



1-1-1999

The Lautenberg Amendment: An Essential Tool for Combatting Domestic Violence

Jodi L. Nelson

Follow this and additional works at: <https://commons.und.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Nelson, Jodi L. (1999) "The Lautenberg Amendment: An Essential Tool for Combatting Domestic Violence," *North Dakota Law Review*: Vol. 75 : No. 2 , Article 7.

Available at: <https://commons.und.edu/ndlr/vol75/iss2/7>

This Note is brought to you for free and open access by the School of Law at UND Scholarly Commons. It has been accepted for inclusion in North Dakota Law Review by an authorized editor of UND Scholarly Commons. For more information, please contact und.common@library.und.edu.

THE LAUTENBERG AMENDMENT: AN ESSENTIAL TOOL FOR COMBATTING DOMESTIC VIOLENCE

I. INTRODUCTION

The 1996 Lautenberg Amendment,¹ an addition to the Gun Control Act of 1968,² follows in the footsteps of the Violence Against Women Act of 1994³ by providing federal tools intended to protect victims of domestic violence.⁴ Together, these statutes strive to achieve the congressional goal of making violence against women a major law enforcement priority.⁵ Most importantly, these statutes take aim at the attitudes that nurture violence against women and seek to provide the help that survivors of domestic violence need.⁶

Essentially, the Lautenberg Amendment makes it unlawful for any person convicted of a misdemeanor crime of domestic violence⁷ to possess a gun.⁸ This has great practical import, especially in a state such as

1. See Lautenberg Amendment of 1996, 18 U.S.C. § 922(g)(9) (Supp. 1997). The Lautenberg Amendment prohibits ownership or possession of firearms by those convicted of a domestic violence crime. *Id.* Specifically, it adds misdemeanor convictions to the list of disqualifications. *Id.*

2. See Gun Control Act of 1968, 18 U.S.C. § 922(g)(1) (1994 & Supp. 1997). The Gun Control Act states:

It shall be unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year 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.

Id.

3. The Violence Against Women Act [hereinafter "VAWA"] of 1994 is a subchapter of the Violent Crime Control and Enforcement Act. See VAWA, 42 U.S.C. §§ 13931-14016 (1994 & Supp. 1996). "Specifically, Title III of VAWA establishes a federal civil right for victims of violent, gender-motivated crimes, providing victims with either injunctive or monetary compensation." Yvette J. Mabbun, Note, *Title III of the Violence Against Women Act: The Answer to Domestic Violence or a Constitutional Time-Bomb?*, 29 ST. MARY'S L.J. 207, 210 (1997).

4. Mabbun, *supra* note 3, at 210.

5. See Margaret Groban, *Family Violence Project*, in FULL FAITH AND CREDIT CONFERENCE (National Council of Juvenile & Family Court Judges eds.) (citing S. Rep. No. 102-197, at 34-35 (1991)). Received as part of the domestic violence research package from the North Dakota Counsel on Abused Women's Services.

6. See *id.*

7. See Lautenberg Amendment of 1996, 18 U.S.C. § 921(a)(33)(A)(i)-(ii) (Supp. 1997). The Amendment defines "misdemeanor crime of domestic violence" as an offense that is a 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 cohabitating with or has cohabitated with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

Id. The law applies to convictions in any court. *Id.*

8. See Lautenberg Amendment of 1996, 18 U.S.C. § 922(g)(9) (Supp. 1997).

North Dakota, as it prevents gun uses such as hunting or simply having a gun on the farm.⁹

Although much of the discussion of the Lautenberg Amendment, as well as its background, focuses on the impact of domestic violence on women, it also has impacts on juvenile law for several reasons.¹⁰ First, there is a direct connection; the Amendment's definition of domestic violence includes child abuse, meaning its strictures apply to those who abuse their children as well as their spouses and domestic partners.¹¹ Therefore, the Amendment directly impacts juvenile law.¹²

Second, there is an indirect connection, as former North Dakota Supreme Court Justice Beryl Levine discussed in *Heck v. Reed*,¹³ a 1995 case. In *Heck*, the court concluded that the statutory rebuttable presumption against awarding custody to a perpetrator of domestic violence could be overcome by clear and convincing evidence.¹⁴ Levine noted that experts have found that witnessing domestic abuse has a negative effect on children even if they are not themselves physically abused.¹⁵ Levine discussed other effects as well; for example, parents suffering from abuse are less able, because of physical and emotional injuries, to devote proper attention to their children's needs.¹⁶ Finally, children of abusive parents are at an increased risk of suffering abuse themselves in the future, since "the pattern of spouse abuse usually precedes the abuse of the child."¹⁷ Thus, because it seeks to reduce the effects of domestic violence, the Lautenberg Amendment has important implications for juvenile law.¹⁸

The Lautenberg Amendment has been controversial, however; this is in part because it provides no exemption for law enforcement, military or government officials.¹⁹ This lack of exemptions in the Lautenberg

9. See *id.* (prohibiting ownership or possession of firearms by those convicted of a domestic violence crime). See also Lautenberg Amendment of 1996, 18 U.S.C. § 925 (1994 & Supp. 1997) (listing the exceptions to the Lautenberg Amendment wherein hunting or farm use is not included).

10. For a discussion of the background of the Lautenberg Amendment, see part II, *infra*.

11. See *supra* note 7.

12. See *supra* note 7.

13. 529 N.W.2d 155 (N.D. 1995).

14. *Heck v. Reed*, 529 N.W.2d 155, 166 (N.D. 1995) (interpreting N.D. CENT. CODE § 14-09-06.2(1)(j) (1993), which creates a rebuttable presumption against awarding custody of a child to a perpetrator of domestic abuse). See also Kathleen B. Garner, Comment, *Applying the Rebuttable Presumption Against Awarding Custody to Perpetrators of Domestic Violence*, 72 N.D. L. REV. 155 (1996) (discussing the *Heck* decision).

15. *Heck*, 529 N.W.2d at 163 (referring to "the growing body of research which teaches that children are victimized by the climate of violence between their parents, even if they are not direct targets of the abuse") (citations omitted).

16. See *id.* at 164 (citing Karen Czapskiy, *Domestic Violence, the Family, and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts*, 27 FAM. L.Q. 247 (1993)).

17. See *id.*

18. See *supra* notes 10-17 and accompanying text.

19. Lautenberg Amendment of 1996, 18 U.S.C. § 925(a)(1) (Supp. 1997) (listing the exceptions

Amendment conflicts with The Gun Control Act of 1968 which does provide exemptions for these individuals when convicted of a domestic violence felony.²⁰ This has resulted in a number of constitutional attacks on the Amendment.²¹ One of these challenges partially, and briefly, succeeded recently, as the United States Court of Appeals for the District of Columbia found the Amendment, in part, violates the Equal Protection Clause²² of the U.S. Constitution²³ because the Amendment

to the Lautenberg Amendment; law enforcement, military and government officials are not included). This is the most distinguishing factor between the Lautenberg Amendment and The Gun Control Act of 1968, which does provide that domestic abuse felons in the military, law enforcement or a government official capacity may retain their firearms in their official capacity. See Lautenberg Amendment of 1996, Pub. L. 104-208, 110 Stat. 3009-372 (1996) (codified as amended at 18 U.S.C. § 925(a)(1)) (amending the Gun Control Act of 1968 to remove the exception for law enforcement, military, or government officials who commit a domestic abuse misdemeanor). *But see* 18 U.S.C. § 925(a)(1) (including domestic abuse felonies as crimes for which law enforcement, military, or government personnel receive an exemption).

20. See Lautenberg Amendment of 1996, Pub. L. 104-208, 110 Stat. 3009-372 (1996) (codified as amended at 18 U.S.C. § 925(a)(1)) (eliminating those exemptions for law enforcement, military, or government officials who are convicted of a domestic abuse misdemeanor). *But see* 18 U.S.C. § 925(a)(1) (excluding domestic abuse felonies from those crimes which are not granted exemptions).

21. Police have been a major force in these challenges, as there is a possibility that a police officer could lose his or her job if unable to possess a firearm. *Gillespie v. City of Indianapolis* captures all of the various constitutional challenges to the Amendment. *Gillespie v. City of Indianapolis*, 13 F. Supp.2d 811, 819-28 (S.D. Ind. 1998) *Gillespie*, a police officer, was convicted of a misdemeanor battery offense involving domestic violence against his ex-wife. *Id.* at 814. As a result of this conviction, *Gillespie* could not possess a firearm under the Lautenberg Amendment, and he was therefore unable to continue in his usual official capacity as a police officer. *Id.* at 814-15. *Gillespie* claimed this violated his Second Amendment right to bear arms both as an individual and as a police officer. *See id.* at 826. Additionally, *Gillespie* contended the Lautenberg Amendment violated the Tenth Amendment on the grounds that it invaded state sovereignty and state criminal law by defining the crime of domestic violence and its penalties. *See id.* at 819. *See also* National Ass'n of Gov't Employees, Inc. v. Barrett, 968 F. Supp. 1564, 1577 (N.D. Ga. 1997). *Gillespie* also advanced a due process argument, claiming section 922(g)(9) of the Amendment arbitrarily and without due process took his right to bear arms. *See Gillespie*, 13 F. Supp.2d at 825. *See also* United States v. Hicks, 992 F. Supp. 1244, 1245 (D. Kan. 1997); Barrett, 968 F. Supp. at 1572, 1575. *Gillespie* also claimed the Lautenberg Amendment was an ex post facto violation, contending section 922(g)(9) retroactively punishes offenders for prior domestic violence crimes. *See Gillespie*, 13 F. Supp.2d at 825. *See also Hicks*, 992 F. Supp. at 1245; United States v. Meade, 986 F. Supp. 66, 69 (D. Mass. 1997); Barrett, 968 F. Supp. at 1576. Next, *Gillespie* tried to persuade the court that the Lautenberg Amendment constituted an equal protection violation by providing a harsher penalty for misdemeanants than for felons. *See Gillespie*, 13 F. Supp.2d at 822. *See also* Fraternal Order of Police v. United States (*Fraternal Order of Police I*), 152 F.3d 998, 1002-03 (D.C. Cir. 1998), *rev'd*, 173 F.3d 898 (D.C. Cir. 1999); Barrett, 968 F. Supp. at 1572-73. *Gillespie* also raised the Commerce Clause, as he claimed the Lautenberg Amendment exceeded Congress' power to regulate interstate commerce. *See Gillespie*, 13 F. Supp.2d at 821. *See also Barrett*, 968 F. Supp. at 1572. *Gillespie* also advanced a bill of attainder argument, as he claimed the Lautenberg Amendment violates U.S. CONST. art. I, § 9, cl. 3, which states that no bill of attainder or ex post facto law shall be passed. *See Gillespie*, 13 F. Supp.2d at 825. *See also Barrett*, 968 F. Supp. at 1575-76. A bill of attainder is a "law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protection of a judicial trial." Barrett, 968 F. Supp. at 1576 n.19. Finally, *Gillespie* asserted that the Lautenberg Amendment was a violation of the Contract Clause of Article I, § 10, cl. 1 of the U.S. Constitution which states: "No state shall . . . pass any . . . Law impairing the Obligation of Contracts . . ." *See Gillespie*, 13 F. Supp.2d at 827. *Gillespie* contended that section 922(g)(9) is "compelled state legislation" that "operates to substantially impair Plaintiff's oath-based contractual obligations." *Id.*

