

2000

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Charles M. Watts Jr.

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Recommended Citation

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 (2000).

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STUDENT ARTICLE

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?

Charles M. Watts Jr.

[The maxim of ignorance of the law is no excuse] is not intended to deny that criminal liability, as well as civil, is founded on blameworthiness. Such a denial would shock the moral sense of any civilized community; or, to put it another way, 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.¹

I. Introduction

A man owns a hunting rifle that he purchased legally and properly registered years before. In fact, he has been a hunter his whole life. He and his wife are in the process of getting a divorce. As part of the divorce

proceedings a temporary restraining order is issued concerning financial matters, child support and custody, and a general admonition not to threaten or harm his wife. The man does not violate any terms contained in the restraining order. Subsequently, this man is arrested for violating a federal law that makes it a felony to be in possession of firearm while subject to a restraining order.² This law was not mentioned in the restraining order, and the judge who issued it had not known of this obscure federal law.³ If found guilty, this man faces up to 10 years in prison.⁴

Much like the general rule of *caveat emptor* regarding consumers, the criminal law has the maxim that ignorance of the law is no defense. Mere possession of a gun is not something that would occur to the average person to be worthy of a federal felony. The severity of the penalty, one might think, calls for the violator to be morally blameworthy. Amazingly, in cases with similar fact patterns, where defendants have argued that they should have been given notice of the existence of this law before being punished, the majority of courts have held that ignorance of the law is no defense and found the defendant guilty.⁵

"Ignorance of the law is no defense" can make sense in the case of minor civil infractions such as parking laws or noise violations where the penalty is a small fine. However, when severe criminal penalties are the consequence, this form of "buyer beware" is unjust when the act criminalized by the law is not morally blameworthy in and of itself. If severe penalties are legislated for such *malum prohibitum* acts - acts which are not inherently morally wrong - it seems just to impose them only if those affected were given notice that such conduct violated the law and then knowingly violated the law anyway.

Two recently passed federal laws, 18 U.S.C. §§ 922(g)(8) and 922(g)(9), collectively referred to as the Lautenberg Amendment, affect a substantial number of

Americans and unbeknownst to them exact severe penalties for the *malum prohibitum* act of possessing a firearm.⁶ This Comment discusses the capricious nature of the current enforcement of the Lautenberg Amendment, underscored in the recent case of *United States v. Wilson*.⁷ Part II of this Comment discusses the legislative history, content, and enforcement of the Lautenberg Amendment. Part III discusses the Lautenberg Amendment in conjunction with the notice and fair warning requirements of the due process clause of the United States Constitution. Part IV analyzes the current efficacy of the Lautenberg Amendment and advocates an extensive public awareness campaign to increase compliance coupled with punishment only in cases where defendants knowingly violate the law.

II. Background

In America, once every 15 seconds a woman is beaten by her husband or boyfriend.⁸ Domestic abuse is the leading cause of injury among women.⁹ Roughly 1500 women each year are killed by their abusive partner.¹⁰ Furthermore, seventy percent of these victims are killed with a gun.¹¹ 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.¹²

In an effort to reduce this carnage, two federal gun control laws, collectively referred to as the Lautenberg Amendment, were recently passed to specifically take guns out of the hands of domestic abusers.¹³ One of these laws, 18 U.S.C. § 922(g)(8), makes it illegal for anyone subject to a protective order to be in possession of a firearm.¹⁴ The other provision, 18 U.S.C. § 922(g)(9), bars gun possession for persons who have been convicted of a misdemeanor domestic violence offense.¹⁵ If found guilty under either of these provisions, the penalty is a felony conviction that could result in a prison term of up

to ten years.¹⁶

Curiously, each provision was enacted with little publication or fanfare.¹⁷ Stranger still after the Lautenberg Amendment became law the Justice Department failed to take steps to notify state and local law enforcement or courts.¹⁸

The undetectable and circuitous path the Lautenberg Amendment to the Gun Control Act of 1968 took to become law is unfortunate considering the extraordinary impact it is having upon American society.¹⁹ The impact – the instantaneous creation of at least one million new felons – is all the more staggering considering that general notice of this new law was not forthcoming and that some recent federal court decisions indicate that violation of the law occurs even when the accused had no knowledge of the law's existence.²⁰

The Lautenberg Amendment has withstood numerous Constitutional challenges in the federal courts.²¹ This Comment focuses on whether the Lautenberg Amendment has been enforced in such a way so that the notice and fair warning requirement under the due process clause has been violated. The combination of recent cases considering this argument with Supreme Court jurisprudence on the issue provides fertile ground for judicial reexamination of the standards under which persons can be convicted of *malum prohibitum* offenses.²²

III. *United States v. Wilson*: Discussion of the Lautenberg Amendment in the Context of the Notice and Fair Warning Requirement Under the Due Process Clause

