang, a trap on Carlton Wilson as a result of which he will serve more than three years in federal prison for an act (actually a failure to act) that he could not have suspected was a crime or even a civil wrong. . . .
>
> The fact that the restraining order contained no reference to guns may have lulled [Wilson] into thinking that, as long as he complied with the order and stayed away from his wife, he could carry on as before.

United States, 511 U.S. 600 (1994); and United States v. X-Citement Video, 513 U.S. 64 (1994). For a masterful synthesis/interpretation of these cases (and a rejection of the "medieval slogan" that ignorance of the law is no excuse), *see* John Shepard Wiley, Jr., *Not Guilty By Reason of Blamelessness: Culpability In Federal Criminal Interpretation*, 85 Va. L. Rev. 1021 (1999): "A rule of mandatory culpability unites these decisions: The Court will demand that the government prove moral culpability when statutory language might reach conduct that is 'not inevitably nefarious'; that is, conduct that is not inevitably blameworthy." Is gun ownership inevitably nefarious? Those who think not generally cite the U.S. Supreme Court for the following language: "[T]here is a long tradition of widespread lawful gun ownership by private individuals in this country." Staples v. United States, 511 U.S. 600, 610 (1994). *See also* United States v. Emerson, __ F. 3d __, ___ (5th Cir., Oct. 16, 2001)(firearms ownership is not inherently evil or suspect).

43. 159 F.3d 280 (7th Cir. 1998), *cert. denied*, 527 U.S. 1024, 119 S. Ct. 2371 (1999).

44. *Id.* at 294.

45. Judge Posner speculates that the judge was unaware of the existence of Section 922(g)(8). *Id.*

> When a defendant is morally culpable for failing to know or guess that he is violating *some* law (as would be the case of someone who committed a burglary without thinking—so warped was his moral sense—that burglary might be a crime), we rely on conscience to provide all the notice that is required. Sometimes the existence of the law is common knowledge . . . . And sometimes, though the law is obscure to the population at large and nonintuitive, the defendant had a reasonable opportunity to learn about it . . . . We want people to familiarize themselves with the laws bearing on their activities. But a reasonable opportunity doesn't mean being able to go to the local law library and read Title 18. It would be preposterous to suppose that someone from Wilson's milieu is able to take advantage of such an opportunity. If none of the conditions that make it reasonable to dispense with proof of knowledge of the law is present, then to intone "ignorance of the law is no defense" is to condone a violation of fundamental principles for the sake of a modest economy in the administration of criminal justice.[46]

Chief Judge Posner also found fault with the Department of Justice's failure to publicize the existence of Section 922(g)(8), including the failure to advise "the state judiciaries of it so that judges could warn defendants in domestic-relations disputes." Judge Posner found that the government's response on this issue represented a tacit admission that "four years after the enactment of the law, the word hadn't gotten out even to judges."[47]

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46. *Id.* at 293-95 (dissent of Chief Judge Posner).

47. "If you're a judge in the process of returning a firearm because a protection order has expired or been vacated, are you aware that you must first determine that the person is not prohibited under any state or federal law from possessing firearms?" asks Assistant U.S. Attorney Laura A. Przybylinski Finn in her article *Those Convicted of Domestic Violence Cannot Possess Firearms*, Wisconsin Lawyer (August, 1999). *See also* State v. S.A., 675 A.2d 678 (New Jersey, Super. A.D. 1996), where state appellate court determined that state judge should not have ordered return of defendant's firearms because it was illegal under federal law for defendant to possess the firearms. . *But see* United States v. Beavers, 206 F.3d 706 (6th Cir. 2000), *cert. denied*, 529 U.S. 1121 (2000), where the defendant argued that he should not be convicted of a Section 922(g)(9) violation because the state had authorized the return of his pistol to his possession after his conviction of a misdemeanor crime of domestic violence. The *Beavers* court held that this state action in returning the pistol did not render the federal prosecution of Beavers unconstitutional as applied. The Court stated: "the state of Michigan is under no obligation to update state-law violators on recent additions to federal law." Although state courts can be appropriate forums in which federal crimes are tried, *see* Palmore v. United States, 411 U.S. 389, 407 (1973) (recognizing the contrary sentiments expressed in *Prigg v. Pennsylvania*, 16 Pet. 539, 615-16 (1842)); New York v. United States, 505 U.S. 144, 178-79, 112 S. Ct. 2408, 2430, 120 L.Ed.2d 120 (1992) ("Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause."), this is apparently not the