22. Equal Protection Clauses are found in both the Fifth and Fourteenth Amendments of the U.S. Constitution. *See* U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1. The analysis for equal protection is substantially identical under both amendments in that a law may neither burden a

unlike allows no exemptions for law enforcement, military or government officials.²⁴ The court found that providing a harsher penalty for a misdemeanor than for a felony violates the Equal Protection Clause.²⁵ As a result of this decision, domestic abusers in law enforcement, the military or the government were once again allowed to possess a firearm.²⁶ However the picture was confused again, in April, when the District of Columbia Court of Appeals, reheard the case, reversed the initial decision and found the Lautenberg Amendment survived the Equal Protection Challenge.²⁷ This new decision once again took guns from domestic abusers, and also adds to the confusion about the Amendment's constitutionality.

This Note addresses the background of the Lautenberg Amendment, as well as recent challenges to it and possible responses to these challenges. Part II comprises an introduction to the Lautenberg Amendment's history and content, as well as those of its predecessors, the Gun Control Act of 1968²⁸ and the VAWA of 1994.²⁹ Part III discusses why the Lautenberg Amendment, despite providing absolutely no exemptions, is indeed necessary to combat domestic violence.³⁰ This includes an examination of state laws, including those of North Dakota, which are simply insufficient to handle the problem of domestic violence.³¹

fundamental right nor target a suspect class. See *Fraternal Order of Police I*, 152 F.3d at 1002. A legislative classification is upheld so long as it "bears a rational relation to some legitimate end." *Id.*

23. See U.S. CONST. amend. XIV, § 1. See also *Fraternal Order of Police I*, 152 F.3d at 1004 (holding that the lack of exemptions in the Lautenberg Amendment for police officers, military and government officials convicted of domestic violence misdemeanors violated such persons' equal protection because those classifications were exempted from the Gun Control Act banning firearm possession for domestic violence felons).

24. See Lautenberg Amendment of 1996, 18 U.S.C. §925(a)(1) (Supp. 1997).

25. See *Fraternal Order of Police I*, 152 F.3d at 1002.

26. *Id.* at 1004. In *Fraternal Order of Police I*, the court held that:

[Section 925] is unconstitutional insofar as it purports to withhold the public interest exception from those convicted of domestic violence misdemeanors. The government may not bar such people from possessing firearms in the public interest while it imposes a lesser restriction on those convicted of crimes that differ only in being more serious.

Id.

27. *Fraternal Order of Police v. United States (Fraternal Order of Police II)*, 173 F.3d 898, 901 (D.C. Cir. 1999), *rev'g*, 152 F.3d 998 (D.C. Cir. 1998). The court began by noting, "[A]t the outset of . . . [another] opinion in which a panel on petition for rehearing abandoned its initial view, we quoted Justice Frankfurter's remark, 'Wisdom too often never comes, and so one ought not to reject it merely because it comes late.' It still seems good advice." *Id.* at 900-01 (citations omitted).

28. Gun Control Act of 1968, 18 U.S.C. § 922(g)(1) (1994).

29. VAWA, 42 U.S.C. §§ 13931-14016 (1994).

30. See Lautenberg Amendment of 1996, 18 U.S.C. § 925(a)(1) (Supp. 1997).

31. See N.D. CENT. CODE § 14-07.1-02 (1997) (providing for domestic violence protection orders); N.D. CENT. CODE § 14-07.1-03 (1997) (providing for temporary protection orders); N.D. CENT. CODE § 14-07.1-06 (1997) (establishing penalties for violating a protection order); N.D. CENT. CODE § 14-07.1-13 (1997) (stating that a person charged with a domestic violence crime may be prohibited from having contact with the victim if a protection order under § 14-07.1-02 or § 14-07.1-03 does not already exist); N.D. CENT. CODE § 62.1-01-02 (1995) (demanding seizure of a

Part IV of this Note will provide an overview of the numerous claims of constitutional violations by the Lautenberg Amendment, and the courts' rejection of those claims.³² This section will also discuss the recent holdings of the District of Columbia Circuit Court of Appeals in *Fraternal Order of Police v. United States*,³³ both initially and on rehearing, that partially invalidated and then restored the Amendment.³⁴ Finally, Part V will discuss both why it is essential that there be no exemptions from the Lautenberg Amendment and how this can be done without violating the United States Constitution.

II. FEDERAL INVOLVEMENT IN DOMESTIC VIOLENCE LAW: THE GUN CONTROL ACT OF 1968, THE VIOLENCE AGAINST WOMEN ACT, AND THE LAUTENBERG AMENDMENT

In 1968, Congress enacted the Gun Control Act, the first of three federal statutes aimed at combating domestic violence.³⁵ Congress continued its efforts in 1994 with the Violence Against Women Act³⁶ and in 1996 with the Lautenberg Amendment.³⁷ This trilogy of federal statutes enables the federal government to assist in combating crimes of domestic violence, over which it has historically lacked jurisdiction.³⁸

dangerous weapon or firearm used or possessed in the act of a felony or misdemeanor involving violence or intimidation); N.D. CENT. CODE § 62.1-02-01 (1995) (disallowing any person convicted of a felony or misdemeanor involving violence or intimidation from owning a firearm for a period of five years). All of these statutes provide for remedies after an act of violence has occurred. See N.D. CENT. CODE §§ 14-07.1-02, -03, -06, -13; N.D. CENT. CODE § 62.1-01-02; N.D. CENT. CODE § 62.1-02-01. In contrast, the Lautenberg Amendment seeks to prevent violence by removing guns from the hands of domestic abusers before they have a chance to use them against their victims. See Lautenberg Amendment of 1996, 18 U.S.C. § 922(g)(9) (Supp. 1997) (stating that "[i]t shall be unlawful for any person who has been convicted in any court of a misdemeanor crime of domestic violence" to possess a firearm).

32. See *supra* note 21.

33. 152 F.3d 998, 1004 (D.C. Cir. 1998), *rev'd*, 173 F.3d 898 (D.C. Cir. 1999).

34. See *Fraternal Order of Police v. United States (Fraternal Order of Police I)*, 152 F.3d 998, 1004 (D.C. Cir. 1998), *rev'd*, 173 F.3d 898 (D.C. Cir. 1999) (holding that the lack of exemptions in the Lautenberg Amendment for police officers, military and government officials convicted of domestic violence misdemeanors violated the Equal Protection Clause because these classifications were exempted from the Gun Control Act, which also bans firearm possession for domestic violence felonies) and *Fraternal Order of Police v. United States (Fraternal Order of Police II)*, 173 F.3d 898, 901 (D.C. Cir. 1999), *rev'g*, 152 F.3d 998 (D.C. Cir. 1998) (overturning *Fraternal Order of Police I* and reinstating summary judgment for United States granted by the district court).

35. The Gun Control Act prohibits domestic violence felons from possessing firearms. See Gun Control Act of 1968, 18 U.S.C. § 922(g)(1) (1994). The Violence Against Women Act provides civil remedies to victims of gender-motivated crime. See VAWA, 42 U.S.C. § 13981 (1994). The Lautenberg Amendment prohibits domestic violence misdemeanants from possessing firearms. See 18 U.S.C. § 922(g)(9).

36. See VAWA, 42 U.S.C. §§ 13931-14016 (1994 & Supp. 1996).

37. See 18 U.S.C. § 922(g)(9).

38. See Groban, *supra* note 5 (citing S. REP. NO. 102-197, at 34-35 (1991)). Received as part of the domestic violence research package from the North Dakota Counsel on Abused Women's Services.

A. THE GUN CONTROL ACT OF 1968

The first piece of federal legislation concerned with domestic violence was the Gun Control Act of 1968.³⁹ This Act expressly prohibits convicted felons, drug addicts, minors, mentally ill people, anyone dishonorably discharged from the military, undocumented immigrants and people who have renounced their U.S. citizenship from buying or owning a gun.⁴⁰ It was the first federal legislation to limit an individual's Second Amendment right to bear arms.⁴¹

The Gun Control Act was primarily intended to create more federal control over interstate and foreign commerce involving firearms and to assist the states in fighting such commerce.⁴² Congress found increased federal control necessary due to the increasing rate of crime and the growing use of firearms in violent crime.⁴³ Combating domestic violence is mentioned nowhere in the purpose listed for the enactment of this legislation.⁴⁴ However, the Gun Control Act affected the problem of domestic violence, as a conviction for a domestic violence felony triggered the Act's provisions, preventing the perpetrator from possessing a firearm.⁴⁵

An important aspect of the Gun Control Act, and one that plainly distinguishes it from the Lautenberg Amendment, is that it contains exemptions for government employees, law officers, and members of the military who use firearms in their official duties.⁴⁶ The Lautenberg Amendment, contrarily, contains no such exemptions.⁴⁷ Thus, under the Gun Control Act, a police officer convicted of a domestic violence felony was allowed to retain a firearm because it was necessary for his job.⁴⁸ However, under the Lautenberg Amendment, the same police officer convicted of a domestic violence misdemeanor is not allowed to

39. See 18 U.S.C. § 922(g)(1) (prohibiting anyone convicted of a felony, including a domestic violence felony, from owning a firearm).

40. Gun Control Act of 1968, 18 U.S.C. § 922 (1994 & Supp. 1997).

41. See Melanie L. Mecka, *Seizing the Ammunition from Domestic Violence: Prohibiting the Ownership of Firearms by Abusers*, 29 RUTGERS L. REV. 607, 607 (1998).