On September 10, 1996, Carleton Wilson had car trouble and pulled his pickup truck to the side of the road.²³ Shortly thereafter, an Illinois state police trooper stopped to assist.²⁴ During a routine check of Mr. Wilson's driver's license, it was learned that there was an

outstanding warrant for his arrest for failing to appear in court.²⁵ Wilson was arrested and a search of his truck yielded three guns.²⁶ Six months later, Wilson was indicted under 18 U.S.C. § 922(g)(8) for illegally possessing a firearm affecting interstate commerce while subject to a domestic relations order of protection.²⁷

The restraining order had been issued during divorce proceedings a year before the arrest.²⁸ Wilson had represented himself at all hearings and there was no evidence that he violated any condition specified in the restraining order.²⁹ The judge had not told Wilson that he was barred from possessing firearms even though he could have made such a condition part of Wilson's restraining order under Illinois State law.³⁰

Unfortunately for Wilson, although the divorce had been finalized, the order of protection had never been rescinded.³¹ In the district court, he was convicted of violating 18 U.S.C. § 922(g)(8), fined \$7,500 and sentenced to 41 months in prison.³² Wilson appealed.³³

In *United States v. Wilson*, the Seventh Circuit Court of Appeals affirmed Wilson's conviction noting that he had violated "a relatively new and obscure portion of 18 U.S.C. § 922."³⁴ After dispensing with several Constitutional challenges³⁵, the court held that Wilson's violation of 18 U.S.C. § 922(g)(8) would stand over his objection that he had not received adequate notice or fair warning of the existence of the statute because ignorance of the law is no excuse.³⁶ In a vigorous dissent, Judge Richard Posner argued that because the act of possessing a firearm in and of itself is not morally blameworthy and the law making that possession illegal for Wilson was unknown even to the judge who issued the restraining order, Wilson should not be punished.³⁷

The majority opinion rejected the argument that Wilson's Fifth Amendment due process rights were violated.³⁸ First, the court held that fair warning and notice was a question of whether the statute in question

is “sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.”³⁹ Because 18 U.S.C. § 922(g)(8) was clearly written there could be no successful “void for vagueness” challenge.⁴⁰ Fair warning could not be violated simply because the government failed to inform Wilson that the law existed.⁴¹

Secondly, the court held that whether Wilson knew of the law or not is irrelevant because “[t]he traditional rule in American jurisprudence is that ignorance of the law is no defense to a criminal prosecution.”⁴² Wilson’s case did not fall under an exception to this maxim because 18 U.S.C. § 922(g)(8) was not “highly technical”⁴³ nor did it exact a penalty for failing to act.⁴⁴ Furthermore, the court held that the term “knowingly” referred to knowledge of the act itself and not to knowledge of the law that prohibited the act.⁴⁵ Therefore, because Wilson knew that he possessed firearms, he knowingly committed the act that the law defined as a crime.⁴⁶

In his dissent, Chief Judge Richard A. Posner asserted that there should be a balancing of the “ignorance of the law is no excuse” maxim with the principle that it is wrong to convict a person of a crime whose acts are morally blameless.⁴⁷ According to Posner, Wilson’s omission to turn in his guns is not morally blameworthy because he could not have suspected that possession of a gun was wrong.⁴⁸ 18 U.S.C. § 922(g)(8) is *malum prohibitum* and therefore does not define an act – possession of guns – that one would intuitively know to be at odds with the moral code of American society.⁴⁹ To Posner, federal case law provides a rough guide to follow in measuring the criminal act against the mores of American society to determine whether knowledge of the law must be proved. Child pornography⁵⁰ and the possession of hand grenades⁵¹ were held to be examples of acts morally at odds with societal norms that did not require the actor’s knowledge of their illegality, while the

importation of ivory in violation of the African Elephant Conservation Act required knowledge.⁵² The dissent inferred that Wilson's acts are more like the latter violation than the former because legal ownership of guns by private individuals enjoys a long and widespread tradition of general acceptance.⁵³

Another factor for Judge Posner in determining whether ignorance of the law should excuse its violation is the extent to which the government has put the public on notice of a new *malum prohibitum* law.⁵⁴ Prior to Wilson's conviction, Posner noted that approximately 160,000 violations of 18 U.S.C. § 922(g)(8) occurred in the four years since the law's inception and only 10 cases filed federal courts throughout the United States.⁵⁵ Furthermore, the Department of Justice had not taken any measures to inform either law enforcement agencies or the state courts.⁵⁶ In fact, during argument of *Wilson*, the prosecutor admitted to the court that the Office of the United States Attorney for the Southern District of Illinois had not made an effort prior to Wilson's trial to notify the local judiciary of the new law.⁵⁷ Predictably, the judge who issued the restraining order to Wilson did not know of the existence of the law.⁵⁸

Judge Posner gave two reasons that would make a defendant morally culpable for ignorance of the law and concluded that Wilson did not meet either of these tests.⁵⁹ If the average person's conscience would tell them that the act was wrong in and of itself, then notice of the illegality of the act can be presumed and ignorance would be no defense.⁶⁰ In other instances, a law could be obscure and nonintuitive to the general population, but could substantially bear upon a particular person's activities to the extent that it is reasonable to presume knowledge of that law.⁶¹ For example, if a person was in the business of shipping pharmaceuticals and violated criminal laws governing that activity, ignorance of the law would not excuse its violation because this person should have known the law.⁶²