Relying heavily on Judge Posner's dissent, a federal district judge dismissed an indictment, charging a violation of Section 922(g)(8), concluding that this section is "an obscure, highly technical" statute that violated due process for failing to require proof that defendant knew he was violating the statute.[48] And in *United States v. Ficke*,[49] a federal district court judge applied Judge Posner's analysis to a Section 922(g)(9) prosecution. In dismissing the indictment the district judge noted that the defendant had no way of knowing that mere possession of hunting firearms had become felonious conduct two years after his misdemeanor conviction "unless he spent considerable time in law libraries keeping track of amendments to federal firearms statutes, a highly unlikely scenario considering the defendant's educational background."[50]

One commentator has suggested that the U.S. Supreme Court, in a series of opinions over the past sixteen years, has followed an unstated rule in ignorance of the law cases that is consistent with the

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case with regard to the Lautenberg Amendment. Gillespie v. City of Indianapolis, 13 F. Supp. 811 (S.D. Ind. 1998) (no federal mandate that states assist in the regulation and enforcement of Section 922(g)(9)). For a discussions of state enforcement of federal criminal law, see Donald H. Zeigler, *Twins Separated at Birth: A Comparative History of the Civil and Criminal Arising Under Jurisdiction of the Federal Courts and Some Proposals for Change*, 19 Vt. L. Rev. 673, 709-720 (Spring, 1995); Warren, *Federal Criminal Laws and the State Courts*, 38 Harv. L. Rev. 545 (1925); Note, *Utilization of State Courts to Enforce Federal Penal and Criminal Statutes: Development in Judicial Federalism*, 60 Harv. L. Rev. 966 (1947).

48. United States v. Emerson, 46 F. Supp. 2d 598 (N.D. Tex. 1999). The district court was reversed by the 5th Circuit Court of Appeals on 16 October 2001. United States v. Emerson, __ F.3d __ (5th Cir., 2001) (stating that firearms ownership is not inherently evil or suspect, and thus, a certain mens rea is required to support weapons conviction; however, necessary mens rea in this context does not require knowledge of the law, but merely of the legally relevant facts—that is, defendant need not know that his actions are unlawful, but only that he know he is engaging in the activity that the legislature has proscribed). *But see* United States v. Napier, 233 F.3d 394 (6th Cir. 2000)(statute proscribing possession of firearms while subject to a domestic violence order does not violate the Fifth Amendment in not requiring actual notice of the gun prohibition); United States v. Kafka, 222 F.3d 1129 (9th Cir. 2000) (conviction did not violate defendant's due process rights, even though only defendant's possession of firearm was knowing, and he did not know that his possession violated the statute under which he was convicted).

49. 58 F. Supp. 2d 1071 (D.Neb. 1999). *But see* United States v. Beavers, 206 F.3d 706 (6th Cir. 2000)(firearms statute did not violate due process by failing to require government to prove, as element of the offense, that defendant knew that his possession of firearm was illegal, and state's actions in returning pistol to defendant after his domestic violence conviction did not render application of federal statute unconstitutional as to defendant).

50. 58 F. Supp. 2d 1071, at 1074 (D.Neb. 1999).

analysis articulated by Judge Posner in his Wilson dissent.[51] This analysis is also supported by some of the reported opinions that appear to agree that ignorance of the law can sometimes be so reasonable as to make prosecution unconstitutional—although in the case of those convicted of misdemeanor crimes of domestic violence, ignorance of Section 922(g)(9) is not sufficiently reasonable.

> [I]t should not surprise anyone that the government has enacted legislation in an attempt to limit the means by which persons who have a history of domestic violence might cause harm in the future. . . . [T]he possession of a gun, especially by anyone who has been convicted of a violent crime, is . . . a highly regulated activity, and everyone knows it. No one can reasonably claim, we think, to be unaware of the current level of concern about domestic violence; it is the subject of daily news reports and other media attention. There is evidence, in addition, that § 922(g)(9) was the subject of considerable public scrutiny and discussion both before and after its enactment. [I]n the present social circumstances, we believe that it is simply disingenuous for [the defendant] to claim that his conviction under Section 922(g)(9) involved *the kind of unfair surprise that the fifth amendment prohibits*.[52]

IV. CONCLUSION

It has been estimated that when the Lautenberg Amendment became effective on September 30, 1996, at least one million new felons were created instantaneously.[53] Indeed, every year there must be tens of thousands of new convictions for misdemeanor crimes of domestic violence[54] that will forever bar those convicted from continuing to possess firearms. Yet these individuals may never be told by the court or by their attorneys that their continued possession of firearms, although permitted by state law, violates federal criminal law.