42. H.R. Rep. 90-1577 (1968), reprinted in 1968 U.S.C.C.A.N. 4410, 4411 (stating the primary purposes of the Gun Control Act was "to strengthen Federal controls over interstate and foreign commerce in firearms and to assist the States effectively to regulate firearms traffic within their borders").

43. See *id.*, reprinted in 1968 U.S.C.C.A.N. 4410, 4411.

44. See *id.*, reprinted in 1968 U.S.C.C.A.N. 4410, 4411.

45. See Gun Control Act of 1968, 18 U.S.C. § 922(g)(1) (1994).

46. Cf. Lautenberg Amendment of 1996, Pub. L. 104-208, 110 Stat. 3009-372 (1996) (codified as amended at 18 U.S.C. § 925(a)(1) (Supp. 1997)) (removing those exemptions for law enforcement, military, and government officials that were not present in the original "Gun Control Act").

47. See Lautenberg Amendment of 1996, 18 U.S.C. § 925(a)(1) (Supp. 1997).

48. See 18 U.S.C. § 925(a)(1) (amended in 1996 to eliminate all exemptions for law enforcement, government, and military employees).

retain a firearm, even though it may be necessary for his job.⁴⁹ This difference between the Gun Control Act and the Lautenberg Amendment led the District of Columbia Circuit Court of Appeals initially to find the Lautenberg Amendment unconstitutional on equal protection grounds.⁵⁰

Although the Gun Control Act indirectly aids in the battle against domestic violence, it falls short of providing an adequate remedy to victims of such violence.⁵¹ The Act only provides a remedy for felonies, and most domestic violence crimes are never classified as such.⁵² Therefore, the Act does not prevent most domestic violence offenders from owning guns.⁵³

B. THE VIOLENCE AGAINST WOMEN ACT OF 1994

As mentioned, the Gun Control Act provides federal assistance in the war against crime generally, but not the war against domestic violence crime in particular.⁵⁴ It was not until 1994 that Congress enacted legislation specifically in response to the growing problem of domestic violence.⁵⁵ This particular legislation was the Violence Against Women Act (VAWA).⁵⁶

49. See 18 U.S.C. § 925(a)(1). This section of the Lautenberg Amendment provides for limited relief from the disabilities the Amendment overall imposes:

The provisions of this chapter, except for sections 922(d)(9) and 922(g)(9) [the sections relating to domestic violence] and provisions relating to firearms subject to the prohibitions of section 922(p), shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof.

Id.

50. See *Fraternal Order of Police v. United States (Fraternal Order of Police I)*, 152 F.3d 998, 1004 (D.C. Cir. 1998), rev'd, 173 F.3d 898 (D.C. Cir. 1999). A more detailed discussion of this case appears in Part IV, *infra*.

51. See 142 CONG. REC. S10380-01 (daily ed. Sept. 12, 1996) (statement of Sen. Murray) (stating that most domestic violence offenders are never convicted of a felony due to outdated or ineffective laws that often treat domestic violence as a lesser offense). Thus, if there is no felony conviction, there can be no remedy under the Gun Control Act. See Gun Control Act of 1968, 18 U.S.C. § 922(g)(1) (1994).

52. See 18 U.S.C. § 922(g)(1).

53. See *id.*

54. See *id.* (neglecting to recognize domestic violence in its original enactment). See also H.R. Rep. 90-1577 (1968), reprinted in 1968 U.S.C.A.N. 4410, 4411.

55. See VAWA, 42 U.S.C. §§ 13931-14016 (1994 & Supp. 1996).

56. See *id.* VAWA was enacted to "combat the growing and widespread epidemic of domestic violence." See Mabbun, *supra* note 3, at 208. It was designed to provide remedies to gender-motivated crime such as domestic violence and to remedy the prejudices that lurk behind it. See S. REP. NO. 103-138 (1993).

The primary purpose of VAWA was to fight domestic violence.⁵⁷ It does this primarily by establishing "a federal civil right for victims of violent, gender-motivated crimes, providing victims with either injunctive or monetary compensation."⁵⁸ Thus, the key to VAWA is that it specifically provides relief for any gender-motivated crimes,⁵⁹ not just for those of domestic violence.⁶⁰

Other provisions of VAWA also seek to further the goal of fighting gender-motivated crimes.⁶¹ For example, portions of VAWA provide "federal grants to states willing to implement pro-arrest policies and training and education programs in domestic violence for judges, prosecutors, and law enforcement officers."⁶² Further, VAWA provides training for federal judges on sexual assault and domestic violence issues.⁶³

Like the Gun Control Act, however, VAWA has limitations that keep it from being completely effective.⁶⁴ First, VAWA requires both a "crime of violence"⁶⁵ and a proven gender-related motivation for that

57. *See id.* A woman is beaten by her husband or boyfriend once every 15 seconds in this country. *See* 142 CONG. REC. S12341-01 (daily ed. Oct. 3, 1996) (statement of Sen. Dodd) (citing FBI crime statistics). Domestic violence claims the lives of four women every day. *See id.* Every six minutes a woman is raped in the United States. *See* Mabbun, *supra* note 3, at 209 (citing S. REP. NO. 101-545, at 27 (1990)). *See also id.* at 208 n.2 (citing S. REP. NO. 102-197, at 36 (1991), documenting growth of domestic violence). "Only sixteen months after VAWA was introduced in June of 1990, the Senate Committee on the Judiciary reported that incidents of sexual assault against women increased by approximately 1.3 million, and an estimated 4 million more women were abused in their homes." *Id.* "The Committee stated: 'The urgency [for a response] reflects not only the increasing number of victims, but also the puzzling persistence of public policies, laws, and attitudes that treat some crimes against women less seriously than other violent crimes.'" *Id.* Congress enacted VAWA to address this day-by-day violence that women from every socio-economic background experience. *See* Mabbun, *supra* note 3, at 208 n.2 (citing S. REP. NO. 101-545, at 27-28 (1990)).

58. *See* Mabbun, *supra* note 3, at 210. *See also* VAWA, 18 U.S.C. § 2264. Unlike the Gun Control Act, VAWA mandates that the court order restitution:

[T]he [c]ourt [in a VAWA case] must order restitution after conviction to reimburse the victim for the full amount of losses. These losses include costs for medical or psychological care, physical therapy, transportation, temporary housing, child care, lost income, attorney's fees, costs incurred in obtaining a civil protection order, and any other losses suffered by the victims as a result of the offense. In a conviction under the Gun Control Act, the court may order restitution.

Groban, *supra* note 5. Received as part of the domestic violence research package from the North Dakota Counsel on Abused Women's Services.

59. *See* VAWA, 42 U.S.C. § 13981(d) (1994) (defining the term "crime of violence motivated by gender" to mean a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender). *Id.* *See also* Mabbun, *supra* note 3, at 220 n.47.

60. *See* Mabbun, *supra* note 3, at 210. *See also* VAWA, 42 U.S.C. § 13701 (1994).

61. *See* 42 U.S.C. § 13701. *See also* Mabbun, *supra* note 3, at 211-12.

62. Mabbun, *supra* note 3, at 211-12.

63. *See* VAWA, 42 U.S.C. § 14001-14002 (1994). *See also* Mabbun, *supra* note 3, at 211 n.17.

64. VAWA, like the Gun Control Act, provides only remedies after the violence has occurred and offers no preventative measures against domestic abusers. *See* 42 U.S.C. § 13981 (providing civil relief to women only after they have become victims of domestic violence).

65. *See* S. REP. NO. 103-138, § 3 (1993).

violence.⁶⁶ The woman who seeks relief under VAWA must demonstrate that she was attacked because she was a woman and "that the attacker was motivated, at least in part, by her gender."⁶⁷ This is difficult to prove, meaning VAWA "will exclude many of the victims it hopes to assist."⁶⁸ Further, the Act does not create a general federal law for all assaults or rapes against women, and the remedy it provides is limited to federal and state felonies.⁶⁹ As the law does not address domestic violence misdemeanors, it offers victims of such misdemeanors no protection or retribution.⁷⁰ Most important, however, VAWA only provides remedies for victims of gender-motivated crimes, and thus it does not seek to prevent violence against women before it starts.⁷¹

C. THE LAUTENBERG AMENDMENT

As a supplement to VAWA, and to prevent domestic violence rather than merely to provide remedies for it, a bill was introduced at the second session of the 104th Congress.⁷² This bill, which became known as the Lautenberg Amendment, would take firearms out of the hands of persons convicted of domestic violence crimes.⁷³ Specifically, the Amendment makes it illegal for any person convicted of a domestic violence misdemeanor to possess a firearm.⁷⁴ Additionally, the Amendment prohibits firearm ownership by persons under a court order to restrain from harassing, stalking, or otherwise threatening an intimate

66. *See id.*

67. *Id.* § 3. "Judges and juries will determine 'motivation' from the 'totality of the circumstances' surrounding the event." *Id.* § 4.

68. *See Mabbun, supra* note 3, at 208 n. 2 (citing Birgit Schmidt Am Busch, *Domestic Violence and Title III of the Violence Against Women Act of 1993: A Feminist Critique*, 6 *HASTINGS WOMEN'S L.J.* 1, 9 (1995)).

69. VAWA "does not expand Federal jurisdiction to all attacks against women . . . Discriminatory motivation is clearly required . . . and the plaintiff bears the burden of proving that motivation. A plaintiff must prove that the crime of violence—whether an assault, a kidnapping, or a rape—was motivated by gender." S.REP. NO. 103-138, § 3(b). Additionally, VAWA's civil rights provisions are "strictly limited to felonious crimes of violence. Specifically, the crime of violence which is proven to be motivated, at least in part, by an animus toward the victim's gender must also be an act that would constitute: (1) a Federal or State felony against the person; or (2) felony against the property that presents a serious risk of physical injury to another." *Id.* § 3(e).

70. *See id.*

71. *See VAWA*, 42 U.S.C. § 13981 (1994).

72. *See Mecka, supra* note 41, at 629. The Lautenberg Amendment was introduced to the 104th Congress on May 14, 1996 by Senator Lautenberg, Democrat of New Jersey. *See Mecka, supra* note 41, at 630.

73. *See Lautenberg Amendment of 1996*, 18 U.S.C. § 922(g)(9) (Supp. 1997).