Posner argued that Wilson's lack of knowledge of 18 U.S.C. § 922(g)(8) did not fit into either of these criteria, and therefore he should not be punished.⁶³ Wilson could not have reasonably guessed that his conduct violated the law, and without notification by the judge who issued his restraining order, according to Posner, Wilson was not morally culpable.⁶⁴ If the expectation is that the average man is supposed to read through and learn the federal criminal code, then to Posner the law is a trap.⁶⁵

If none of the conditions that make it reasonable to dispense with proof of knowledge or the law is present, then to invoke "ignorance of the law is no defense" is to condone a violation of fundamental principles for the sake of judicial economy in the administration of criminal justice.⁶⁶

Judge Posner next discussed a string of United States Supreme Court cases that have held that there are exceptions to "ignorance of the law is no defense" and argued that Wilson's acts are excusable under their reasoning.⁶⁷ This Comment will add substance to the Posner dissent's discussion of these Supreme Court cases to more comprehensively describe current jurisprudence on the status of "ignorance of the law is no defense."

The seminal case that carved out an exception to this maxim is *Lambert v. California*.⁶⁸ In *Lambert*, a woman who had previously been convicted of a felony failed to register with the Los Angeles Police as required by a municipal code ordinance.⁶⁹ The majority stated, "[t]he question is whether a registration act of this character violated due process where it is applied to a person who has no actual knowledge of his duty to register, and where no showing is made of the probability of such knowledge." The Court noted that "[e]ngrained in our concept of due process is the requirement of notice" and "the principle is . . . appropriate where a person, wholly

passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case."⁷⁰ The conduct was wholly passive because it was "unaccompanied by any activity whatever, mere presence in the city being the test."⁷¹ Lambert was unaware of wrongdoing because "circumstances which might move one to inquire as to the necessity of registration [were] completely lacking."⁷² The Supreme Court held that the municipal ordinance violated the due process requirement of the Fourteenth Amendment when applied to a person such as Lambert whose act was passive and who had no actual knowledge of the law.⁷³ The Court's rationale is worth quoting at length.

[T]his appellant on first becoming aware of her duty to register was given no opportunity to comply with the law and avoid its penalty, even though her default was entirely innocent. She could but suffer the consequences of the ordinance, namely, conviction with the imposition of heavy criminal penalties thereunder. We believe that actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand. As Holmes wrote in *The Common Law*, '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.' Its severity lies in the absence of an opportunity either to avoid the consequences of the law or to defend any prosecution brought under it. Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it

otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community.⁷⁴

In *Wilson*, Judge Posner found all of the same circumstances present.⁷⁵ Wilson's criminal "act" was really an omission because mere possession of a firearm was all that was required to violate the law.⁷⁶ Circumstances such as moral culpability and notice of the law, either on the restraining order itself or by the issuing judge at the hearing, that would have moved Wilson to comply with the law were totally lacking.⁷⁷ Also, when Wilson became aware of violating the law, he was given no opportunity to comply and avoid penalty.⁷⁸ In short, according to Posner, the fact pattern in *Wilson*⁷⁹ mirrors that in *Lambert* and called for the same result.

The basic premise of *Lambert* has been supported in recent Supreme Court cases where the Court has further eroded the efficacy of the "ignorance of the law is no excuse" maxim where the defendant lacked knowledge of the crime they were charged with.⁸⁰ Four cases, *Liparota v. United States*,⁸¹ *Ratzlaf v. United States*,⁸² *Staples v. United States*,⁸³ and *United States v. X-Citement Video*,⁸⁴ when taken together, demonstrate a pattern of requiring morally culpable conduct for finding a violation of a federal criminal law.⁸⁵

In *Liparota*, the Liporata brothers, owners of a Chicago sandwich shop, were arrested for repeatedly buying federal food stamps from recipients for less than face value.⁸⁶ The federal law regarding food stamps criminally penalized one who "knowingly . . . transfers, acquires, alters, or possesses" food stamps in an unauthorized manner.⁸⁷ The Liporata's defense was that their act was not morally blameworthy in and of itself and that they did not know it was illegal to buy food stamps from recipients.⁸⁸ The Supreme Court held that to convict the Liporatas under this federal statute

required proof that they “knew that his conduct was unauthorized or illegal.”⁸⁹ Thus to be convicted under this *malum prohibitum* federal criminal statute, one must have knowledge of the law.