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51. John Shepard Wiley Jr., *Not Guilty By Reason of Blamelessness: Culpability In Federal Criminal Interpretation*, 85 Va. L. Rev. 1021 (1999). See also footnote 42, supra.

52. United States v. Hutzell, 217 F.3d 966, 968-69 (8th Cir. 2000) (emphasis added).

53. James Bovard, "*Disarming Those Who Need Guns Most*," Wall Street Journal, Dec. 23, 1996, at 2 (the one million new felons were those who had previously been convicted of domestic violence misdemeanors but who retained their firearms because they never had notice of the new statute).

54. "Each year between 100,000 to 150,000 are convicted of misdemeanor domestic violence offenses and more than 100,000 become subject to a restraining order." Charles M. Watts, Jr., *The Lautenberg Amendment: Should The Federal Government Be Required To Notify State Governments And Citizens When It Enacts A Malum Prohibitum Criminal Law Whose Punishment Is A Felony Resulting In Extended Incarceration?*, 12 Loy. Consumer L. Rev. 234, 247 (2000).

Thousands more are made subject to domestic violence protection orders or are involuntarily committed—but with no notice of the impact on their rights to continued possession of firearms.[55]

It does appear that the most effective way for subsections (4), (8) and (9) of Section 922(g) of the Federal Gun Control Act to achieve the statute's objective of reducing domestic homicide would be to properly publicize its substance and that this has not been done. For instance, with regard to subsections (8) and (9):

> The Department of Justice in a combined effort with local authorities could systematically comb through the criminal records and find the name of everyone who has committed a misdemeanor crime of domestic violence. The Department could then send notices to these people requiring them to get rid of their firearms. Also, every judge handing down a conviction for domestic violence should notify the guilty that they are no longer allowed to have a gun for the rest of their lives. Likewise, every judge issuing a restraining order should be required to notify the recipient that they are not allowed to have a gun while under the order. After these steps are taken, it would be appropriate to begin to punish those who violate the law. The threshold where "ignorance of the law is no excuse" could be justly applied will have been crossed. The result of proceeding in this fashion would yield a lower rate of homicide with the law informing and improving the conduct of the citizens.[56]

The same effort could be made with regard to those who have been or will be involuntarily committed to a mental hospital—and who are therefore subject to Section 922(g)(4). If these provisions of the Federal Gun Control Act are indeed a needed law,[57] then they deserve significantly more effort devoted to their publication and enforcement.[58]

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55. *Id.*

56. *Id.* at 246-47.

57. And arguably they are. "In America, once every 15 seconds a woman is beaten by her husband or boyfriend. Domestic abuse is the leading cause of injury among women. Roughly 1500 women each year are killed by their abusive partner. Furthermore, seventy percent of these victims are killed with a gun. In homes where guns are present the overall risk of homicide being committed by a family member or intimate partner is seven times greater than in homes where guns are not present. In an effort to reduce this carnage, . . . the Lautenberg Amendment, [was] . . . passed to specifically take guns out of the hands of domestic abusers." *Id.* at 236.

58. In his dissent in United States v. Wilson, 159 F.3d 280, 294-95 (7th Cir. 1998) *cert. denied*, 527 U.S. 1024 (1999), Chief Judge Posner states that the Office of the U.S. Attorney for the Southern District of Illinois had made no effort to advise the local courts of 18 U.S.C. § 922(g)(8) and that there have been "perhaps fewer than 10" prosecutions of 18 U.S.C. § 922(g)(8) nationwide in 6 years out of a possible 40,000

Attached below are copies of three documents that appear on the Department of the Treasury's Bureau of Alcohol, Tobacco and Firearms (ATF) home page on the Internet:

(1) Open Letter From the Director Bureau of Alcohol, Tobacco and Firearms (http://www.atf.treas.gov/firearms/domestic/opltratf.htm);

DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
WASHINGTON, D.C. 20226

OPEN LETTER FROM THE DIRECTOR
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

The purpose of this letter is to provide the public with information concerning a recent amendment to the Gun Control Act of 1968. This amendment makes it unlawful for any person convicted of a "misdemeanor crime of domestic violence" to ship, transport, possess, or receive firearms or ammunition. It also makes it unlawful for any person to sell or otherwise dispose of a firearm or ammunition to any person knowing or having reasonable cause to believe that the recipient has been convicted of such a misdemeanor.