74. *See id.* Section 922(g)(9) specifically states:

It shall be unlawful for any person . . . who is 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.

partner.⁷⁵ Unlike other laws forbidding persons to own guns,⁷⁶ the Lautenberg Amendment provides no exceptions for police, military personnel or government officials.⁷⁷ This has proved to be its most controversial aspect.⁷⁸

The Gun Control Act of 1968 and VAWA of 1994 were positive steps in the fight against domestic violence.⁷⁹ VAWA in particular must not be overlooked, as it provides much-needed remedies to victims of domestic violence.⁸⁰ Despite such efforts, however, statistical data and other factors suggest that domestic violence and society's acceptance of it are still widespread and pervasive.⁸¹

75. See Lautenberg Amendment of 1996, 18 U.S.C. § 922(g)(8) (Supp. 1997). This provision of the Lautenberg Amendment states:

It shall be unlawful for any person . . . 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 (ii) 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.

Id.

76. See generally Gun Control Act of 1968, 18 U.S.C. § 922 (1994). The Gun Control Act prohibits convicted felons, drug addicts, minors, mentally ill people, anyone dishonorably discharged from the military, undocumented immigrants and people who have renounced their U.S. citizenship from buying or owning a gun. See *id.*

77. See Lautenberg Amendment of 1996, 18 U.S.C. § 925(a)(1) (1997). See also Jonathan Kerr, *Critics Say Anti-Domestic Violence Amendment Takes Shot at Police*, WEST'S LEGAL NEWS, Dec. 2, 1996, at *1, available in 1996 WL 684742.

78. See *infra* text accompanying notes 182-203.

79. See Gun Control Act of 1968, 18 U.S.C. §922(g)(1). See also VAWA, 42 U.S.C. §§ 13931-14016 (1994 & Supp. 1996).

80. See VAWA, 42 U.S.C. § 13701 (1994).

81. See Mabbun, *supra* note 3, at 209-10 nn.7-8 (citing NANCY HUTCHINGS, *THE VIOLENT FAMILY: VICTIMIZATION OF WOMEN, CHILDREN AND ELDERS* 18 (1988) (asserting that growth of domestic violence has numbed society's awareness of the problem)). Mabbun discusses Hutchings' ideas suggesting that gender stereotyping is one cause of society's lethargy in dealing with domestic violence. Mabbun, *supra* note 3, at 210 n.8 (citing HUTCHINGS, *supra*, at 18-23). She notes, "Hutchings asserts that developmental theories taught to medical health professionals have been based on Freudian theories of psychosexual development. Freudian theories espoused the views that man is physically superior and sexually aggressive, while the woman's role is deemed passive and receptive." Mabbun, *supra* note 3, at 210 n.8 (citing HUTCHINGS, *supra*, at 18) (concluding that Freudian theories translated into widespread belief that women derived sexual pleasure from abuse). See also LEWIS OKUN, *WOMAN ABUSE: FACTS REPLACING MYTHS* 12 (1986) (reasoning that medical and police categorization of injuries is a factor contributing to the under-reporting of domestic violence). Further, Mabbun writes, "Doctors often designate injuries incurred from domestic abuse as 'accidental,' 'traumatic,' or sustained from an 'unspecified origin' . . . Further, police label assaults between intimates as 'domestic disturbances' or 'family trouble,' and therapists categorize psychological problems inflicted by domestic abuse as 'depression,' 'paranoia' or 'anxiety neuroses.'" Mabbun, *supra* note 3, at 210 n.8 (citing OKUN, *supra*, at 12-13). Some scholars note that the idea of the "family ideal" is the most consistent barrier to abuse reform. See ELIZABETH PLECK, *DOMESTIC TYRANNY* 7 (1987). "The 'family ideal' is defined as unrelated but distinct concepts relating to the privacy of the family, stability of the home and the right of access to children by parents and spouses . . . A crucial element of the 'family

According to 1996 statistics, a woman is beaten by her husband or boyfriend once every fifteen seconds in this country.⁸² Domestic violence claims the lives of four women every day.⁸³ These disturbing statistics persist despite increased public and judicial awareness of domestic violence.⁸⁴ In North Dakota alone, 5,920 incidents of domestic violence were reported to crisis intervention centers in 1997.⁸⁵

As many politicians and commentators have noted, guns and domestic violence go hand in hand.⁸⁶ Guns represent the essence of the intimidation used in domestic violence: "While firearms can be used to physically harm a battered woman, they also can be used to instill fear and terror."⁸⁷ The mere presence of a gun offers the means to escalate an abusive argument into a homicide.⁸⁸

Supporters of the Lautenberg Amendment sought to create a legal tool to help combat these high rates of gun-related domestic violence.⁸⁹ These supporters believed removing guns from the hands of abusers is an essential first step in protecting victims of domestic violence.⁹⁰

ideal' is the belief in the separate, private nature of the family unit." See Mabbun, *supra* note 3, at 210 n.8 (citing PLECK, *supra*, at 8) ("asserting that the 'family ideal' concept results in less government intervention in family affairs").

82. See 142 CONG. REC. S12341-01 (daily ed. Oct. 3, 1996) (statement of Sen. Dodd).

83. See *id.*

84. See Jonathan Kerr, *Abuse Forum: Domestic Violence Still Judicial Shame*, West's Legal News, Dec. 2, 1996, at *1, available in 1996 WL 694927.

85. See NORTH DAKOTA COUNCIL ON ABUSED WOMEN'S SERVICES, *FACTS ABOUT DOMESTIC VIOLENCE IN NORTH DAKOTA* (1997).

86. See 142 CONG. REC. S10379-01 (daily ed. Sept. 12, 1996) (statement of Sen. Murray). "Every year, an estimated 2 million women are victimized by domestic violence . . . and [o]f these 2 million, nearly 6,000 die." *Id.* "And 70 percent of the time, the perpetrators of the deadly violence use a gun." *Id.* In North Dakota, "Sixty-nine percent of female deaths in domestic violence incidents involved firearms, while 32 percent of female deaths in non-domestic violence incidents involved firearms." ATTORNEY GENERAL HEIDI HEITKAMP, *CRIMINAL JUSTICE STATISTICS SPECIAL REPORT: HOMICIDE IN NORTH DAKOTA, 1997*, at 11. According to the North Dakota Attorney General's statistics, "Persons killed in domestic violence incidents were more likely to be killed with a firearm than those killed in non-domestic incidents." *Id.*

87. Family Violence Prevention Fund, *Firearms and Domestic Violence, 4 SPEAKING UP: THE FAMILY VIOLENCE PREVENTION FUND'S NEWS AND TIPS FOR THE DOMESTIC VIOLENCE COMMUNITY*, Aug. 6, 1998, at 1.

88. See *id.* at 2.

89. See 142 CONG. REC. S10379-01 (daily ed. Sept. 12, 1996) (statement of Sen. Murray). See also Heitkamp, *supra* note 86, at 11. See *supra* note 86 for text.

90. See 142 CONG. REC. S10379-01 (daily ed. Sept. 12, 1996) (statement by Sen. Murray). "The gun is the key ingredient most likely to turn a domestic violence incident into a homicide." *Id.* Particularly, one victim had an ex-husband who was physically abusive and had been convicted of misdemeanors.

[One abuser] knew he was prone to violence against his family, and did not trust himself. He purposely separated the gun and the bullets at two different ends of their house, so he would not be able to shoot her in the heat of the moment. But the measures he took were not quite enough, when he came home one night, drunk, and yelling that the house wasn't clean enough for him. Because he was able to find the bullets, find the gun, load it, and point it at his wife. That she is alive today is a miracle. [Additional research states that] nearly 65 percent of all murder victims known to have been killed by intimates were shot to death. We have seen that firearms-associated family and intimate assaults are 12 times more likely to be fatal than those not associated with firearms. A California study

III. THE NEED FOR UNIFORM FEDERAL DOMESTIC VIOLENCE LAW

Many opponents of the Lautenberg Amendment view it as another step towards "Federalism"⁹¹ and therefore a federal invasion into state sovereignty.⁹² However, as this Note will discuss, the Amendment is absolutely necessary because of the lack or insufficiency of other remedies.⁹³ For example, some states do not recognize rape of a spouse as a criminal act or do not accord rape felony status.⁹⁴ Therefore, a uniform federal law is essential.

A. THE INSUFFICIENCY OF EXISTING STATE LAW

Existing state law is insufficient to deal with domestic violence for several reasons. First, while federal law has long prohibited firearm possession by convicted felons,⁹⁵ "[It] is an unfortunate fact that many

showed when a domestic violence incident is fatal, 68 percent of the time the homicide was done with a firearm.

Id.

91. "Federalism" can be defined as "federal control;" critics of the Amendment use the term to refer to federal control of the individual states. See WEBSTER'S NEW INTERNATIONAL DICTIONARY (3d ed. 1986).

92. See *Gillespie v. City of Indianapolis*, 13 F. Supp.2d 811, 819 (S.D. Ind. 1998). Gillespie claims that the Lautenberg Amendment invades state sovereignty in violation of the Tenth Amendment by supplanting state criminal law by defining the crime of domestic violence and establishing substantive penalties for such offense. See *id.* Gillespie also asserted the Lautenberg Amendment violates the Tenth Amendment because it supplants state civil law by dictating qualifications of state and local law enforcement officials and imposes a duty on States to serve as implements of regulation. See *id.* See also *National Association of Government Employees, Inc. v. Barrett*, 968 F. Supp. 1564, 1577 (N.D. Ga. 1997) (arguing that the Lautenberg Amendment usurps powers reserved to the states by the Tenth Amendment to the United States Constitution).

93. Crimes of domestic violence in many states have not been lifted to the level of a felony. See 142 CONG. REC. H10434-01 (daily ed. Sept. 17, 1996) (statement of Rep. Mrs. Schroeder). In addition, if a domestic violence offender is charged with a felony, it is often reduced to a misdemeanor. See 142 CONG. REC. S10377-01 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg).

94. In Arizona and Connecticut, it is a defense to a prosecution for sexual abuse, sexual assault of a minor, or sexual assault that the alleged offender was the spouse of the victim at the time of the commission of the act. See ARIZ. REV. STAT. ANN. § 13-1407(D) (1989 & Supp. 1998); CONN. GEN. STAT. ANN. § 53a-67 (West 1994). Additionally, in Arizona, sexual assault is a class two felony. See ARIZ. REV. STAT. ANN. § 13-1406 (1989 & Supp. 1998). A first offense sexual assault against a spouse, however, is only a class six felony, and the judge has discretion to enter judgment for the conviction as a class one misdemeanor with mandatory counseling. See ARIZ. REV. STAT. ANN. § 13-1406.01(B) (1989 & Supp. 1998). In Delaware, if an alleged rape victim was a voluntary social companion/spouse of the accused or if she had sexual intercourse with him within 12 months prior to the alleged rape, it is not classified as a crime of rape even though it occurs without the victim's consent. See DEL. CODE ANN. tit. 11, § 775 (1995 & Supp. 1998). In Montana, only forced sexual intercourse is a felony; all other types of sexual assault are punishable only by a fine not to exceed \$500 with no more than six months in jail. See MONT. CODE ANN. § 45-5-502 (1997). Tennessee allows a claim for spousal rape only if the defendant is armed or reasonably believed to be armed, causes bodily injury, or the spouses were living apart at the time of the rape and one has filed for separate maintenance or divorce. See TENN. CODE ANN. § 39-13-507 (1997).