In *Ratzlaf*, a man was arrested for depositing numerous cashiers’ checks in an effort to evade the reporting requirement for cash transactions of \$10,000 or more in violation of the Money Laundering Control Act.⁹⁰ At trial, a jury had found that Ratzlaf knew of the \$10,000 reporting requirement and sought to evade it.⁹¹ The Supreme Court held that in order to convict Ratzlaf of the crime, the government had to prove that he knew that structuring his transactions into amounts less than \$10,000 was in violation of the reporting requirement.⁹² Because Ratzlaf was ignorant of this law and his act – depositing less than \$10,000 in cash numerous times over a short period – he was morally blameless in and of itself, he could not be convicted of the offense.⁹³

The *Staples* case concerned the illegal possession of a machine gun.⁹⁴ The defendant was accused of converting a semi-automatic weapon into an automatic weapon in violation of federal gun control law.⁹⁵ Staples maintained that he did not know his gun was automatic or that there was a law prohibiting possession of one.⁹⁶ Reversing the district court, the Supreme Court held that the government had the burden of proving that Staples knew that his gun was an automatic weapon.⁹⁷

The fourth case, *United States v. X-Citement Video*, had its roots in the infamous story of Traci Lords, a woman who at the tender age of 15 had starred in numerous adult movies.⁹⁸ Shortly after this story broke, an undercover officer purchased videotapes featuring the young Ms. Lords.⁹⁹ X-Citement was charged for knowingly transporting or shipping images of “minor[s] engag[ed] in sexually explicit conduct.”¹⁰⁰ The Supreme Court held that to convict the owner of X-Citement Video of this crime, the government had to prove that the owner knew that videos he sold contained images of Ms.

Lords when she was under age 18.¹⁰¹

Liparota, *Ratzlaf*, *Staples*, and *X-Citement Video* all required that in order for a person to be convicted of a crime that made a morally blameless act illegal that it must be proved that the person knew their conduct was against the law.¹⁰² Like *Lambert*, these cases uphold the notion that it is wrong to convict a morally blameless person of a crime for committing¹⁰³ an act that he had no reason to believe was wrong.

IV. Analysis

It should be a bedrock principle of American jurisprudence that in order to punish someone for violation of a criminal law that they should be morally culpable.¹⁰⁴ In most cases, the criminal law is self-evident because it makes conduct that society deems immoral an illegal act. One can be presumed to know that stealing or battery is against the law.

Wilson, by simply owning a gun, did not commit an act that made him morally culpable. For the entire history of the United States up to 1994 possessing a gun while under a domestic relations restraining order or after being convicted of a misdemeanor was perfectly legal. In fact, it was not even categorized as a civil wrong. Then, first as one provision in a 300 page Omnibus Crime bill¹⁰⁵ and then as an amendment to a Postal Appropriations bill,¹⁰⁶ the status of possessing a gun by such persons is now a serious felony. To turn heretofore innocent conduct into a possible 10-year prison term with the lifetime blemish of a felony criminal record is extraordinary.

The need to protect women and children from abusive men is great. It is justifiable to prohibit those who have demonstrated a propensity for committing acts of domestic violence, whether manifested in a misdemeanor domestic violence conviction or a domestic-relations restraining order, from possessing

guns. Men who have the capacity to beat their wives, girlfriends or children to the extent that they are held accountable under what is often an inadequately enforced and prosecuted area of the law¹⁰⁷ have placed themselves in a shameful category of persons clearly separable from the general population. If these people are dispossessed of their guns, statistics convincingly indicate that there would be a significant reduction in domestic homicides.¹⁰⁸

However, instead of publicizing such a radical new course in the law and enlisting the help and support of state and local law enforcement, the Department of Justice decided to spring a draconian trap on a handful of people. By way of analogy, enforcement of the Lautenberg Amendment by the Department of Justice is like a school of piranhas attacking a herd of cattle crossing a stream. A thousand cows cross an innocent-looking stream and unbeknownst to the rest of the herd, one cow disappears underwater and is eaten alive. Enforcement of the Lautenberg Amendment gun provisions should be done more like a pack of wolves than a school of piranhas. The Department of Justice should howl to the moon and appear on the edge of the field. The herd of cattle would then be aware of the danger.

The most effective way for the Lautenberg Amendment's objective of reducing domestic homicide to be achieved is to have people obey the law. 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. A significant stigma would be forever placed on those who are violent to their loved ones.

On the other hand, a more vigorous enforcement of the Lautenberg Amendment without first engaging in a notification and publicity campaign could lead to the unfortunate result of the law being repealed. Each year between 100,000 to 150,000 are convicted of misdemeanor domestic violence offenses¹⁰⁹ and more than 100,000 become subject to a restraining order.¹¹⁰ Combining this large group with all those convicted of domestic violence misdemeanors in the past yields a substantial number of people who would view the Lautenberg Amendment as too harsh. A few well-publicized cases where somewhat sympathetic defendants are sent to the penitentiary and the grouping of the not so morally corrupt with the truly evil into the same category of banned-from-owning-a-gun-forever would trouble many people. However, were there to be a public education initiative modeled on the efforts to decrease drunk driving that accompanied significant strengthening of those laws, the Lautenberg Amendment would enjoy large support among the general public. Most people now regard drunk driving as a morally culpable act that deserves severe punishment. The same shift in public opinion would occur in regards to banning the ownership of guns from those who commit acts of domestic violence.