As defined in the new law, a "misdemeanor crime of domestic violence" means an offense that:

(1) is a misdemeanor under federal or state law; and

(2) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

This definition includes all misdemeanors that involve the use or attempted use of physical force (e.g., simple assault, assault and battery), if the offense is committed by one of the defined parties. This is true whether or not the State statute or local ordinance specifically defines the offense as a domestic violence misdemeanor. For example, a person convicted of misdemeanor assault against his or her spouse would be prohibited from receiving or possessing firearms. Moreover,

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violations per year. Professor Wiley, contends that publicity and notice should be a standard feature of the enforcement of federal laws that prohibit conduct that is not inevitably nefarious. Wiley, *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 Va. L. Rev. 1021, 1092-94 (1999). *See* discussion in footnote 42 *supra*.

the prohibition applies to persons convicted of such misdemeanors at any time, even if the conviction occurred prior to the new law's effective date, September 30, 1996. As of the effective date of the new law, such a person may no longer possess a firearm or ammunition. However, a conviction would not be disabling if it has been expunged, set aside, pardoned, or the person has had his or her civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) AND the person is not otherwise prohibited from possessing firearms or ammunition.

Individuals subject to this disability should immediately lawfully dispose of their firearms and ammunition. We recommend that such persons relinquish their firearms and ammunition to a third party, such as their attorney, to their local police agency, or a Federal firearms dealer. The continued possession of firearms or ammunition by persons under this disability is a violation of law and may subject the possessor to criminal penalties. In addition, such firearms and ammunition are subject to seizure and forfeiture.

If you have questions regarding this matter, please *contact your local ATF office.*

John W. Magaw
Director

(2) Open Letter to All State and Local Law Enforcement Officials (http://www.atf.treas.gov/firearms/domestic/opltrleo.htm)

DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
WASHINGTON, D.C. 20226

OPEN LETTER TO ALL STATE AND LOCAL
LAW ENFORCEMENT OFFICIALS

The purpose of this letter is to provide information to all State and local law enforcement agencies regarding one specific aspect of the recently enacted Omnibus Consolidated Appropriations Act of 1997 (the Act). One part of the Act amended the Gun Control Act of 1968 (GCA) to make it unlawful for any person convicted of a "misdemeanor crime of domestic violence" to ship, transport, possess, or receive firearms or ammunition. It also makes Tot unlawful for any person to sell or otherwise dispose of a firearm or ammunition to any person knowing or having reasonable cause to believe that the recipient has been convicted of such a misdemeanor. This new prohibition does apply to all law enforcement officers.

Act adds new firearms disability

As defined in the GCA, a "misdemeanor crime of domestic violence" means an offense that:

(1) is a misdemeanor under Federal or State law; and

(2) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common ' by a person who is cohabiting with or has cohabited with the victim as a spouse , parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

This definition includes all misdemeanors that involve the use or attempted use of physical force (e.g., simple assault, assault and battery) if the offense is committed by one of the defined parties. This is true whether or not the State statute or local ordinance specifically defines the offense as a domestic violence misdemeanor. For example, a person convicted of misdemeanor assault against his or her spouse would be prohibited from receiving or possessing firearms or ammunition. Moreover, the prohibition applies to persons convicted of such misdemeanors at any time, even if the conviction occurred prior to the new law's effective date, September 30, 1996. As of the effective date of the new law, such a person may no longer possess a firearm or ammunition. However, with respect to all persons, a conviction would not be disabling if it has been expunged, set aside, pardoned, or the person has had his or her civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil right-s-under such an offense) AND the person is not otherwise prohibited from possessing firearms or ammunition.

(3) Misdemeanor Crime of Domestic Violence Questions and Answers (dated April 28, 1997); located at:

(http://www.atf.treas.gov/firearms/domestic/qa.htm).