95. See Gun Control Act of 1968, 18 U.S.C. § 922(g)(1) (1994). The Gun Control Act prohibits felons, drug addicts, minors, mentally ill people, anyone dishonorably discharged from the military,

domestic violence offenders are never convicted of a felony [at the state level]. Outdated or ineffective [state] laws often treat domestic violence as a lesser offense."⁹⁶ This occurs in part because domestic violence felons are often allowed to reduce the felony to a misdemeanor by plea bargaining.⁹⁷ Consequently, as Senator Lautenberg stated, "If you beat up or batter your neighbor's wife, it is a felony. If you beat up, batter, or brutalize your own wife or your own child, it is a misdemeanor."⁹⁸

Another example of insufficient state law is that some states do not have a specific classification for crimes of domestic violence.⁹⁹ In other words, a man who beats his wife or child may be found guilty of an assault, but not specifically a domestic assault.¹⁰⁰ This lack of domestic crime classification in some states has allowed perpetrators to argue that the Lautenberg Amendment cannot apply to them, as it only applies to domestic violence misdemeanants.¹⁰¹ Courts have rejected this argument by interpreting the Amendment's reference to a "misdemeanor crime of domestic violence" not to require that the state crime actually have a domestic relationship element or be classified as a domestic violence crime.¹⁰² Thus, if a state statute does not provide categories for domestic

undocumented immigrants and people who have renounced their U.S. citizenship from buying or owning a gun. *See id.*

96. 142 CONG. REC. S10380 (daily ed. Sept. 12, 1996) (statement of Sen. Feinstein). *See also* 142 CONG. REC. H10434-01 (daily ed. Sept. 17, 1996) (statement of Rep. Schroeder).

Our biggest problem is many States have not lifted domestic violence convictions to the level of a felony. They consider them a misdemeanor. Other States have allowed people, even though it is considered a felony, to plead guilty to a lesser crime. Therefore, when they do the checks for whether or not you should be able to buy a gun, an awful lot of people who have been convicted of domestic violence problems are able to escape.

142 CONG. REC. H10434-01 (daily ed. Sept. 17, 1996) (statement of Rep. Schroeder):

97. *See* 142 CONG. REC. S10377-01 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg). *See also* 142 CONG. REC. H10434-01 (daily ed. Sept. 17, 1996) (statement of Rep. Schroeder); 142 CONG. REC. S10379-01 (September 12, 1996) (Statement of Sen. Murray) (stating that "plea bargains often result in misdemeanor convictions for what are really felon crimes").

98. *Id.* 142 CONG. REC. S10377-01 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg).

99. *See generally* United States v. Meade, 986 F. Supp. 66 (D. Mass. 1997). In this case, the defendant had been convicted of a misdemeanor for assault and battery upon his wife. *See id.* at 67. He argued, however, that the Lautenberg Amendment did not apply to his past conviction for assault and battery under Massachusetts law because the state statute does not require a familial relationship between the parties as an element of the state crime. *See id.* *See also* United States v. Smith, 964 F. Supp. 286, 290-91 (D. Iowa 1997). In an Iowa case, the defendant had been convicted of a misdemeanor assault against his wife. *See Smith*, 964 F. Supp. at 288. Although the defendant could have been charged under the state's new domestic assault statute, he was charged with only a simple assault. *See id.* A few years later, the defendant shot his wife and was convicted for being a domestic violence misdemeanant in possession of a firearm. *See id.* He argued that the Lautenberg Amendment did not apply to him because he was not convicted of a domestic violence misdemeanor *per se*. *See id.*

100. *See id.*

101. *See id.*

102. *See Meade*, 986 F. Supp. at 68. *See also Smith* 964 F. Supp. at 290 (holding that the court believes the use of force requirement and the domestic relationship requirement of the Lautenberg Amendment are two separate elements).

violence offenses, or if the offense is plea bargained from a domestic violence crime to a lesser offense, the Amendment still applies.¹⁰³

Therefore, the Lautenberg Amendment helps to close dangerous loopholes in domestic violence law by providing uniformity.¹⁰⁴ Additionally, the Amendment picks up the slack left by state laws that either do not have a category for domestic violence crimes or allow them to be pleabargained down to lesser offenses.¹⁰⁵

B. NORTH DAKOTA'S RESPONSE TO DOMESTIC VIOLENCE: A GOOD EFFORT BUT STILL INADEQUATE

North Dakota has not ignored the problem of domestic violence, and the legislature has passed a number of laws addressing the problem.¹⁰⁶ While North Dakota's domestic violence laws do not provide the loopholes of other states,¹⁰⁷ its laws still fall short.¹⁰⁸ Just

103. See *Meade*, 986 F. Supp. at 68. In *Meade*, the United States District Court from Massachusetts referred to the legislative history behind the Lautenberg Amendment. See *id.* The court stated:

Senator Lautenberg's statements make clear that the phrase 'has, as an element' relates to state crimes that involve an element of force. The legislative history reveals that 'has, as an element, the use or attempted use of physical force, or threatened use of a deadly weapon' was added to the statute shortly before passage . . . Therefore, Senator Lautenberg did not intend that the language 'as an element' would apply to the domestic relationship requirement.

Id. at 68-69 (citing 142 CONG. REC. S11872-01 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg)).

104. See *Meade*, 986 F. Supp. at 68. The District Court from the District of Massachusetts cited the legislative history of the Lautenberg Amendment. The court stated:

the amendment was proposed to remedy the disparate treatment between those convicted of a felony involving domestic assault and those convicted of a misdemeanor involving domestic assault. The sponsor of the legislation, Senator Lautenberg, stated that 'This amendment would close this dangerous loophole and keep guns away from violent individuals who threaten their own families.'

Id. (citing 142 CONG. REC. S10377-01 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg)).

105. See *id.* The District Court for the District of Massachusetts stated: "[t]his amendment looks to the type of crime, rather than the classification of the conviction. Anyone convicted of a domestic violence offense would be prohibited from possessing a firearm." *Id.* (quoting 142 CONG. REC. S10379-01 (daily ed. Sept. 12, 1996) (statement of Sen. Feinstein)).

106. See N.D. CENT. CODE § 14-07.1-02 (1997) (providing for domestic violence protection orders); N.D. CENT. CODE § 14-07.1-03 (1997) (providing for temporary protection orders); N.D. CENT. CODE § 14-07.1-06 (1997) (establishing penalties for violating a protection order); ND.CENT. CODE § 14-07.1-13 (1997) (stating that a person charged with a domestic violence crime may be ordered to be prohibited from having contact with the victim if a protection order under either section 14-07.1-02 or section 14.07.1-03 does not already exist); N.D. CENT. CODE § 62.1-01-02 (1995) (demanding seizure of a dangerous weapon or firearm used or possessed in the act of a felony or misdemeanor involving violence or intimidation); N.D. CENT. CODE § 62.1-02-01 (1995) (disallowing any person convicted of a felony or misdemeanor involving violence or intimidation from owning a firearm for a period of five years).

107. See *supra* note 94.

108. See Heitkamp, *supra* note 86, at 10. For the period of 1978-97, 49 percent of deaths due to homicide in North Dakota involved domestic violence. Heitkamp, *supra* note 86, at 10.

like federal legislation such as the Gun Control Act and VAWA, however, North Dakota offers victims of domestic violence remedies only after the actual violence has occurred, and its laws do not seek to prevent domestic violence from occurring.¹⁰⁹ For example, the North Dakota Century Code allows courts to issue protection orders “[u]pon a showing of actual or imminent domestic violence.”¹¹⁰ North Dakota law also provides for temporary protection orders¹¹¹ and penalties for violations of such protection orders.¹¹² A first violation of such a protection order is a class A misdemeanor, and any subsequent violation is a class C felony.¹¹³ Another statute allows a court order, when a protection order is not already in place, to prohibit a person charged with or arrested for a domestic violence crime from having contact with the victim.¹¹⁴

The classification of protection order violations into the categories of misdemeanors and felonies shows the North Dakota legislature’s awareness of the problem of domestic violence.¹¹⁵ Further, North Dakota prohibits any person guilty of a felony or a class A misdemeanor from owning a firearm.¹¹⁶ In addition, firearms involved in a felony or a misdemeanor that involves violence or intimidation must be forfeited.¹¹⁷ The problem however, is that according to North Dakota law the gun must first be used.¹¹⁸ Consequently, there is no preventive mechanism

109. *See supra* note 106. *See also* VAWA, 42 U.S.C. §§ 13701, 13981 (1994). VAWA also only provides remedies after a crime of violence has occurred. 42 U.S.C. §§ 13701, 13981.

110. N.D.CENT. CODE § 14-07.1-02. This section of the North Dakota Century Code provides for protection orders for victims of actual or imminent violence. *Id.*

111. *See* N.D.CENT. CODE § 14-07.1-03. As provided by statute, a temporary protection order allows a court to grant an *ex parte* temporary protection order, pending a full hearing, based upon an allegation of a recent incident of actual domestic violence and alleging an immediate and present danger of domestic violence to the applicant. *Id.*

112. *See* N.D.CENT. CODE § 14-07.1-06.

113. *See id.*

114. N.D. CENT. CODE § 14-07.1-13 (1997).

115. *See* N.D.CENT. CODE § 14-07.1-06 (1997).

116. N.D.CENT. CODE § 62.1-02-01 (1995). Any person guilty of a felony or class A misdemeanor when

that crime was committed while using or possessing a firearm or dangerous weapon . . . is prohibited from owning a firearm or having one in possession from the date of conviction and continuing for a period five years after the date of conviction or release from incarceration or probation, whichever is the latter.

Id.

117. *Id.* (stating that firearms “used or possessed while in the commission of a felony or a misdemeanor involving violence or intimidation” must be forfeited).