V. Conclusion

United States v. Wilson was a poor interpretation of

the current status of the notice and fair warning requirement of the due process clause. Judge Posner's dissent, when combined with the reasoning in a line of Supreme Court precedents, calls for a different outcome. As consumers of the law, all Americans should dread if it comes to pass that persons who are not morally culpable can be convicted of a crime they had no reason to know existed. The Lautenberg Amendment is a needed law, but one that needs to be made known to local law enforcement, courts, and the general public so that it will be complied with and supported. Once educated, Americans would properly associate gun possession by perpetrator of domestic violence as a morally culpable act deserving of punishment.

Endnotes

1. OLIVER WENDELL HOMES, *THE COMMON LAW* 50 (1881).
2. *See* Gun Control Act of 1968, 18 U.S.C. §§ 922 (g)(8), 922(g)(9) (Supp. 1999).
3. *See id.*
4. *See* 18 U.S.C. § 924(2) (Supp. 1999).
5. *See* *United States v. Hicks*, 992 F.Supp. 1244, 1246 (D. Kan. 1997) (holding that 18 U.S.C. § 922 (g)(9) did not violate Ex Post Facto Clause or due process); *United States v. Wilson*, 159 F.3d 280, 288-89 (7th Cir. 1998) *cert. denied*, —U.S.—, 119 S. Ct. 2371 (1999) (holding that 18 U.S.C. § 922 (g)(8) did not violate due process clause); *United States v. Henson*, 55 F.Supp. 528, 530 (S.D. W.Va. 1999) (same); *United States v. Spruill*, 61 F.Supp.2d 587, 589 (W.D. Tex. 1999) (same); *but see* *United States v. Ficke*, 58 F.Supp.2d 1071, 1075 (D. Neb. 1999) (holding that 18 U.S.C. § 922 (g)(9) violated defendant's right to notice and fair warnings under the due process clause); *United States v. Emerson*, 46 F.Supp.2d 598, 611-13 (N.D. Tex. 1999) (holding that 18 U.S.C. § 922 (g)(8) violated defendant's Fifth Amendment rights to be subject to prosecution without proof that defendant had knowledge that his conduct violated the statute).

6. See 18 U.S.C. §§ 922 (g)(8), 922(g)(9) (Supp. 1999). For complete text of the statute see *infra* note 14.

7. See *Wilson*, 159 F.3d at 288-89 (holding that 18 U.S.C. § 922 (g)(8) did not violate due process clause); *but see Ficke*, 58 F.Supp.2d at 1075 (holding that 18 U.S.C. § 922 (g)(9) violated defendant's right to notice and fair warnings under the due process clause); *Emerson*, 46 F.Supp.2d at 611-13 (holding that 18 U.S.C. § 922 (g)(8) violated defendant's Fifth Amendment rights to be subject to prosecution without proof that defendant had knowledge that his conduct violated the statute).

8. See CONG. REC. S12341-01 (daily ed. Oct. 3, 1996) (statement of Senator Dodd quoting FBI crime statistics).

9. See CONG. REC. S10378-03 (daily ed. Sept. 12, 1996) (statement of Senator Wellstone).

10. See *id.* (extrapolating from Senator Wellstone's statement indicating that, on average, four women are killed each day by acts of domestic abuse). Senator Feinstein asserted that the number of women killed in domestic violence incidents was 6,000 per year. See *id.* at S10380-01.

11. See *id.* (statement of Senator Feinstein).

12. NANCY A. CROWELL & ANN W. BURGESS, UNDERSTANDING VIOLENCE AGAINST WOMEN 26 (Nat'l Academy Press 1996).

13. See CONG. REC. S10377-80 (daily ed. Sept. 12, 1996); Gun Control Act of 1968, 18 U.S.C. § 922 (g)(9) (Supp. 1999); 18 U.S.C. § 922 (g)(8) (Supp. 1999). 18 U.S.C. § 922 (g)(8) was passed as part of the Violent Crime Control and Law Enforcement Act on September 13, 1994. Pub. L. 103-322, 108 Stat. 2144-110401 (1994). 18 U.S.C. § 922 (g)(9) was passed in 1996. See CONG. REC. S10380-02 (daily ed. Sept. 12, 1996). Although these provisions of the Gun Control Act of 1968 became law in different years, they have been collectively referred to as the Lautenberg Amendment. See Jodi L. Nelson, Note, *The Lautenberg Amendment: An Essential Tool for Combating Domestic Violence*, 75 N.D. L. REV. 365, n. 75 (1999). This Comment will refer to both laws collectively as the Lautenberg Amendment.

14. 18 U.S.C. § 922 (g)(8) and 18 U.S.C. § 922 (g)(9) state:

It shall be unlawful for any person . . .

- (8) who is subject to a court order that—
 - (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
 - (B) restrains such person 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
 - (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
 - (C)(ii) by its terms explicitly prohibits the use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or
- (9) who has been convicted in any court of a misdemeanor crime of domestic violence; 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.