MISDEMEANOR CRIME OF DOMESTIC VIOLENCE QUESTIONS AND ANSWERS

As of April 28, 1997

1. WHAT IS A MISDEMEANOR CRIME OF DOMESTIC VIOLENCE?

As defined in the Gun Control Act of 1968, a "misdemeanor crime of domestic violence" means an offense that:

(1) is a misdemeanor under Federal or State law;

(2) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon; and

(3) was committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

However, a person is not considered to have been convicted of a misdemeanor crime of domestic violence unless:

(1) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and

(2) in the case of a prosecution for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either–

(a) the case was tried by a jury, or

(b) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

In addition, a conviction would not be disabling if it has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the jurisdiction in which the proceedings were held provides for the loss of civil rights upon conviction for such an offense) unless the pardon, expunction, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms, and the person is not otherwise prohibited by the law of the jurisdiction in which the proceedings were held from receiving or possessing firearms.

2. WHAT IS THE EFFECTIVE DATE OF THIS DISABILITY?

The law was effective September 30, 1996. However, the prohibition applies to persons convicted of such misdemeanors at any time, even if the conviction occurred prior to the new law's effective date.

3. DOES THE NEW DISABILITY APPLY TO LAW ENFORCEMENT OFFICERS?

Yes. The Gun Control Act of 1968 was amended so that employees of Government agencies convicted of qualifying misdemeanors would NOT be exempt from this new disability with respect to their receipt or possession of firearms or ammunition. Thus, law enforcement officers and other Government officials who have been convicted of a disqualifying misdemeanor may not lawfully possess or receive firearms or ammunition for any purpose, including performance of their official duties. This disability applies to firearms and ammunition issued by Government agencies, firearms and ammunition purchased by Government employees for use in performing their official duties, and personal firearms and ammunition possessed by such employees.

4. IS THIS PROVISION OF THE LAW BEING APPLIED RETROACTIVELY IN VIOLATION OF CONSTITUTIONAL RIGHTS?

No. This provision is not being applied retroactively or in violation of the ex post facto clause of the Constitution. This is because the law does not impose additional punishment upon persons convicted prior to the effective date, but merely regulates the future possession of firearms on or after the effective date. The provision is not retroactive merely because the person's conviction occurred prior to the effective date.

5. WHAT IS THE PENALTY FOR VIOLATING THIS OFFENSE?

Any individual who knowingly violates this provision of the law is subject to a fine of $250,000, imprisonment of up to 10 years, or both.

6. DOES THE LAW IMPOSE ANY ADDITIONAL DUTIES ON DEALERS IN FIREARMS AND AMMUNITION?

Yes. Until the Form 4473 and Brady forms have been revised to include the new offense, licensees should inquire of their customers whether they have been convicted of a disqualifying domestic violence misdemeanor and avoid transferring any firearms or ammunition to such persons. ATF is in the process of revising the forms and will provide them to licensees as soon as possible.

7. WHAT SHOULD A LICENSEE DO IF HE HAS BEEN CONVICTED OF A MISDEMEANOR CRIME OF DOMESTIC VIOLENCE?

Federal firearms licensees should verify that they are disabled under the new prohibition. A licensee convicted of a disqualifying misdemeanor may not lawfully possess firearms or ammunition. In addition, a licensee who incurs firearms disabilities during the term of a license may not continue operations under the license for more than 30 days after incurring the disability unless the licensee applies for relief from Federal firearms disabilities.

8. WHAT SHOULD A PERSON DO IF HE HAS BEEN CONVICTED OF A MISDEMEANOR CRIME OF DOMESTIC VIOLENCE?

Individuals subject to this disability should immediately lawfully dispose of their firearms and ammunition. ATF recommends that such persons transfer their firearms and ammunition to a third party, such as their attorney, to their local police agency, or a Federal firearms dealer. The continued possession of firearms or ammunition by persons under this disability is a violation of law and may subject the possessor to criminal penalties. In addition, such firearms and ammunition are subject to seizure and forfeiture.

9. X WAS CONVICTED OF MISDEMEANOR ASSAULT ON OCTOBER 10, 1996. THE CRIME OF ASSAULT DOES NOT MAKE SPECIFIC MENTION OF DOMESTIC VIOLENCE, BUT THE CRIMINAL COMPLAINT REFLECTS THAT X ASSAULTED HIS WIFE. MAY X STILL POSSESS FIREARMS OR AMMUNITION?

No. X may no longer possess firearms or ammunition.

10. X WAS CONVICTED OF THE SAME CRIME ON SEPTEMBER 20, 1996, 10 DAYS BEFORE THE EFFECTIVE DATE OF THE NEW STATUTE. HE POSSESSES A FIREARM ON OCTOBER 10, 1996. MAY X LAWFULLY POSSESS FIREARMS?

No. If a person was convicted of a crime at any time, he or she may not lawfully possess firearms or ammunition on or after September 30, 1996.

11. WHAT STATE AND LOCAL OFFENSES ARE "MISDEMEANORS" FOR PURPOSES OF 18 U.S.C. • 922(D)(9) AND (G)(9)?

"Misdemeanor" as used in 18 U.S.C. sections 922(d)(9) and (g)(9) includes any offense that is classified as a misdemeanor under Federal or State law. In addition, the definition includes any state or local offense punishable only by a fine or by imprisonment for a term of one year or less.

12. IN DETERMINING WHETHER A CONVICTION IN A STATE COURT IS A "CONVICTION" OF A MISDEMEANOR CRIME OF DOMESTIC VIOLENCE, DOES FEDERAL OR STATE LAW APPLY?

State law applies. If a conviction for a qualifying misdemeanor does not occur under State law, the person has not been "convicted" of a misdemeanor crime of domestic violence. The law states that a person must be *convicted* of a State misdemeanor to be under firearms disabilities. Therefore, if the State does not consider the person to be convicted, the person would not have Federal firearms disabilities.

13. IS A PERSON WHO RECEIVED "PROBATION BEFORE JUDGMENT" OR SOME OTHER TYPE OF DEFERRED ADJUDICATION SUBJECT TO THIS DISABILITY?

What is a conviction is determined by the law of the jurisdiction in which the proceedings were held. If the State law where the proceedings were held does not consider probation before judgement or deferred adjudication to be a conviction, the person would not be subject to Federal firearms disabilities.

14. ARE LOCAL CRIMINAL ORDINANCES "MISDEMEANORS UNDER STATE LAW" FOR PURPOSES OF SECTIONS 922(D)(9) AND (G)(9)?

Yes, assuming a violation of the ordinance meets the definition of "misdemeanor crime of domestic violence" in all other respects.

15. X WAS CONVICTED OF MISDEMEANOR ASSAULT ON OCTOBER 10, 1996. THE CRIME OF ASSAULT DOES NOT MAKE SPECIFIC MENTION OF DOMESTIC VIOLENCE BUT THE CRIMINAL COMPLAINT REFLECTS THAT HE ASSAULTED HIS WIFE. MAY X STILL POSSESS FIREARMS OR AMMUNITION?

No. X may no longer possess firearms or ammunition.

16. X WAS CONVICTED OF THE SAME CRIME ON SEPTEMBER 20, 1996, 10 DAYS BEFORE THE EFFECTIVE DATE OF THE NEW STATUTE. HE POSSESSES A FIREARM ON OCTOBER 10, 1996. MAY X LAWFULLY POSSESS FIREARMS?

No. If a person was convicted of the crime at any time, he or she may not lawfully possess firearms or ammunition on or after September 30, 1996.

17. OFFICER C WAS CHARGED WITH FELONY ASSAULT ON HER CHILD IN 1989. SHE PLED GUILTY TO A MISDEMEANOR AND THE FELONY CHARGE WAS DISMISSED. SHE WAS SUSPENDED FROM THE POLICE FORCE AND ORDERED TO UNDERGO COUNSELING. AFTER SUCCESSFUL COMPLETION OF THE COUNSELING, SHE WAS REINSTATED. MAY OFFICER C LAWFULLY POSSESS FIREARMS OR AMMUNITION?

No. Officer C may no longer lawfully possess firearms or ammunition either on or off duty.

18. ARE CONVICTIONS FOR MISDEMEANOR CRIMES OF DOMESTIC VIOLENCE ENTERED BY AN INDIAN TRIBAL COURT DISQUALIFYING UNDER 18 U.S.C. 922 (D) (9) AND (G) (9)?

Convictions for misdemeanor crimes of domestic violence entered by "tribal courts" are not disqualifying under 18 U.S.C. 922 (d) and (g) (9) since the statute expressly refers to federal and state court convictions, but does not reference tribal court convictions. However, Courts of Indian Offenses operated by the Bureau of Indian Affairs under 25 C.F.R. Part 11 are federal instrumentalities. Therefore, convictions for purposes of 18 U.S.C. 922 (d) and (g) (9).

Note: For one who has been convicted of a misdemeanor crime of domestic violence, the prohibition on the possession of firearms and ammunition DOES not apply if the-individual has received a pardon for the crime, the conviction has been expunged or set-aside, or the person has had civil rights restored (if there was a loss of civil rights) AND the person is not otherwise prohibited from possessing firearms or ammunition.