118. *See* N.D. CENT. CODE § 62.1-02-01(2) (1995). This provision of the statute states that a person “convicted of a class A misdemeanor involving violence or intimidation and that crime was committed while using or possessing a firearm in the act of a felony or misdemeanor involving violence or intimidation” is prohibited from using or possessing a firearm for a period of five years. *Id.* The law clearly states that the firearm must have been used in the commission of the crime. *Id.*

for the victim.¹¹⁹ Further, despite attempts to prevent it, abusers often ignore protection orders.¹²⁰

In another set of laws aimed at domestic violence, the North Dakota Century Code allows police to take a perpetrator from the location of the offense to jail, even though the victim may not want to press charges.¹²¹ The law also allows law enforcement officers to arrest an abuser without a warrant if the abuser is violating a protection order.¹²² This is true even if the officer was not present when the violation occurred,¹²³ and under some circumstances an officer may arrest a suspected abuser without a warrant.¹²⁴

However, these remedies fail to help prevent crimes.¹²⁵ Domestic violence situations often occur suddenly and without warning, preventing victims from obtaining a protection order and denying officers time to make arrests and/or seize weapons.¹²⁶ The Lautenberg Amendment seeks to remedy these exact situations by removing guns from abusers with a history of violent behavior before they have a chance to use them.¹²⁷ It seeks to keep guns from the very individuals who have proven their instability by threatening and beating their own loved ones.¹²⁸ Most importantly, it aims to decrease substantially the number of domestic violence homicides and allow victims an opportunity to get

119. *See id.*

120. NORTH DAKOTA COUNCIL ON ABUSED WOMEN'S SERVICES, *supra* note 85 (reporting that "134 batterers violated their protection orders: 60 were arrested for a first violation and 12 were arrested for a subsequent violation"). *See also* N.D. CENT. CODE § 14-07.1-06 (1997) (providing that a first time protection order violation is a class A misdemeanor and subsequent violations result in a class C felony).

121. *See* N.D. CENT. CODE § 14-07.1-11 (1997). *See also* ATTORNEY GENERAL HEIDI HEITKAMP, DOMESTIC VIOLENCE IN NORTH DAKOTA, 1996, at 23.

122. *See* N.D. CENT. CODE § 14-07.1-11 (stating that law enforcement officers have the right to "arrest a person without warrant if the person has committed the offense of violating a protection order under section 14-07.1-06, whether or not the violation was committed in the presence of the officer").

123. *See id.*

124. N.D. CENT. CODE 14-07.1-11 (1997) allows an officer to "arrest a person without a warrant if the arrest is made within four hours from the time the officer determines there is probable cause to arrest for an assault of a family or household member . . . whether or not the assault took place in the presence of the officer." *Id.*

125. *See supra* note 106. All of North Dakota's laws regarding domestic violence provide remedies only after an act of violence has occurred. *See supra* note 106.

126. *See* 142 CONG. REC. S10379-01 (daily ed. Sept. 12, 1996) (statement of Sen. Murray). When alcohol or other drug use is involved, the abuser may come home in a fit of rage and use a firearm against his victim. *See id.* *See also* Heitkamp, *supra* note 121, at 19 (stating that substance abuse is a factor that often contributes to domestic violence).

127. *See* Lautenberg Amendment of 1996, 18 U.S.C. § 922(g)(9) (Supp. 1997). The Lautenberg Amendment bans firearm possession by those convicted of domestic violence misdemeanors, thus, proving they have a history of violent behavior. *See id.*

128. *See* 142 CONG. REC. S10377-01 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg) (stating that the Lautenberg Amendment will "keep guns away from violent individuals who threaten their own families, people who have shown that they cannot control themselves and are prone to fits of violent rage, directed unbelievably enough, against their own loved ones").

out of their situation alive.¹²⁹ This is an opportunity victims do not have when a gun is pointed in their face and the trigger is pulled.¹³⁰ While North Dakota law provides punishment and remedies after this occurs, it offers no mechanism to keep it from happening.¹³¹

C. JUDICIAL REACTIONS TO DOMESTIC VIOLENCE

Legislative action is only half the story, however. Quite possibly the most tragic element of domestic violence is the response its victims have received from society, the criminal justice system and courts.¹³² The legislative history behind the Lautenberg Amendment discusses the "outrageous callousness and disregard"¹³³ some judges have demonstrated to domestic violence victims.¹³⁴ This callousness can be seen in

129. *See id.* Domestic violence victims are often afraid to press charges against their abusers because

they are afraid that the guy, the fellow who first treated them to a fist in the face, may come home with a gun and take their lives . . . We hope this amendment will send a loud and clear message that you are not going to get away with this kind of thing, because we are going to take away your gun. We are going to take away that extra chance that the woman might be killed.

Id.

130. *See* 142 CONG. REC. S10379-01 (daily ed. Sept. 12, 1996) (statement of Sen. Murray).

Unfortunately, this amendment will not make life better for many women who are abused, even when guns are present in the home. We know that most domestic violence is not even reported, and of the cases that are reported, many do not lead to a conviction . . . But for thousands of women and men in this country, this amendment would mean immediate results. To get the gun out of the home will mean the difference between life and death.

Id.

131. *See supra* note 106.

132. *See* Mabbun, *supra* note 3, at 209-10. Commentators have noted that the growth of domestic violence has numbed society's awareness of the problem. *See* Mabbun, *supra* note 3, at 210 n.7 (citing generally HUTCHINGS, *supra* note 81). "Further, police label assaults between intimates as 'domestic disturbances' or 'family trouble,' and therapists categorize psychological problems inflicted by domestic abuse as 'depression,' 'paranoia' or 'anxiety neuroses.'" Mabbun, *supra* note 3, at 210 n.8 (citing generally OKUN, *supra* note 81). "[D]omestic abuse is . . . often considered to be a personal family matter, which jurors, police or the general public believe should not be criminalized as assault and battery." Mabbun, *supra* note 3, at n.9 (citing Lisa M. Fitzgerald, *The Violence Against Women Act: Is it an Effective Solution?*, 1 HOW. SCROLL: THE SOC. JUS. REV. 46, 50 (1993)).

133. 142 CONG. REC. S10377-01 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg).

134. *See id.*

In Baltimore County [only four years ago] a State circuit court judge was hearing a case involving a man who shot his wife in the head and killed her. As he handed down the light sentence, with time to be served weekends only, and not a very long time at that, the judge said that the worse part of his job is, and I quote 'Sentencing noncriminals as criminals,' as if shooting your wife in the head was not criminal behavior.

.....

Or take the case of a man who tracked down his wife, shot her five times in the face and killed her. The judge in that case gave the man a minimal sentence to be served on weekends. In explaining why he was being so lenient, the judge said the victim provoked her husband by not telling him that she was leaving their abusive marriage.

Id.

the light sentences, including placing the blame on the victims, some judges have given to men who have murdered their wives.¹³⁵ Some justifications for these light sentences include that domestic abusers are not criminals and that the victim caused the violence by leaving the abusive relationship.¹³⁶

Further, as one commentator notes, "Victims are reluctant to cooperate [with the judicial system] for fear of more violence."¹³⁷ Pressing charges against an abusive domestic partner often aggravates the situation and makes victims much more vulnerable as their abusers are merely slapped on the wrist from judges with outdated views on domestic violence.¹³⁸ Hence, a federal law is essential to provide uniformity in combating domestic violence.¹³⁹

North Dakota has also had problems with judicial attitudes towards domestic violence. For example, in a recent case, North Dakota Supreme Court Justice Mary Maring noted in a concurrence that the trial judge had found domestic violence in the case mitigated by the fact that the victim's actions "would have made most reasonable persons commit domestic violence."¹⁴⁰ She went on to criticize the judge for failing to follow Canon 3 of the Code of Judicial Conduct, which requires judges to "perform judicial duties without bias or prejudice."¹⁴¹

Further, the 1996 final report of the North Dakota Commission on Gender Fairness in the Courts discussed a number of gender fairness concerns, including "concerns that cases of sexual assault by an acquaintance might be handled differently than other sexual assault cases"¹⁴² The Commission also cited survey results indicating

135. *See id.*

136. *See id.*

137. 142 CONG. REC. S10377-01 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg).

138. Furthermore, despite the attitudes of society, there is still the problem of clogged court dockets and red tape. *See Kerr, supra* note 84, at *1. Hennepin County, Minnesota, recently adopted family court procedures for streamlining domestic abuse proceedings have been only partially successful in the face of a flood of new restraining-order cases. *See Kerr, supra* note 84, at *1. Additional problems include a high volume of cases, increasingly complex domestic situations, language translation difficulties, insufficient medical evidence and lack of uniformity in the enforcement of restraining orders which means that the courts cannot give fully detailed attention to each one. *See Kerr, supra* note 84, at *1. Often victims of domestic violence are afraid that their abuser, may come home with a gun and take their lives if they further anger him through legal proceedings. *See Kerr, supra* note 84, at *1.

139. The Lautenberg Amendment provides an "across the board" standard that makes it illegal for all domestic violence misdemeanants to possess guns. *See Lautenberg Amendment of 1996*, 18 U.S.C. § 922(g)(9) (Supp. 1997). By enacting a federal statute such as the Lautenberg Amendment, there is less discretion left to the courts, leaving less room for the gender bias that many victims face in a courtroom. *See Mabun, supra* note 3, at 210.

140. *Huesers v. Huesers*, 560 N.W.2d 219, 223 (N.D. 1997) (Maring, J., concurring).

141. *See id.* at 223-24.