15. See 18 U.S.C. §§ 922 (g)(8), 922 (g)(9) (Supp. 1999).

16. See *id.* The penalty for “knowingly” violating 18 U.S.C. §§ 922 (g)(8) or 922(g)(9) is a felony punishable by a fine and/or imprisonment for up to 10 years. See 18 U.S.C. § 924(2) (Supp. 1999).

17. See Eric Andrew Pullen, Comment, *Guns, Domestic Violence, Interstate Commerce, and the Lautenberg Amendment: “[S]imply because Congress May Conclude that a Particular Activity Substantially Affects Interstate Commerce Does Not Necessarily Make It So.”* 39 S. TEX. L. REV. 1029, 1035-39 (1998); *United States v. Wilson*, 159 F.3d 280, 293-96 (7th Cir. 1998) *cert. denied*, —U.S.—, 119 S. Ct. 2371 (1999) (Posner, J., dissenting) (discussing the obscurity and lack of notice given to law enforcement, courts, and the public at large of 18 U.S.C. § 922(g)(8) which, similar to 18 U.S.C. § 922(g)(9), makes it a federal crime to be in possession of a firearm if under a restraining order). The legislative history indicates that the sponsor of 18 U.S.C. § 922(g)(8) intended that 18 U.S.C. § 922(g)(9) was to be part of the same piece of legislation. See CONG. REC. S10378-03 (daily ed. Sept. 12, 1996) (statement of Sen. Wellstone).

18. James Bovard, *Disarming Those Who Need Guns Most*, WALL ST. J., Dec. 23, 1996, at 2 (noting that because of the nearly undetectable way in which the Lautenberg Amendment was passed that there are probably more than 1 million new felons – those who have been convicted of domestic violence misdemeanors in the past yet retain their firearms because they have not been given notice of the new statute); *see also* United States v. Ficke, 58 F.Supp.2d 1071, 1072-76 (D. Neb. 1999); United States v. Wilson, 159 F.3d 280, 294-95 (7th Cir. 1998) cert. denied – U.S.—, 119 S. Ct. 2371 (1999) (Posner, J. dissenting) (discussing that the prosecutor testified 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) which makes possession of a firearm while subject to a restraining order a federal felony; noting 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 violations per year); John Shepard Wiley Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*. 85 VA. L. REV. 1021, 1092-94 (1999) (contending that publicity and notice should be a standard feature of the enforcement of *malum prohibitum* federal laws exemplified by the extensive publicity used by the United States Custom Service to notify travelers of the requirement of reporting the carrying of cash in excess of \$10,000 as an example of wise policy). This author contends that when a law has the effect of creating one million new felons, the government ought to notify everyone affected.

19. *See* Pullen *supra* note 17, at 1035-39.

20. Bovard *supra* note 18, at 2 (noting that there are probably more than 1 million new felons have not been given notice of the new statute); *see also* United States v. Hicks, 992 F.Supp. 1244, 1246 (D. Kan. 1997) (holding that 18 U.S.C. § 922 (g)(9) did not violate Ex Post Facto Clause or due process); United States v. Wilson, 159 F.3d 280, 288-89 (7th Cir. 1998) cert. denied, —U.S.—, 119 S. Ct. 2371 (1999) (holding that 18 U.S.C. § 922 (g)(8) did not violate due process clause); United States v. Henson, 55 F.Supp. 528, 530 (S.D. W.Va. 1999) (same); United States v. Spruill, 61 F.Supp.2d 587, 589 (W.D. Tex. 1999) (same); *but see* United States v. Ficke, 58 F.Supp.2d 1071, 1075 (D. Neb. 1999) (holding that 18 U.S.C. § 922 (g)(9) violated defendant’s right to notice and fair warnings under the due process clause); United States v. Emerson, 46 F.Supp.2d 598, 611-13 (N.D. Tex. 1999) (holding that 18 U.S.C. § 922 (g)(8) violated defendant’s Fifth Amendment rights to be subject to prosecution without proof that

defendant had knowledge that his conduct violated the statute).

21. *See Gillespie v. City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999) (holding that the Lautenberg Amendment did not violate (1) congressional power under the Commerce Clause, (2) Tenth Amendment by forcing states to enforce federal law, (3) due process clause of the Fifth Amendment, or (4) the Second Amendment right to bear arms); *see also United States v. Hicks*, 992 F.Supp. 1244, 1246 (D. Kan. 1997) (holding that 18 U.S.C. § 922 (g)(9) did not violate Ex Post Facto Clause or due process); *United States v. Wilson*, 159 F.3d 280, 288-89 (7th Cir. 1998) *cert. denied*, —U.S.—, 119 S. Ct. 2371 (1999) (holding that 18 U.S.C. § 922 (g)(8) did not violate due process clause); *United States v. Henson*, 55 F.Supp. 528, 530 (S.D. W.Va. 1999) (same); *United States v. Spruill*, 61 F.Supp.2d 587, 589 (W.D. Tex. 1999) (same); *but see United States v. Ficke*, 58 F.Supp.2d 1071, 1075 (D. Neb. 1999) (holding that 18 U.S.C. § 922 (g)(9) violated defendant's right to notice and fair warnings under the due process clause); *United States v. Emerson*, 46 F.Supp.2d 598, 611-13 (N.D. Tex. 1999) (holding that 18 U.S.C. § 922 (g)(8) violated defendant's Fifth Amendment rights to be subject to prosecution without proof that defendant had knowledge that his conduct violated the statute).

22. *See Wilson*, 159 F.3d at 293-96 (Posner, J. dissenting) (arguing that the enforcement of the Lautenberg Amendment violates the notice and fair warning requirement under the due process clause); *Ficke*, 58 F.Supp.2d 1071 (holding that 18 U.S.C. § 922 (g)(9) violated defendant's right to notice and fair warnings under the due process clause); *United States v. Emerson*, 46 F.Supp.2d 598, 611-13 (N.D. Tex. 1999) (holding that 18 U.S.C. § 922 (g)(8) violated defendant's Fifth Amendment rights to be subject to prosecution without proof that defendant had knowledge that his conduct violated the statute).

23. *See Wilson*, 159 F.3d at 283.

24. *See id.*

25. *See id.* at 284.

26. *See id.*

27. *See id.*; 18 U.S.C. § 922 (g)(8) (Supp. 1999).

28. *See Wilson*, 159 F.3d at 283.

29. *See id.* at 283; *id.* at 295. (Posner, J., dissenting).

30. *See id.* at 294 (Posner, J., dissenting). That the judge did not force Wilson to turn in his guns is significant because the judge who issued the restraining order knew that Wilson had beaten his wife. *See id.* (Posner, J., dissenting). On the one hand, this inaction might show a need for enacting the Lautenberg Amendment gun control provisions. On the other hand it is an example of the lack of publicity of the law or need for it that a judge in the domestic relations milieu did not apparently know of the statute and thus did not think to dispossess Wilson of his guns.

31. *See id.* at 284.

32. *See id.*

33. *See id.* at 283-84.

34. *See id.* at 283.

35. Wilson, the defendant, argued that 18 U.S.C. § 922(g)(8) was an invalid exercise of Congressional power under the Commerce Clause and an unconstitutional usurpation of state power in violation of the Tenth Amendment. *See Wilson*, 159 F.3d at 283-89. There have been numerous constitutional challenges to the Lautenberg Amendment. *See generally* Ashley G. Pressler, *Guns and Intimate Violence: A Constitutional Analysis of the Lautenberg Amendment*, 13 ST. JOHN'S J. LEGAL COMMENT. 705, 713-730 (1999) (arguing that the Lautenberg Amendment is constitutional); Pullen *supra* note 17, at 1040-64 (arguing that the Lautenberg Amendment is unconstitutional in several ways).

36. *See Wilson*, 159 F.3d at 288-89. This Comment focuses on the issue of notice and fair warning and the maxim that ignorance of the law is no excuse. For a more complete analysis of all of the constitutional issues surrounding the Lautenberg Amendment refer to both the Pullen and Pressler articles cited *supra* note 35.

37. *See Wilson*, 159 F.3d at 293-296 (Posner, J., dissenting).

38. *See id.* at 288-89.

39. *See id.* at 288 (quoting *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926)).

40. *See id.*

41. *See id.*

42. *See id.*

43. *See id.* (citing *Bryan v. United States*, 524 U.S. 184, 194-95 (1998)) (noting the risk of setting a trap for unsuspecting individuals engaging in “apparently innocent conduct” is for “highly technical” statutes).

44. *See id.* at 288-89 (citing *Lambert v. California*, 355 U.S. 225, 228 (1957)) (holding that notice is only required to secure a criminal conviction if the penalty is for a failure to act).

45. *See id.* at 289 (citing *Bryan v. United States*, 524 U.S. 184, 194-95 (1998)).

46. *See id.*

47. *See id.* at 293 (Posner, J., dissenting).

48. *See id.* at 294-95 (Posner, J., dissenting).

49. *See id.* at 294 (Posner, J., dissenting).

50. *See id.* (Posner, J., dissenting) (citing *United States v. Robinson*, 137 F.3d 652, 654 (1st Cir. 1998)).

51. *See id.* (Posner, J., dissenting) (citing *United States v. Freed*, 401 U.S. 601, 609 (1971)).

52. *See id.* (Posner, J., dissenting) (citing *United States v. Grigsby*, 111 F.3d 806, 816-21 (11th Cir. 1997)).

53. *See id.* (Posner, J., dissenting); *see also* *Staples v. United States*, 511 U.S. 600, 611 (1994).

54. *See Wilson*, 159 F.3d at 294 (Posner, J., dissenting).

55. *See id.* (Posner, J., dissenting).

56. *See id.* at 294-95 (Posner, J., dissenting) (noting that all the Department of Justice need do was to apprise courts that handle domestic-relations disputes of the new law, thereby notifying and giving fair warning to those citizens who would be affected by 18 U.S.C. § 922(g)(8)).

57. *See id.* at 294. (Posner, J., dissenting).