142. A DIFFERENCE IN PERCEPTIONS: THE FINAL REPORT OF THE NORTH DAKOTA COMMISSION ON GENDER FAIRNESS IN THE COURTS, 72 N.D. L. REV. 1113, 1218 (1996).

perceptions that "defendants (mostly men) convicted of assault in cases of domestic violence received lighter sentences than do defendants convicted of other assaults."¹⁴³ While the Commission was careful to characterize its findings as "based primarily on perception data" and "hampered by lack of accessible system-wide data," the report indicates that the national problem of the judicial treatment of domestic violence cases is also a problem, at least to a certain extent, in North Dakota.¹⁴⁴

IV. SEVERAL FAILURES AND ONE SHORT-LIVED SUCCESS: CONSTITUTIONAL ATTACKS ON THE LAUTENBERG AMENDMENT

The Lautenberg Amendment has been challenged on numerous constitutional grounds since its enactment.¹⁴⁵ The most noted challenges have been based on the Second and Tenth Amendments and on due process, *ex post facto* and equal protection grounds.¹⁴⁶ Courts have consistently rejected these challenges and declared the Lautenberg Amendment constitutional.¹⁴⁷

As the Lautenberg Amendment is fairly new legislation, there have been a limited number of reported decisions on its constitutionality.¹⁴⁸ However, one major case, *Gillespie v. City of Indianapolis*,¹⁴⁹ includes almost all of the constitutional challenges thus far made against the Amendment.¹⁵⁰ Mr. Gillespie was employed by the Indianapolis police department and was in danger of losing his job since, as a result of the Lautenberg Amendment and a domestic violence misdemeanor conviction, he could no longer possess a firearm.¹⁵¹ Consequently, he made several constitutional challenges to the Amendment.¹⁵²

Gillespie first claimed that the Lautenberg Amendment violated his Second Amendment¹⁵³ right to bear arms both as an individual and as a

143. *Id.* The study indicated that 69% of women attorneys, 55% of men attorneys, and 33% of judges thought defendants convicted of domestic assault received generally shorter sentences than those convicted of other assaults. *Id.* at 1224.

144. *Id.* at 1218-19 (discussing study methodology and results).

145. *See supra* note 21.

146. *See supra* note 21.

147. *See supra* notes 20-21.

148. The Lautenberg Amendment was signed by President Clinton on September 28, 1996. *See Mecka supra* note 41, at 625.

149. 13 F.Supp.2d 811 (S.D. Ind. 1998).

150. *Gillespie v. City of Indianapolis*, 13 F. Supp. 811, 819-28 (S.D. Ind. 1998) (addressing a claim that the Lautenberg Amendment violated the Tenth and Second Amendments, and the Commerce, Equal Protection, Due Process, Bill of Attainder, *Ex Post Facto*, and Contracts Clauses).

151. *See id.* at 814, 815.

152. *See id.* at 819, 821-22, 825-27.

153. The Second Amendment of the United States Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms,

police officer.¹⁵⁴ While the court declined to address the issue of whether the plaintiff had an individual constitutional right to own a gun,¹⁵⁵ it held that it need not address the issue because, even under the strictest standard of constitutional review,¹⁵⁶ Gillespie's claim failed.¹⁵⁷ The court found that the governmental interest of keeping deadly firearms from dangerous domestic violence offenders was a compelling interest.¹⁵⁸ It also found the Lautenberg Amendment was narrowly tailored, as it applies only to those convicted of a crime of domestic violence.¹⁵⁹

The *Gillespie* court next rejected the plaintiff's claim that the Lautenberg Amendment violated the Tenth Amendment¹⁶⁰ by invading state sovereignty in three ways: (1) the Lautenberg Amendment effectively supplanted state criminal law by defining the crime of domestic violence and establishing substantive penalties for such offense; (2) the Lautenberg Amendment effectively supplanted state civil law by dictating qualifications of state and local law enforcement officials; and (3) the Lautenberg Amendment imposed a duty on States to serve as implements of regulation.¹⁶¹

The court's rejection of this claim stated that the Lautenberg Amendment neither creates nor amends state law, but rather creates federal law applying only to the Lautenberg Amendment and leaves states free to "define and punish domestic violence crimes as they wish."¹⁶² In other words, the Lautenberg Amendment is merely a supplement to state law.¹⁶³

Gillespie also asserted that the Lautenberg Amendment violated his due process rights,¹⁶⁴ arguing that his right to own a gun could not be

shall not be infringed." U.S. CONST. amend. II.

154. See *Gillespie*, 13 F.Supp.2d at 826.

155. See *id.*

156. The highest level of constitutional review is known as "strict scrutiny":

Under this test for determining if there has been a denial of equal protection, burden is on government to establish necessity of the statutory classification . . . Measure which is found to affect adversely a fundamental right will be subject to "strict scrutiny" test which requires state to establish that it has compelling interest justifying the law and that distinctions created by law are necessary to further some governmental purpose.

BLACKS LAW DICTIONARY 1422 (6th ed. 1990).

157. See *Gillespie*, 13 F.Supp.2d at 827.

158. *Id.*

159. See *id.*

160. The Tenth Amendment states: "The powers not delegated to the United States Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

161. See *Gillespie*, 13 F.Supp.2d at 819.

162. *Id.*

163. See *id.*

164. U.S. CONST. amend. XIV, § 1 provides substantive due process rights: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . ." *Id.* Substantive due process is broadly defined as the constitutional guarantee that a person's life,

removed arbitrarily and without the due process afforded to him by the Constitution.¹⁶⁵ On this issue, the court held that because Gillespie's right to possess a firearm was not a fundamental right,¹⁶⁶ it need only be analyzed under the rational basis test.¹⁶⁷ The court held the Lautenberg Amendment satisfied this rational basis test because of the state's legitimate interest in keeping firearms away from domestic violence offenders.¹⁶⁸

The court also rejected Gillespie's procedural due process claim: "[W]hen the legislature passes a law which affects a general class of persons, those persons have all received procedural due process the legislative process."¹⁶⁹ Other courts have also answered due process claims by holding that the Lautenberg Amendment "plainly sets forth the conduct which it prohibits and to whom it applies."¹⁷⁰ The Lautenberg Amendment clearly states that a domestic violence misdemeanor may not possess a gun, meaning there is therefore no violation of due process; the offender has been informed of the restrictions through the plain language of the Amendment.¹⁷¹ Thus, the offender has received notice of the implications of his conduct, which is sufficient to satisfy due process.¹⁷²

liberty, or property shall not be arbitrarily taken. See BLACKS LAW DICTIONARY 1429 (6th ed. 1990). Procedural due process rights are derived from the Fifth Amendment of the Constitution, which states: "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

165. See U.S. CONST. amend. V. See also *Gillespie*, 13 F. Supp.2d at 825.

166. A fundamental right is one that has its source explicitly or implicitly guaranteed in the United States Constitution. See BLACKS LAW DICTIONARY 674 (6th ed. 1990). While the Second Amendment is an explicit constitutional right, the court in *Gillespie* followed the United States Supreme Court's interpretation of the Second Amendment:

[I]n the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.

United States v. Miller, 307 U.S. 174, 178 (1939). Although *Gillespie* does not quote this language directly, it does refer to this quote as the Supreme Court's position on the Second Amendment. *Gillespie*, 13 F. Supp.2d at 825.

167. The rational basis test, a standard of review for statutory enactments challenged on equal protection grounds, requires that "classifications created by a state must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." BLACKS LAW DICTIONARY 1262 (6th ed. 1990).

168. See *Gillespie*, 13 F. Supp.2d at 825. In response to Gillespie's equal protection claim, the court held that the Lautenberg Amendment passed the rational basis test because it did not infringe on any fundamental rights and was rationally related to the legitimate government interest of keeping guns away from potentially dangerous persons. *Id.*

169. *Gillespie*, 13 F. Supp.2d at 825.

170. See *United States v. Hicks*, 992 F. Supp. 1244, 1246 (D. Kan. 1997).

171. See *id.*

172. See *id.*

The ex post facto challenges¹⁷³ to the Lautenberg Amendment assert that it is unconstitutional because it punishes past crimes.¹⁷⁴ For example, a person convicted twenty-five years ago of a domestic violence crime will lose his or her current ability to possess a firearm as a result of this statute.¹⁷⁵ The courts have responded to this particular challenge by holding that the Amendment merely penalizes the possession of a firearm after the date the statute was enacted.¹⁷⁶ This means that the crime of being a domestic violence misdemeanor in possession of a firearm is not committed until after the effective date of the statute.¹⁷⁷ There would be an ex post facto violation if the Lautenberg Amendment punished domestic violence offenders who had possessed a firearm at any time after their convictions.¹⁷⁸ However, the Lautenberg Amendment defines a new crime, being a domestic violence offender in possession of a firearm after the 1996 enactment of the Amendment.¹⁷⁹ Hence, there is no ex post facto violation.¹⁸⁰

Despite the rejection of these constitutional challenges, one attack prevailed in August of 1998.¹⁸¹ In *Fraternal Order of Police I*, the United States Court of Appeals in the District of Columbia held the Lautenberg Amendment violated the Constitution's Equal Protection Clause.¹⁸²

The court based its holding on the Amendment's lack of exceptions for law enforcement, military, or government officials who were found guilty of a domestic violence misdemeanor, while the Gun Control Act provided an exemption for those convicted of domestic violence felonies.¹⁸³ The court found that providing a harsher penalty for domes-

173. See *Gillespie*, 13 F. Supp.2d at 825; *Hicks*, 992 F. Supp. at 1245; *United States v. Meade*, 986 F. Supp. 66, 69 (D. Mass. 1997); *National Ass'n of Gov't Employees, Inc. v. Barrett*, 968 F. Supp. 1564, 1575 (N.D. Ga. 1997).

174. The U.S. Constitution prevents both federal and state governments from enacting ex post facto laws. See U.S. CONST. art. I, § 9, cl.3; U.S. CONST. art. I, § 10, cl. 1. "Ex post facto laws" are laws "passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed." BLACKS LAW DICTIONARY 580 (6th ed. 1990).

175. See Lautenberg Amendment of 1996, 18 U.S.C. § 922(g)(9) (Supp. 1997) (making it illegal for anyone ever convicted of a domestic violence misdemeanor to own or possess a firearm).

176. See *Gillespie*, 13 F. Supp.2d at 825-26 n.11. See also *Mead*, 986 F. Supp. at 69; *Barrett*, 968 F. Supp. at 1575, 1576; *Hicks*, 922 F. Supp. at 1246.

177. See *Gillespie*, 13 F. Supp.2d at 826.

178. *Id.*

179. See *Hicks*, 922 F. Supp. at 1246.

180. See *Gillespie*, 13 F. Supp.2d at 825-26. See also *Mead*, 986 F. Supp. at 69; *Barrett*, 968 F. Supp. at 1575-76; *Hicks*, 922 F. Supp. at 1246.

181. See *Fraternal Order of Police v. United States (Fraternal Order of Police I)*, 152 F.3d 998 (D.C. Cir. 1998), *rev'd*, 173 F.3d 898 (D.C. Cir. 1999) (holding the Lautenberg Amendment violates equal protection because it provides a harsher penalty for misdemeanants than for felons).

182. *Fraternal Order of Police I*, 152 F.3d at 1004.