58. *See id.* (Posner, J., dissenting).

59. *See id.* at 295. (Posner, J., dissenting).

60. *See id.* at 295. (Posner, J., dissenting). The United States Court of Appeals for the Fourth Circuit confronted the argument that a person under a restraining order could not have reasonably expected that he would be committing a federal felony under 18 U.S.C. § 922(g)(8) by retaining possession of his gun. *See United States v. Bostic*, 168 F.3d 718, 722 (1999). The court held that by engaging in abusive conduct, Bostic had “removed himself from the class of ordinary citizens” and therefore “[l]ike a felon, a person in Bostic’s position cannot reasonably expect to be free from regulation when possessing a firearm.” *id.* In other words, this court held that Bostic, as recipient of a restraining order, became more like the shipper of pharmaceuticals who violated the criminal law in *Dotterweich* and therefore should have availed himself of Title 18 and familiarized himself with the federal gun laws. *See id.*; *see also United States v. Dotterweich*, 320 U.S. 277 (1943). Thus because Bostic was “like a felon” after receiving a restraining order, the fact that the judge who issued the restraining order never informed him of the federal law did not excuse his ignorance. *See id.*

61. *See Wilson*, 159 F.3d at 295 (Posner, J., dissenting); *but see United States v. Bostic*, 168 F.3d 718, 722 (1999).

62. *See Wilson*, 159 F.3d at 295 (Posner, J., dissenting) (citing *United States v. Dotterweich*, 320 U.S. 277 (1943)); *but see Bostic*, 168 F.3d at 722.

63. *See Wilson*, 159 F.3d at 293-96. (Posner, J., dissenting).

64. *See id.* (Posner, J., dissenting); *but see Bostic*, 168 F.3d at 722.

65. *See Wilson*, 159 F.3d at 295. (Posner, J., dissenting).

66. *See id.* (Posner, J., dissenting).

67. *See id.* (Posner, J., dissenting).

68. *See Lambert v. California*, 355 U.S. 225 (1957).

69. *See id.* at 226.
70. *See id.* at 228.
71. *See id.* at 229.
72. *See id.*
73. *See id.* at 229-30.
74. *See id.*
75. *See United States v. Wilson*, 159 F.3d 280, 293-96 (7th Cir.) *cert. denied*, —U.S.—, 119 S. Ct. 2371 (Posner, J., dissenting).
76. *See id.* at 295-96. (Posner, J., dissenting).
77. *See id.* (Posner, J., dissenting).
78. *See id.* at 293-96. (Posner, J., dissenting).
79. *See id.* at 295-96 (Posner, J., dissenting); *see also Lambert v. California*, 355 U.S. 225, 228-30 (1957). The majority opinion maintained that Wilson, unlike Lambert had committed an act and therefore distinguished *Lambert*. *See Wilson*, 159 F.3d at 288-89. This Comment agrees with Judge Posner and argues that one who owns a gun previous to the passage of the law and continues to possess the gun in ignorance of the law has omitted to act – to turn in his gun – and not acted. *See id.* at 293 (Posner, J., dissenting).
80. John Shepard Wiley Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*. 85 VA. L. REV. 1021, 1022-30, 1037-46 (1999).
81. 471 U.S. 419 (1985).
82. 510 U.S. 135 (1994).
83. 511 U.S. 600 (1994).
84. 513 U.S. 64 (1994).
85. *See Wiley supra* note 80, at 1039-46.
86. *See Liporata v. United States*, 471 U.S. 419, 421 (1985).

87. *See id.* at 420 n. 1 (quoting 7 U.S.C. § 2024(b)(1)).
88. *See id.* at 423.
89. *See id.* at 434.
90. *See Ratzlaf v. United States*, 510 U.S. 135 (1994).
91. *See id.* at 137-38.
92. *See id.* at 149.
93. *See id.*
94. *See Staples v. United States*, 511 U.S. 600 (1994).
95. *See id.* at 603.
96. *See id.*
97. *See id.* at 619.
98. 513 U.S. 64 (1994).
99. *See id.* at 66.
100. *See id.* at 68 (quoting 18 U.S.C. § 2252).
101. *See id.* at 78.
102. *See Wiley supra* note 80, at 1044.
103. *See Lambert v. California*, 355 U.S. 225, 228-30 (1957).
104. *See generally Wiley supra* note 80.
105. *See* 18 U.S.C. § 922(g)(8) (Supp. 1999).
106. *See* 18 U.S.C. § 922(g)(9) (Supp. 1999).
107. *See* Jodi L. Nelson, *The Lautenberg Amendment: An Essential Tool for Combating Domestic Violence*, 75 N.D. L. REV. 365, 376-84 (1999).
108. *See* CROWELL & BURGESS *supra* note 12, at 26.

109. Bovard *supra* note 18, at 2.

110. See *United States v. Wilson*, 159 F.3d 280, 294 (7th Cir.) *cert. denied*, —U.S.—, 119 S. Ct. 2371 (Posner, J., dissenting).