183. The Gun Control Act of 1968 provides an exemption for law enforcement, military and government officials who are convicted of felonies. See Gun Control Act of 1968, 18 U.S.C. §

tic violence misdemeanants than for domestic violence felons violated equal protection.¹⁸⁴ Therefore, the court ruled that the exemption portion of the Amendment was unconstitutional, and so law enforcement, military and government officials must be permitted to retain firearms for their official duties.¹⁸⁵ Although the court left the rest of the Amendment intact, this ruling allowed domestic violence criminals to possess firearms,¹⁸⁶ further endangering their victims.¹⁸⁷

This decision was short lived, however. Upon a petition for rehearing by the United States, the District of Columbia Circuit Court of Appeals in *Fraternal Order of Police II* reversed its prior decision.¹⁸⁸ Therefore, abusers convicted of domestic violence misdemeanors cannot legally possess a firearm in any capacity, no matter their job description.¹⁸⁹

The court justified its reversal by quoting former Supreme Court Justice Frankfurter: "Wisdom too often never comes, and so one ought not to reject it merely because it comes late."¹⁹⁰ In this case, the wisdom came in the form of an unconventional look at the Congressional intent behind the Lautenberg Amendment.¹⁹¹ At first glance, the Court admits that treating misdemeanants more harshly than felons "seems irrational in the conventional sense of that term."¹⁹² However, the Court further analyzed society's treatment of misdemeanants versus felons, finding that while society often keeps felony behavior in close check, its attitude towards misdemeanants is much more lax, creating the dangerous loopholes that the Lautenberg Amendment was designed to close.¹⁹³

922(g)(1) (1994). See also 18 U.S.C. § 925(a)(1). However, the Lautenberg does not provide the same exemptions for those convicted of domestic violence misdemeanors. See 18 U.S.C. § 925(a)(1).

184. See *Fraternal Order of Police I*, 152 F.3d at 1004.

185. See *id.*

186. See *id.* Thus, it is still generally

unlawful for any person . . . who has been convicted 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.

Lautenberg Amendment of 1996, 18 U.S.C. § 922(g)(9) (Supp. 1997). However, a convicted offender who is in the capacity of law enforcement, military, or government official will be exempted from the Amendment. See *Fraternal Order of Police I*, 152 F.3d at 1004.

187. See SUE GLICK ET AL., *WHEN MEN MURDER WOMEN: AN ANALYSIS OF 1996 HOMICIDE DATA 3* (Violence Policy Center ed., 1998). "There were 398 women shot and killed by their husband or intimate acquaintance during the course of an argument—more than one woman murdered every day of the year." *Id.* See also 142 CONG. REC. S10379-01 (daily ed. Sept. 12, 1996) (statement of Sen. Murray) (stating that the gun is the ingredient most likely to turn a domestic violence incident into a homicide).

188. See *Fraternal Order of Police v. United States*, 173 F.3d 898 (D.C. Cir. 1999).

189. See *id.*

190. See *id.* at 900-01 (quoting Justice Frankfurter's dissent in *Henslee v. Union Planters Nat. Bank & Trust Co.*, 335 U.S. 595, 600 (1949)).

191. See *id.* at 903-04.

192. See *id.* at 903.

193. See *id.* at 903-04:

Thus, "When the government is faced with a 'practical determination' like this one, we are obliged to accept 'rough,' even 'illogical' solutions with an 'imperfect fit between means and ends.'"¹⁹⁴

In reality, it was not the intent of the Lautenberg Amendment to treat domestic violence misdemeanants more severely than domestic violence felonies.¹⁹⁵ The lack of exemptions for law enforcement, military personnel and government officials within the Lautenberg Amendment was simply the result of the opposition's tactics to cause the Amendment to fail.¹⁹⁶ In order to weaken the bill before its approval, opponents led a last-minute effort to modify the Amendment by removing the "official-use" exception.¹⁹⁷ However, the end result of *Fraternal Order of Police II* serves as a much-needed protection for victims of domestic violence.

[O]n reflection it appears to us not unreasonable for Congress to believe that existing laws and practices adequately deal with the problem of issuance of official firearms to felons but not to domestic violence misdemeanants—adequately at least in the sense of explaining how Congress might have found that as to felons the net benefit of federal prohibition (and non-exemption) fell below the net benefit of prohibition and non-exemption as to misdemeanants. Although state laws do not uniformly ban felons from possessing guns . . . nonlegal restrictions such as formal and informal hiring practices may, as the government argues, prevent felons from being issued firearms covered by Sec. 925(a)(1) in a large measure of the remaining cases.

Id.

194. See *id.* at 904 (citing *Heller v. Doe*, 509 U.S. 312, 321 (1993)).

195. See 18 U.S.C. § 922(g)(9). The purpose of the Amendment was to remove firearms from those convicted of domestic violence misdemeanors. *Id.* The Amendment was meant to remedy the problem of abusers entering plea bargains to avoid a felony conviction and to supplement insufficient state law. See 142 Cong. Rec. S10379-01 (daily ed. Sept. 12, 1996) (statement of Sen. Murray). See also 142 Cong. Rec. H10434-01 (daily ed. Sept. 17, 1996) (statement of Sen. Schroeder).

196. See Mecka, *supra* note 41, at 632. At the last minute before the bill was passed, the "official-use" exceptions were removed from the Amendment. See Mecka, *supra* note 41, at 632. Senator Lautenberg explained that "the Congressional Republicans 'were threatening to hold up the whole show on this and we had to swallow it or risk seeing the whole appropriations bill crash.'" Mecka, *supra* note 41, at 632 n.135. "Now it looks like it was intended to undermine the bill all along." Mecka, *supra* note 41, at 632 n.135.

197. See Mecka, *supra* note 41, at 632. The "official-use" exception is the exemptions portion of the Gun Control Act of 1968 which states that law enforcement, military, and government officials are not prohibited from possessing firearms in their official capacity even if convicted of a domestic violence felony. See 18 U.S.C. § 925. In the original draft of the Lautenberg Amendment, section 925 also held these same exemptions. See Kerr, *supra* note 77, at *1.

A staffperson in Senator Lautenberg's office confirmed that removal of the 925(a) exemption came only after a private ultimatum from House Republicans, who gave in on nearly every other objection to the bill. It was either that or lose the entire bill. It was a tough decision, but being left with that ultimatum, the Senator felt he had no choice.

Id.

Republican Representative Robert Barr of Georgia, who led the way in excluding the exemptions portion of the Lautenberg Amendment, has been labeled a poster boy for the National Rifle Association as a result of his high rating by the pro-gun lobby organization. See Kerr, *supra* note 77 at *1. It is possible to deduce from Representative Barr's gun lobby efforts that his motives for removing the exemptions portion of the Lautenberg Amendment were not objective, as it is difficult to understand why a gun lobbyist attempted to remove someone's Second Amendment rights. See Kerr, *supra* note 77, at *1.

As a result of *Fraternal Order of Police I*, more women were again in danger of having a firearm used against them in a domestic crime, although the bulk of the Amendment was left intact and only the section 925 exemptions portion of the statute were found unconstitutional.¹⁹⁸ After the recent decision in *Fraternal Order of Police II*, though, domestic violence victims are again afforded protection under the Lautenberg Amendment.¹⁹⁹ The fate of the Amendment, however, is uncertain: The opposite decisions in *Fraternal Order of Police I* and *II* show that its constitutionality is not entirely clear, and it is likely to remain so unless or until it is appealed to the Supreme Court for a final decision on its constitutionality.

After the initial holding of *Fraternal Order of Police I*, several bills were introduced to the 105th Congress that would have amended the Lautenberg Amendment provisions.²⁰⁰ In particular, one bill would have provided that the ban on firearm possession by domestic violence offenders would not apply to government entities, such as police and the military.²⁰¹ Another bill proposed that any firearm prohibitions resulting from the Lautenberg Amendment would not apply if the conviction occurred before the Amendment became law.²⁰² The 105th Congress enacted neither of these bills, nor any others, and it is not clear whether it will do so in the future.²⁰³

V. CONCLUSION

The Lautenberg Amendment is essential in the fight against domestic violence.²⁰⁴ State domestic violence laws are insufficient either because they do not consider certain acts of domestic violence criminal or because offenses are so often plea bargained to a lesser offense.²⁰⁵ Therefore, the pre-Lautenberg Amendment legislation which bars convicted felons from possessing firearms will not affect most domestic

198. See *Fraternal Order of Police I*, 152 F.3d at 1004 (holding that domestic violence offenders who are military, law enforcement, or government officials may possess firearms for their official duties). See also GLICK ET AL., *supra* note 187, at 3. See also 142 Cong. Rec. S10379-01 (daily ed. Sept. 12, 1996) (Statement of Sen. Murray).

199. See *Fraternal Order of Police II*, 173 F.3d at 901 (holding that the original Amendment, including the "no exemptions" portion, is constitutional).

200. See Letter from Byron L. Dorgan, U.S. Senator, to Jodi Nelson (Dec. 1, 1998) (on file with author).

201. See *id.*

202. See *id.*

203. See *id.*

204. Lautenberg Amendment of 1996, 18 U.S.C. 922(g)(9) (Supp. 1997).

205. See 142 Cong. Rec. S10377-01 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg). See also 142 Cong. Rec. H10434-01 (daily ed. Sept. 17, 1996) (statement of Rep. Schroeder); 142 Cong. Rec. S10379-01 (daily ed. Sept. 12, 1996) (statement of Sen. Murray) (stating that "plea bargains often result in misdemeanor convictions for what are really felon crimes").

violence offenders, as they are usually convicted of only misdemeanors.²⁰⁶

The purpose of the Lautenberg Amendment is not to prohibit law-abiding citizens from purchasing guns.²⁰⁷ It applies only to citizens who have already been convicted of a crime of domestic violence.²⁰⁸ Today, most homicides committed against women are not committed by a criminal on a dark street.²⁰⁹ Their attacker is not usually a depraved stranger.²¹⁰ The harsh reality is that in many instances the perpetrator is her husband or boyfriend.²¹¹ The Lautenberg Amendment is necessary because in too many domestic violence cases, "the only difference between a battered woman and a dead woman is the presence of a gun."²¹²

Jodi L. Nelson

206. See sources cited *supra* note 205.

207. See 142 Cong. Rec. S10377-01 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg).

208. See *id.*

209. See GLICK ET AL., *supra* note 187, at 1.

210. See GLICK ET AL., *supra* note 187, at 1.

211. See GLICK ET AL., *supra* note 187, at 12.

212. 142 Cong. Rec. S10377-01 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg).