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NOTE

AT THE INTERSECTION OF DOMESTIC VIOLENCE AND GUNS: THE PUBLIC INTEREST EXCEPTION AND THE LAUTENBERG AMENDMENT

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[A]ll too often, the difference between a battered woman and a dead woman is the presence of a gun.

—Senator Frank Lautenberg.[1]

INTRODUCTION

When a woman is a victim of physical violence in the United States, more likely than not the perpetrator is someone she knows;[2] approximately twenty-eight percent of the perpetrators are either husbands or boyfriends of the female victims.[3] As a result, more women are injured by domestic violence than by car accidents, muggings, and stranger rapes combined.[4] An incidence of domestic violence occurs every fifteen seconds—more frequently than any other crime in the country.[5] Over 572,000 women experience violence at the hands of their intimates every year.[6]

In addition to these staggering statistical data, domestic violence has several unique characteristics that differentiate it from other forms of criminal assault. They include underreporting and high rates of recidivism. While only three percent of stranger attacks go unreported, conservative estimates indicate that eighteen percent of all domestic violence incidents are not reported because of victims' fear that the perpetrator will retaliate.[7] This fear of repeat violence is not unfounded; a domestic assault victim is three times more likely than a victim of stranger assault to suffer from a repeat assault within a six-month period.[8] According to the Department of Justice's National

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1 142 CONG. REC. S11,227 (daily ed. Sept. 25, 1996) (statement of Sen. Lautenberg) (quoting Senator Wellstone's earlier remark).

2 *See* RONET BACHMAN, U.S. DEP'T OF JUSTICE, VIOLENCE AGAINST WOMEN: A NATIONAL CRIME VICTIMIZATION SURVEY REPORT 1 (1994) ("Over two-thirds of violent victimizations against women were committed by someone known to them . . . ."). In contrast, the report establishes that only five percent of all male victimizations were perpetrated by intimates or relatives. *See id.*

3 *See id.*

4 *See* Evan Stark & Anne Flitcraft, *Violence Among Intimates: An Epidemiological Review, in* HANDBOOK OF FAMILY VIOLENCE 293, 301 (Vincent B. Van Hasselt et al. eds., 1988); *see also* David M. Fine, Note, *The Violence Against Women Act of 1994: The Proper Federal Role in Policing Domestic Violence*, 84 CORNELL L. REV. 252, 256 & n.19 (1998) (citing Stark & Flitcraft, *supra*).

5 *See* STATE OF N.Y. OFFICE FOR THE PREVENTION OF DOMESTIC VIOLENCE, DATA SHEET 1 (1995) [hereinafter N.Y. DATA SHEET] (citing 1987 FBI statistics).

6 *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DOMESTIC VIOLENCE: VIOLENCE BETWEEN INTIMATES 2 (1994) [hereinafter BJS FINDINGS]. This may be a conservative estimate. One source puts the number at approximately two million women per year. *See* 142 CONG. REC. S10,380 (daily ed. Sept. 12, 1996) (statement of Sen. Feinstein). Yet another source puts the number nearly four million women each year. *See* Fine, *supra* note 4, at 256.

7 *See* BACHMAN, *supra* note 2, at 1.

8 *See* N.Y. DATA SHEET, *supra* note 5, at 2 (citing 1986 Bureau of Justice Statistics data).

Crime Victimization survey, approximately one in five victims of domestic abuse report three or more similar assaults within that six-month period.[9]

Victimizations by intimates are often more violent and cause more severe injury than attacks by strangers. For example, victims of domestic violence are almost twice as likely to be seriously injured and more likely to require medical care than are victims of stranger violence.[10] Furthermore, domestic battery injuries account for twenty-two to thirty-five percent of women seeking hospital emergency care.[11] Recidivism is a prevalent factor: domestic violence is almost always characterized by a pattern of abusive conduct that continually escalates in both frequency and severity.[12]

When weapons enter into the equation of violence, the result is often lethal. Of all the women murdered in the United States in a given year, approximately thirty percent lose their lives to husbands or boyfriends.[13] In 1992, 1432 women were murdered by their intimates.[14] Sixty-two percent of these murder victims were killed by a gun.[15] Considering these domestic violence data, one researcher concluded that the "availability of guns in the home greatly increases the likelihood that domestic disputes and quarrels will end up in killings if there has been a history of nonlethal violence."[16]

In response to this epidemic of domestic violence, the call for both awareness and legislative proposals aimed at combating such violence have increased in the past thirty years.[17] Although at first action

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9 *See* BJS FINDINGS, *supra* note 6, at 2.

10 *See* BACHMAN, *supra* note 2, at 1 (stating that 59% of women victimized by their intimates were seriously injured compared with 27% of women victimized by strangers, and that 27% of injured women attacked by intimates required medical care, while only 14% of those attacked by strangers did).

11 *See* N.Y. DATA SHEET, *supra* note 5, at 2 (citing the American Medical Association's *Diagnostic and Treatment Guidelines on Domestic Violence*).

12 *See Amend Section 658 of the Fiscal Year 1997 Omnibus Appropriation Act; Gun Ban for Individuals Convicted of a Misdemeanor Crime of Domestic Violence: Hearings on H.R. 26 and H.R. 445 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 105th Cong. (1997) [hereinafter *Hearings on H.R. 26 and H.R. 445*] ("Those who are separated or divorced from their [abusive] partners suffer dramatically increased rates of violence.").

13 *See* N.Y. DATA SHEET, *supra* note 5, at 2 (citing 1990 FBI statistics).

14 *See* BJS FINDINGS, *supra* note 6, at 2 (citing the FBI's *Crime in the U.S.*). However, another source gives a significantly higher estimate. *See* 142 CONG. REC. S10,380 (daily ed. Sept. 12, 1996) (statement of Sen. Feinstein) (stating that every year approximately 6000 women die as a result of domestic violence).

15 *See* N.Y. DATA SHEET, *supra* note 5, at 1 (citing 1995 Bureau of Justice Statistics data).

16 Peter Wetzels, *Family Violence in the United States and Abroad*, 15 N.Y.L. SCH. J. INT'L & COMP. L. 223, 224 (1995) (contribution to a multiauthor symposium).

17 *See, e.g.*, George B. Stevenson, *Federal Antiviolence and Abuse Legislation: Toward Elimination of Disparate Justice for Women and Children*, 33 WILLAMETTE L. REV. 847, 848-57 (1997) (surveying the federal legislative response to domestic violence and documenting the historical setting in which this response took place).

was taken primarily at the state and local level, the federal government has recently issued new antidomestic violence initiatives.[18] In particular, Congress passed the Violence Against Women Act of 1994 (VAWA)[19] as a part of a massive anti-crime bill.[20] The VAWA commits a substantial amount of federal funds and attention to "the criminal justice system's response to violence against women."[21]

Despite ever increasing intervention, the availability of civil protection orders, and better tracking of offenders, assailants charged with misdemeanor crimes of domestic violence (punishable by a fine or less than a year in prison) were neither required to relinquish their personal firearms nor prohibited from obtaining weapons.[22] Thus, documented abusers were able to retain the tools by which they threatened and carried out serious acts of violence against their intimates. In contrast, perpetrators of nondomestic violence, who are more readily charged and convicted of felonies (punishable by a year or more in prison), lost their right to possess firearms under federal gun-control laws.[23] Only recently have state and federal legislators begun to fill in this gap.

Changes at the state level have come in one of two forms. States have adopted weapons-banning provisions within their domestic violence statutes[24] or disqualification provisions for domestic violence offenders within their firearm statutes.[25] Many of these statutes require a current restraining order to prevent an individual from owning or possessing a firearm.[26]

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18 *See* Fine, *supra* note 4, at 253-57.

19 Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 8, 18 & 42 U.S.C.).

20 *See* Fine, *supra* note 4, at 259.

21 Stevenson, *supra* note 17, at 856.

22 *See* Barbara J. Hart, Firearms and Protection Order Enforcement: Implications for Full Faith and Credit and Federal Criminal Prosecutions 1 (Oct. 15, 1996) (unpublished notes and outline of the presentation to the National College of District Attorneys, on file with author).

23 *Cf. Hearings on H.R. 26 and H.R. 445*, *supra* note 12 (written testimony of Rita Smith, Executive Director, National Coalition Against Domestic Violence), *available in* 1997 WL 8219766 ("In most states, domestic violence is considered largely a misdemeanor offense, although the injuries to all battered women are at least as serious as those incurred in 90% of all violent crimes classified as felonies.").

24 Fourteen states have such domestic violence statutes that specifically restrict gun ownership by perpetrators of domestic violence. *See infra* notes 69-77.

25 These are gun control statutes that identify individuals who are not permitted to possess or transfer firearms. For a full discussion of the distinctions between these various kinds of state statutes, see *infra* Part I.A.

26 *See* Hart, *supra* note 22, at 1-4 (stating that "recent developments in protection order enforcement reflect the emerging view that domestic batterers should be dispossessed of and denied access to firearms" and listing various state statutes requiring civil protection orders for dispossession).

In an attempt to federalize this effort, Congress passed two expansions of the federal Gun Control Act of 1968 (GCA).[27] First, in 1994 Congress amended the GCA to prevent individuals subject to court protective orders from receiving firearms.[28] Despite this amendment, many perpetrators of domestic violence escaped the expanded GCA provision and continue to buy and own guns.[29] This gap motivated the second expansion of the GCA.

New Jersey Senator Frank Lautenberg led this second push by introducing a bill to further amend the GCA.[30] The Lautenberg Amendment, which passed overwhelmingly[31] as part of a major federal spending bill, extends the original GCA by criminalizing firearm possession not only for perpetrators of felonies but also for perpetrators of domestic violence misdemeanors.[32] Senator Lautenberg commented in 1996 that his bill "stands for the simple proposition that if you beat your wife . . . you should not have a gun."[33]

Despite its potential for effective protection of domestic violence victims and the strong endorsement by Congress, the Lautenberg Amendment has faced a barrage of legislative[34] and federal court challenges.[35] In particular, members of the police and the military have

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27 Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended in scattered sections of 18 & 26 U.S.C.). For a discussion of the GCA and its 1994 amendment, see *infra* Part I.B.1-2.

28 *See* 18 U.S.C. § 922(d)(8), (g)(8) (1994). However, law enforcement officers are still exempt from the firearm prohibitions by the 1994 amendment, as they were under the original GCA. *See id.* § 925(a)(1).

29 *See* 142 CONG. REC. S10,379 (daily ed. Sept. 12, 1996) (statement of Sen. Wellstone).

30 S. 1632, 104th Cong. (1996) (enacted).

31 The Lautenberg Amendment passed by a vote of 97 to 2 on September 12, 1996. *See* 142 CONG. REC. S10,380 (daily ed. Sept. 12, 1996). Interestingly, the two Senators who voted against the amendment, Howell Heflin of Alabama and Jeff Bingaman of New Mexico, were both Democrats. *See Political Ad Watch*, IDAHO STATESMAN, Apr. 9, 1998, at 1B, *available in* 1998 WL 11223287.

32 *See* Pub. L. No. 104-208, § 658, 110 Stat. 3009-371, 3009-371 to -372 (1996). The Lautenberg Amendment amended the following provisions of the GCA in 18 U.S.C.: § 921(a) (defining domestic violence misdemeanor); § 922(d) (prohibiting the sale or disposal of firearms to anyone convicted of a domestic violence misdemeanor); § 922(g) (prohibiting anyone convicted of a domestic violence misdemeanor from possessing or transporting firearms); § 922(s)(3)(B)(i) (requiring licensed dealers to get a buyer's statement that the buyer has not been convicted of and is not under indictment for a domestic violence misdemeanor); § 925(a)(1) (excluding 18 U.S.C. § 922(d)(9) and (g)(9) from the public interest exception to the GCA). For a discussion of the changes brought on by the Lautenberg Amendment and the removal of the public interest exception, see *infra* Part I.B.3.

33 142 CONG. REC. S9458 (daily ed. Aug. 2, 1996) (statement of Sen. Lautenberg).

34 *See* H.R. 445, 105th Cong. (1997) (introduced by Rep. Stupak) (proposing to apply the public interest exception to misdemeanor convictions); H.R. 26, 105th Cong. (1997) (introduced by Rep. Barr) (proposing to apply the Lautenberg Amendment only prospectively).

35 *See* Gillespie v. City of Indianapolis, 13 F. Supp. 2d 811, 828-29 (S.D. Ind. 1998) (dismissing the equal protection claim against the Lautenberg Amendment after it failed rational basis review standard), *aff'd*, 185 F.3d 693 (7th Cir. 1999); Fraternal Order of

severely criticized the Lautenberg Amendment.[36] This Note centers on one such criticism: while previous federal gun control legislation created a special exemption—the so-called public interest exception—for governmental agencies, including the police and the military,[37] the Lautenberg Amendment specifically precludes this exception from applying to domestic violence misdemeanor convictions.[38] In other words, the Lautenberg Amendment does not exempt the police and the military, while all other federal gun control statutes do. This arguably creates a felon-misdemeanant anomaly: police and military personnel with felony convictions of any kind are permitted, via the GCA public interest exception, to possess weapons, while under the Lautenberg Amendment those with domestic violence misdemeanor convictions are not.

Because of the lack of a public interest exception for domestic violence misdemeanants, members of the police force and police organizations have sought to overturn the Lautenberg Amendment. Numerous legal challenges against the Lautenberg Amendment have been based on the claim that the Amendment exceeds Congress's Commerce Clause power,[39] that it violates the Second,[40] Fifth,[41] and Tenth[42] Amendments, that it is an ex post facto law,[43] and that it is an unlawful bill of attainder.[44] To date, all of these challenges have ultimately failed. This result suggests unanimity among the circuits; however, one particular constitutional challenge against the Lautenberg

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Police v. United States, 981 F. Supp. 1, 2-3 (D.D.C. 1997) (granting summary judgment in favor of government in police association's challenge against the Lautenberg's Amendment), *rev'd*, 152 F.3d 998, 1004 (D.C. Cir.) (holding that the Lautenberg Amendment violates the Equal Protection Clause and applying the public interest exception to police officers convicted of domestic violence misdemeanors as remedy), *reh'g granted*, 159 F.3d 1362 (D.C. Cir. 1998) (per curiam), *aff'd on reh'g*, 173 F.3d 898, 905-08 (D.C. Cir.) (affirming the district court's holding and holding that the amendment does not violate the Fifth Amendment, the Second Amendment, the Tenth Amendment, or the Commerce Clause); National Ass'n of Gov't Employees v. Barrett, 968 F. Supp 1564 (N.D. Ga. 1997), *aff'd sub. nom.*, Hiley v. Barrett, 155 F.3d 1276 (11th Cir. 1998) (upholding the constitutionality of 18 U.S.C. § 922(g)(9)). For a full discussion of these cases and the equal protection arguments involved, see *infra* Parts II.B, III.A.

36 *See* John Fales, *Domestic-Violence Amendment Causes Problems in the Military*, WASH. TIMES, Aug. 10, 1998, at A10; Jonathan Kerr, *Critics Say Anti-Domestic Violence Amendment Takes Shot at Police*, WEST'S LEGAL NEWS, Dec. 2, 1996, *available in* 1996 WL 684742; Roberto Suro & Philip P. Pan, *Law's Omission Disarms Some Police: Domestic Violence Act Has Some Officers Hanging Up Their Guns*, WASH. POST, Dec. 27, 1996, at A16.

37 *See* 18 U.S.C. § 925(a)(1) (1994).

38 *See id.* (as amended 1996).

39 *See, e.g., Barrett*, 968 F. Supp. at 1572.

40 *See, e.g., Fraternal Order of Police*, 152 F.3d at 1002.

41 *See, e.g., id.*

42 *See, e.g., Barrett*, 968 F. Supp. at 1577-78.

43 *See, e.g., id.* at 1575-76.

44 *See, e.g., id.* at 1576-77.

Amendment—that it violates the Equal Protection Clause of the Fifth Amendment—has proven particularly troublesome.

In *Fraternal Order of Police v. United States* ("*FOP I*"),[45] the District of Columbia Circuit originally held that certain provisions of the 1996 Lautenberg Amendment violate the Fifth Amendment's Equal Protection Clause by irrationally treating domestic violence misdemeanants worse than domestic violence felons.[46] As a remedy, the court held that § 925, the provision of the Lautenberg Amendment that explicitly prohibits the public interest exception from applying to domestic violence misdemeanor convictions, is unconstitutional.[47] Subsequently, the District of Columbia Circuit vacated this decision, granted rehearing, and reversed ("*FOP II*").[48] The court ultimately held with some reservation that despite the felon-misdemeanant anomaly, the Amendment did not fail rational basis review, the least exacting standard of constitutional scrutiny.[49] In addition, the Eleventh Circuit also affirmed[50] a district court's holding that the Lautenberg Amendment did not violate the Equal Protection Clause.[51] However, the Eleventh Circuit approached the equal protection issue through a different lens than the District of Columbia Circuit.[52]

The recent litigation involving the constitutionality of the Lautenberg Amendment focuses on the applicability of the public interest exception. The temporary circuit split over the Lautenberg Amendment created by the District of Columbia Circuit in *FOP I*, *FOP II*'s timid reversal of the original decision, and the courts' different approaches to the equal protection questions involved all highlight a

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45 152 F.3d 998 (D.C. Cir. 1998) ("*FOP I*"), *rev'g* 981 F. Supp. 1 (D.D.C. 1997), *reh'g granted*, 159 F.3d 1362 (D.C. Cir. 1998), *rev'd on reh'g*, 173 F.3d 898 (D.C. Cir. 1999), *cert. denied*, 68 U.S.L.W. 3249 (U.S. Oct. 12, 1999) (No. 99-106). For a discussion of *FOP I*, see *infra* Part II.B.2.c.

46 *See id.* at 1002-03.

47 *See id.* at 1004.

48 *See* Fraternal Order of Police v. United States, 173 F.3d 898 (D.C. Cir. 1999) ("*FOP II*"), *cert. denied*, 68 U.S.L.W. 3249 (U.S. Oct. 12, 1999) (No. 99-106). For a discussion of *FOP II*, see *infra* Part II.B.2.d.

49 *See id.* at 903-04.

50 *See* Hiley v. Barrett, 155 F.3d 1276, 1277 (11th Cir. 1998).

51 *See* National Ass'n of Gov't Employees v. Barrett, 968 F. Supp. 1564, 1572-75 (N.D. Ga. 1997), *aff'd sub nom.* Hiley v. Barrett, 155 F.3d 1276 (11th Cir. 1998). For a discussion of *Barrett*, see *infra* Part II.B.1.

52 The plaintiffs in *Barrett* claimed that "irrationally distinguishing between persons convicted of misdemeanor crimes of domestic violence and persons convicted of other types of misdemeanor crimes of violence" violates the Equal Protection Clause. *Barrett*, 968 F. Supp. at 1572. They also claimed that the Lautenberg Amendment violates the Equal Protection Clause by "irrationally allowing felons, but not domestic violence misdemeanants, to possess a firearm once their civil rights have been restored under [state law] . . . and [by] discriminating against domestic violence misdemeanants who are law enforcement officers." *Id.*

fundamental question: Should the federal government allow members of the police and the military to own and possess firearms despite domestic violence convictions?

This Note attempts to grapple with this fundamental question by investigating how effectively the underlying purposes of the Lautenberg Amendment apply in the police and military context. Part I of this Note describes the Lautenberg Amendment, traces its legislative history, and places it within the context of state and federal domestic violence and gun control legislations. Part II details the federal court responses and legislative challenges to the Lautenberg Amendment. Part III discusses the constitutionality of the Lautenberg Amendment, focusing on whether the Second Amendment triggers strict scrutiny for the purpose of equal protection analysis. Part III argues that the courts should review the Lautenberg Amendment under a rational basis analysis; despite the felon-misdemeanant anomaly, the Amendment should survive the rational basis test. Finally, this Note concludes that as a policy matter, Congress should remedy the current law's felon-misdemeanant anomaly by explicitly precluding the public interest exception from applying to any domestic violence perpetrators, whether convicted of felonies or misdemeanors. Retaining the public interest exception in the area of domestic violence seriously undermines the purpose and efficacy of the Lautenberg Amendment.

I
LEGISLATION ON GUNS AND DOMESTIC VIOLENCE

Although society has long recognized the existence of domestic violence,[53] specific legislation to combat it is a relatively recent phenomenon.[54] To the extent that law enforcement responded to domestic violence at all, it had done so through existing state assault laws or state and local criminal and civil protection order laws.[55] The mid-1980s, however, marked a turning point as authorities began to pay increasing attention to the development of tactical response to domestic violence. Informed by the feminist political movement's call for awareness of spousal abuse[56] and the first research experiments on domestic violence,[57] the public, policymakers, and the police all be-

53 *See* Stevenson, *supra* note 17, at 848 ("Throughout this country's history, domestic violence has been a culturally recognized but often denied social ill.").

54 *See id.* at 848-49 ("Congress did little until the groundswell of public opinion and activist group pressure forced attention on child abuse in the 1970s and spousal abuse in the mid-1980s.").

55 *See* Fine, *supra* note 4, at 253 & nn.1-2.

56 *See* Stevenson, *supra* note 17, at 852 & n.19.

57 *See* Lawrence W. Sherman & Richard A. Berk, *The Minneapolis Domestic Violence Experiment*, 1 POLICE FOUND. REP. 1 (1984); *see also* Lawrence W. Sherman & Richard A. Berk,

gan reassessing traditional approaches to domestic violence.[58] As a result, local, state, and federal governments proposed and passed new legislation.

By 1990, ninety-three percent of local police departments and seventy-seven percent of sheriffs' departments had developed official policies for confronting domestic disputes.[59] Additionally, by this time forty-five percent of police departments and forty percent of the sheriffs' departments had created special domestic violence units.[60] Soon states also began to pass statewide legislation mandating law enforcement intervention in domestic violence disputes. By 1992, legislation requiring mandatory arrest of domestic violence perpetrators existed in fourteen states and the District of Columbia.[61]

By the late 1980s and early 1990s, Congress also turned its attention to what it perceived as the national epidemic of domestic violence.[62] Beginning in 1984, Congress passed a series of federal statutes addressing this issue.[63] Although federal legislation initially focused primarily on compensating victims and funding domestic violence shelters,[64] by the early 1990s Congress had begun incorporating domestic violence provisions into comprehensive crime bills such as the Crime Control Act of 1990[65] and the Violent Crime Control and Law Enforcement Act of 1994.[66] Ultimately, the federal effort culminated with the inclusion of the Violence Against Women Act in the Violent Crime Control and Law Enforcement Act of 1994.[67]

The Specific Deterrent Effects of Arrest for Domestic Assault, 49 AM. SOC. REV. 261 (1984) (discussing the results of a study showing that police intervention substantially reduced spousal abuse recidivism).

58 *See* Stevenson, *supra* note 17, at 851-54.

59 *See* BJS FINDINGS, *supra* note 6, at 5 (citing a 1990 Law Enforcement Management and Administrative Statistics Survey).

60 *See id.*

61 *See id.* (citing Barbara J. Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations*, JUV. & FAM. CT. J., 1992, No. 4, at 63). These states include Arizona, Connecticut, Hawaii, Iowa, Louisiana, Maine, Missouri, Nevada, New Jersey, Oregon, Rhode Island, South Dakota, Washington, and Wisconsin. *See id.*

62 *See* CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, VIOLENCE AGAINST WOMEN: AN OVERVIEW 6 (1994) (reporting that the American Medical Association found domestic violence to be a national health problem of "epidemic proportions").

63 *See* Victims of Crime Act of 1984, Pub. L. No. 98-473, 98 Stat. 2170 (codified as amended in scattered sections of 18, 39, and 42 U.S.C.) (creating federal funds for state agency assistance to victims of domestic violence); Family Violence Prevention and Services Act, 42 U.S.C. §§ 10401-10418 (1994 & Supp. III 1997) (authorizing federal assistance for domestic violence shelters, research, resources, and training).

64 *See, e.g.*, 42 U.S.C. §§ 10401-10413.

65 Pub. L. No. 101-647, 104 Stat. 4789 (codified as amended in scattered sections of 12, 15, 18, 28, and 42 U.S.C.).

66 Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 2, 8, 12, 15, 16, 18, 20, 21, 26, 28, 31, and 42 U.S.C.).

67 tit. IV, 108 Stat. 1796, 1902 (codified as amended in scattered sections of 8, 16, 18, 28, and 42 U.S.C.). For example, VAWA prohibits domestic violence and order of protec-

A. State Gun Control and Domestic Violence Laws

State laws focused specifically on the intersection of domestic violence and gun control fit into the earlier portion of this larger historical picture. Initially, regulations passed to disarm domestic violence offenders occurred exclusively at the state level. States have addressed and continue to address the issue of domestic violence and gun control through a variety of legislative approaches.[68] These different vehicles for disarming domestic violence assailants vary in their stringency, duration, discretionary leniency, and retroactivity. Because recent federal legislative efforts such as the Lautenberg Amendment attempt to add uniformity to state legislation, it is necessary to examine systematically what states have and have not done to disarm domestic violence offenders.

Only two states—Arizona and New Jersey—have domestic violence laws that specifically mandate police seizure of weapons at all domestic violence incident scenes.[69] Prosecutors then have the option to follow the seizures with forfeiture proceedings.[70]

States with more lenient domestic violence and gun control laws allow for weapon seizure only if the perpetrator used the weapon or threatened to use the weapon against the victim.[71] These laws often include provisions granting the state ten or fewer days to petition for permanent forfeiture.[72]

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tion violations with an interstate dimension, allows the victim to speak to the danger posed by defendant during a pretrial detention hearing, provides for victim restitution, mandates that states give full faith and credit to all valid protection orders issued from other jurisdictions, and creates a federal civil rights cause of action for gender motivated crimes. *See id.* For a full discussion of VAWA's provisions and constitutionality, see generally Fine, *supra* note 4.

68 *See, e.g.*, Melanie L. Mecka, Note, *Seizing the Ammunition from Domestic Violence: Prohibiting the Ownership of Firearms by Abusers*, 29 RUTGERS L.J. 607, 610-29 (1998) (describing in detail New Jersey's gun control law against domestic violence offenders and comparing it to similar laws in other states). The Mecka article contributed to the development of the state survey presented in this section.

69 *See* ARIZ. REV. STAT. ANN. § 13-3601(C) (West Supp. 1999) (allowing a peace officer to temporarily seize a weapon upon learning of or observing weapon's presence either through a plain view discovery or upon a consensual search); N.J. STAT. ANN. § 2C:25-21(d)(1) (West 1995) (allowing police officer "who has probable cause to believe that an act of domestic violence" has occurred to inquire into the presence of weapons and to seize any weapons that the officer believes pose a danger).

70 *See* ARIZ. REV. STAT. ANN. § 13-3601(F) (West Supp. 1999) (allowing prosecutor to file forfeiture proceedings if, in the prosecutor's judgment, offender poses a threat to the victim and also placing forfeiture decision within the court's discretion); N.J. STAT. ANN. § 2C:25-21(d)(2) to (3) (West 1995) (granting return of weapon to offender after 45 days unless a county prosecutor successfully petitions to family court for permanent forfeiture).

71 *See, e.g.*, OKLA. STAT. ANN. tit. 22, § 60.8(A) (West Supp. 2000) (permitting seizure of a weapon by peace officer when a perpetrator uses it to commit an act of domestic violence).

72 *See, e.g.*, CAL. PENAL CODE § 12028.5(e) (West Supp. 1999); HAW. REV. STAT. ANN. § 134-7.5(d)(1) (Michie Supp. 1999) (requiring return of weapon within seven days if not

Some states[73] approach the problem through gun control laws rather than domestic violence statutes by completely disqualifying a person with a domestic violence conviction from owning or possessing a permit to own a firearm.[74] Other states, such as Kentucky and Wisconsin, limit firearm disqualification only to those currently under a restraining order.[75]

Finally, many states have civil or criminal protective order statutes that allow issuing courts to prohibit the perpetrator from possessing or purchasing firearms while the order is in effect. Although these statutes vary widely from jurisdiction to jurisdiction, certain general legislative patterns have emerged. States such as New Hampshire and New Jersey categorically prevent a defendant under a protective order from possessing any firearm or weapon.[76] A less stringent statute in Alaska only allows the issuing courts to order the surrender of firearms, actually used in the domestic violence incident leading to the protective order.[77]

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retained for evidentiary purpose); 750 ILL. COMP. STAT. ANN. 60/304(c) (West Supp. 1999) (stating that seized weapon "shall be returned forthwith").

73 These states include Alaska, Hawaii, and Utah.

74 Unlike the Lautenberg Amendment, discussed *infra* Part I.B.3, most state statues prohibiting domestic violence convicts from possessing firearms limit the retroactive application by requiring the domestic violence conviction to have occurred within the last six years in order for the gun control disqualification to apply. *See e.g.*, ALASKA STAT. § 18.65.705(4) (Michie 1998) (disqualifying on the basis of two or more convictions of misdemeanors within the past six years); WASH. REV. CODE ANN. § 9.41.040(1)(b)(i) (West 1999) (prohibiting possession of firearms by a person convicted of domestic violence offense on or after July 1, 1993).

75 *See, e.g.*, KY. REV. STAT. ANN. § 237.110(11) (Banks-Baldwin 1999) (enforcing suspension of firearm permit until expiration of order or until issuing judge terminates the suspension); WIS. STAT. ANN. § 813.12(4m)(b)(1) (West Supp. 1999) (requiring the surrender of firearm until domestic violence injunction is vacated or expires); *see also* NEV. REV. STAT. ANN. § 202.3657(3)(g) (Michie 1997) (mandating that sheriffs deny or revoke permit of individuals with domestic violence convictions); N.J. STAT. ANN. § 2C:58-3(c)(6) (West 1995) (denying a permit to purchase firearms to anyone subject to domestic violence courr order); N.C. GEN. STAT. § 14-269.8(a) (1999) (prohibiting individuals under domestic violence orders from purchasing firearms); W. VA. CODE § 61-7-4(a)(6) (1997) (denying state firearm license to anyone facing pending charges or subject to court-ordered supervision or restraining order for domestic violence).

76 *See* N.H. REV. STAT. ANN. § 173-B:4(II) (Supp. 1999); N.J. STAT. ANN. § 2C:25-29(b)(16) (West Supp. 1999). Both the New Hampshire and the New Jersey statutes also authorize the issuing court to order a search and seizure for firearms and other weapons. *See* N.H. REV. STAT. ANN. § 173-B:4(II); N.J. STAT. ANN. § 2C:25-29(b)(16). For states that allow issuing courts to enforce firearm surrender but do not permit searches and seizures, see CAL. FAM. CODE § 6389 (West Supp. 1999); COLO. REV. STAT. § 18-1-1001(3)(c) (1999); DEL. CODE ANN. tit. 10, § 1045(a)(8) (Supp. 1998); and MD. CODE ANN. FAM. LAW § 4-506(d)(11) (1999).

77 *See, e.g.*, ALASKA STAT. § 18.66.100(c)(6)-(7) (Michie 1998). Other states with similar statutes to that of Alaska extend their laws slightly by granting the court discretion to order weapon surrender if the court reasonably believes that the defendant poses a violent risk to the victim. *See, e.g.*, N.D. CENT. CODE § 14-07.1-13(2) (1997).

As this description indicates, not all states have attempted to disarm domestic violence perpetrators,[78] and even among the states that do, there is a lack of uniformity. Additionally, state officials do not uniformly and consistently enforce these laws.[79] These factors suggest the need for a uniform federal effort consistently enforced by both law enforcement and the courts.

B. Federal Gun Control and Domestic Violence Laws

Congress has passed two laws dealing specifically with domestic violence and gun control. Both pieces of legislation amended the existing federal gun control law, the Gun Control Act of 1968.[80] The first amendment took effect in 1994[81] and dealt only with domestic violence evidenced by the issuance of a court protective order.[82] The second law, the Lautenberg Amendment[83] passed in 1996, was far broader in scope; it restricts gun possession by anyone with a domestic violence misdemeanor conviction.[84] Although the clear purpose of both pieces of legislation is to combat the particular harm of domestic violence, one cannot understand either their effect or their potential constitutional infirmities without first examining their places in the broader context of federal gun control legislation.

1. *Background—The Gun Control Act of 1968*

The purpose of the GCA, which superseded the Federal Firearms Act of 1938,[85] was to withhold access to weapons from dangerous individuals. Congress passed the GCA under the authority given by the Commerce Clause.[86] This sweeping gun control legislation placed li-

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78 *See* Mecka, *supra* note 68, at 622-29 (listing current and proposed state legislation in the area of domestic violence and firearm laws and arguing that "all states should be sending the message to abusers that they can no longer violate the rights of victims and keep all of their rights too, such as the right to bear arms").

79 *See id.* at 629. "'The whole idea was to take guns out of the hands of abusers. That doesn't happen with this law.'" (quoting a Wisconsin county sheriff's comment about the efficacy of that state's law).

80 Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended in scattered sections of 18 and 26 U.S.C.).

81 Pub. L. No. 103-322, § 110401, 108 Stat. 2014 (1994).

82 *See* 18 U.S.C. § 922(d)(8), (g)(8), (h) (1994).

83 Pub. L. No. 104-208, § 658, 110 Stat. 3009-371 (1996).

84 *See* 18 U.S.C. §§ 921(a)(33)(A), 922(d)(8)-(9), 922(g)(8)-(9) (1994 & Supp. III 1997).

85 ch. 850, 52 Stat. 1250 (amended and repealed 1968).

86 U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause gives Congress the power to regulate commerce among the states. From 1937 until 1995, the Supreme Court's Commerce Clause doctrine allowed Congress to exercise virtually unbridled power to pass federal laws under this Clause. *See* Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 MICH. L. REV. 554, 562 (1995) ("Current doctrine (pre-*Lopez*) allows one to justify federal regulation by pointing to any connection between the activity regulated, whether in the particular instance or in the

censing restrictions on the sale and manufacture of guns, as well as criminalizing certain conduct relating to the possession of firearms.[87]

Sections 922(d) and (g) of the GCA—the sections later expanded by the 1994 amendment and the Lautenberg Amendment—created disqualification classes.[88] Disqualified individuals under the original GCA included: anyone convicted of "a crime punishable by imprisonment for a term exceeding one year"[89] ("felon"), fugitives,[90] drug addicts,[91] mental incompetents,[92] illegal aliens,[93] those dishonorably discharged from the armed services,[94] and those who have renounced their U.S. citizenship.[95] Under § 922(d), a licensed dealer may not sell or distribute weapons to anyone who falls within one of the disqualification categories, while § 922(g) prohibits disqualified individuals from transporting or possessing a firearm. For example, § 922(g)(1) makes it a federal felony for a person with a previous felony conviction to possess a firearm.

The original GCA, and all amendments to the Act prior to the Lautenberg Amendment, created a safe harbor for military and law enforcement personnel by exempting from its prohibitions "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

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expansive aggregate, and some crossing of a state line by something or someone, sometime, somewhere."). In 1995 this doctrine shifted with the Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995). In *Lopez*, the Court struck down the Gun-Free School Zones Act of 1990 as exceeding Congress's Commerce Clause authority. *See id.* at 552. According to the Court, the subject matter of the Act, possession of firearms within 1000 feet of schools, did not have any substantial effect on interstate commerce. *See id.* at 561.

87 *See* 18 U.S.C. § 922(a) (1994) (specifying unlawful acts related to the importation, manufacture, transport, and possession of firearms and ammunition); 18 U.S.C. § 922(g) (creating disqualification categories for firearm possession and transport affecting interstate commerce); 18 U.S.C. § 923(a) (1994) (providing that "[n]o person shall engage in the business of importing, manufacturing, or dealing in firearms, or importing or manufacturing ammunition, until" receiving the required license).

88 Referring to disqualification categories under § 922(g), 18 U.S.C. § 922(h) prohibits disqualified individuals from receiving, transporting, or possessing firearms in the course of employment. *See* 18 U.S.C. § 922(h) (1994). Since the Lautenberg Amendment did not expand on this provision, this Note will not examine it specifically.

89 Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, 1220 (codified as amended at 18 U.S.C. § 922(d)(1) (1994)).

90 *See id.* (codified as amended at 18 U.S.C. § 922(d)(2) (1994)).

91 *See id.* (codified as amended at 18 U.S.C. § 922(d)(3) (1994)) (specifying anyone unlawfully using or being addicted to a controlled substance as defined by the Controlled Substances Act, Pub. L. No. 91-513, § 102, 84 Stat. 1242, 1242-45 (1970) (codified as amended at 21 U.S.C. § 802 (1994))).

92 *See id.* (codified as amended at 18 U.S.C. § 922(d)(4) (1994)) (specifying anyone who "has been adjudicated as a mental defective or has been committed to any mental institution").

93 *See id.* (codified as amended at 18 U.S.C. § 922(d)(5) (1994)).

94 *See id.* (codified as amended at 18 U.S.C. § 922(d)(6) (1994)).

95 *See id.* (codified as amended at 18 U.S.C. § 922(d)(7) (1994)).

State or any department, agency, or political subdivision thereof."[96] This so-called public-interest exception permits a military, police, or government official to possess a gun for official use, even after a felony conviction.

Despite a dearth of federal case law discussing the application of § 925(a)(1) in the context of the police exemption, the issue appears to have been resolved in 1978 by the Ninth Circuit in *Hyland v. Fukuda*.[97] In this case, the plaintiff (Hyland) in a civil rights action challenged the state of Hawaii's refusal to hire him as an adult corrections officer.[98] The state based its decision on a belief that Hyland's previous felony conviction for armed robbery disqualified him under 18 U.S.C. § 922(h) from carrying a weapon—a necessary condition of employment.[99] The court, however, took a different approach. Noting that "any firearm Hyland might be permitted to carry in the position he seeks would be owned by, and used exclusively for, the state,"[100] the court affirmed the district court's decision and held that § 922 does not justify the state's refusal to hire Hyland.[101] Since "the plain terms of section 925(a)(1) remove firearms owned by the state and used exclusively for its purposes from the limitations of section 922," the previous felony conviction should not interfere with Hyland's state job opportunities.[102] In other words, the court interpreted § 925(a)(1) as exempting Hyland from the GCA provision.

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96 18 U.S.C. § 925(a)(1) (1994) (amended 1996). It is worth noting that most states also have laws barring felons from possessing firearms. *See* Fraternal Order of Police v. United States, 152 F.3d 998, 1003 (D.C. Cir.), *reh'g granted*, 159 F.3d 1362 (D.C. Cir. 1998) (per curiam), *rev'd on reh'g*, 173 F.3d 898 (D.C. Cir.), *cert. denied*, 68 U.S.L.W. 3249 (U.S. Oct. 12, 1999) (No. 99-106).

97 580 F.2d 977 (9th Cir. 1978).

98 *See id.* at 978.

99 *See id.* at 979.

100 *Id.*

101 *See id.*

102 *Id.* Ultimately the court held that Hyland was prohibited from carrying a firearm under a different, but overlapping statute. *See id.* (referring to 18 U.S.C. app. § 1202(a) (repealed 1986)). Sections 1202(a) and 922(h) are nearly identical in statutory language. Congress passed the two statutes under different titles, titles VII and IV respectively, within the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968). *See* 580 F.2d at 979 n.3 (citing United States v. Bass, 404 U.S. 336, 341-43 (1971)). The court held that no explicit or implicit equivalent of § 925(a) exists that would exempt Hyland from the prohibition of § 1202(a). *See id.* at 980. However, the inclusion of Hyland within the prohibited class of § 1202(a) is now moot, because the law was repealed by Congress on May 19, 1986. *See* Pub. L. No. 99-308, § 104(b), 100 Stat. 459 (1986).

For a discussion of the application of 18 U.S.C. § 925(a), see *Perri v. Department of the Treasury*, 637 F.2d 1332, 1337 (9th Cir. 1981) (holding that § 925(a)(1) does not apply to sale of firearms to an undercover agent who is a convicted felon). *But cf.* United States v. Kozerski, 518 F. Supp. 1082, 1091 (D.N.H. 1981) ("[I]t follows that neither 18 U.S.C. § 925(a)(1) nor any purported application of state statutes here exempted defendant [a rural police officer] from the application of the federal firearms laws the violation of which forms the basis of the instant indictment.").

Under this ruling, Hyland, despite his felony conviction, was permitted to possess a weapon for use in the course of his official duties.

Prior to the passage of the Lautenberg Amendment, the original GCA and all subsequent amendments left the public-interest exception intact. Surprisingly, there is almost no evidence in the *Congressional Record* or subsequent case law explaining Congress's specific motivation in creating this broad and significant exemption.[103]

2. *The Amendment to the Gun Control Act of 1994*

Congress enacted the first domestic-violence-specific amendment to the GCA in 1994.[104] It prohibits anyone subject to certain protective orders from owning or possessing a gun.[105] It also prohibits anyone from selling or transferring a gun to someone whom they know or should reasonably believe to be under a restraining order.[106] In order to fall within this provision, the protective order must restrain harassment, stalking, or threatening of an "intimate partner."[107]

Until the enactment of the Lautenberg Amendment in 1996, members of the police and military were uniformly exempt from this provision under 18 U.S.C. § 925(a)(1)—the general public-interest exception of the GCA.[108]

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103 *See* Gillespie v. City of Indianapolis, 13 F. Supp. 2d 811, 829 (S.D. Ind. 1998). While acknowledging a lack of authority on congressional intent, the *Gillespie* court still rejected the plaintiff police officer's argument regarding the possible motivation behind the exception:

> Gillespie contends that Congress previously provided the exemption . . . in recognition of state sovereignty, particularly, the states' police powers, and that Congress' subsequent denial of this exemption [by the Lautenberg Amendment] constitutes an impermissible invasion of the states' police power . . . . Gillespie provides no case law, legislative history or other support for this bare contention, and *the Court has been unable to locate any authority on point.*
>
> . . . Nevertheless, we cannot create legislative intent out of whole cloth, and . . . we are not free to speculate as to congressional intent.

Id. (citation omitted) (emphasis added). For a similar claim as to the motivation behind the exception, see *Hearings on H.R. 26 and H.R. 445*, *supra* note 12 (statement of William J. Johnson, General Counsel, National Association of Police Organizations Inc.), *available in* <http://commdocs.house.gov/committees/judiciary/hju58106.000/hju58106-0f.htm> [hereinafter *Johnson Testimony*) ("[T]he exception is a necessary and constitutionally mandated recognition of the fact that state and local governments may not be dictated to by Congress in matters of state and local enforcement of state and local law.").

104 *See* Pub. L. No. 103-322, § 110401, 108 Stat. 2014, 2014-15 (1994).

105 *See* 18 U.S.C. § 922(g)(8) (1994).

106 *See id.* § 922(d)(8).

107 *Id.* Intimate partner is defined as a spouse, a former spouse, parent of a mutual child, cohabitant, or former cohabitant. *See id.* § 921(a)(32).

108 *See* Major Einwechter & Captain Christiansen, *Abuse Your Spouse and Lose Your Job: Federal Law Now Prohibits Some Soldiers From Possessing Military Weapons*, ARMY LAW., Aug. 1997, at 25, 26 n.79.

3. *The Lautenberg Amendment*

Faced with statistical affirmation of the danger of armed domestic violence perpetrators, policymakers at the federal level rallied for stronger gun control provisions in domestic violence law.[109] Proposed by Senator Frank Lautenberg, a Democrat from New Jersey, on March 21, 1996,[110] the Lautenberg Amendment passed overwhelmingly by a vote of ninety-seven to two in the Senate.[111] President Clinton signed the law four months later as part of an omnibus federal spending bill.[112]

The Amendment adds another disqualification category to the GCA. Under the Amendment, "any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence" is prohibited from owning or possessing firearms and ammunition.[113] Furthermore, anyone who has been convicted of a misdemeanor[114] involving the use or attempted use of force or threat with a deadly weapon against a spouse, child, intimate partner, or other cohabitant is prohibited from owning or possessing firearms and ammunition.[115] Punishment for violation of these provisions can result in a felony conviction, fine of $250,000, maximum imprisonment of ten years, or any combination of the above.[116]

Although there were no hearings on the Lautenberg Amendment in either the Senate or the House of Representatives,[117] both the debate on the floor of the Senate and the nearly unanimous vote in favor of passage reveal Congress's strong endorsement of the amendment. Focusing in particular on the reality of domestic violence prosecutions, which are almost always charged as, or plea-bargained down to, misdemeanor convictions, supporters of the law saw it as an opportunity to close a loophole existing under the GCA.[118]

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109 *See* Remarks in Columbus, Ohio, 2 PUB. PAPERS 1355, 1358-59 (Aug. 26, 1996) (William J. Clinton) (address to Columbus Police Academy).

110 *See* S. 1632, 104th Cong. (1996) (enacted).

111 *See* 142 CONG. REC. S10,380 (daily ed. Sept. 12, 1996).

112 *See* James Bovard, *Disarming Those Who Need Guns Most*, WALL ST. J., Dec. 23, 1996, at A12.

113 18 U.S.C. § 922(g)(9) (1994 & Supp. III 1997).

114 Misdemeanor crime of domestic violence is defined under either state or federal law for the purposes of the amendment. *See id.* § 921(a)(33)(A)(i).

115 *See id.* § 922(g)(8)-(9). For a list of the pertinent changes to the GCA by the Lautenberg Amendment, see Pub. L. No. 104-208, § 658, 110 Stat. 3009-371, 3009-371 to 3009-372.

116 *See* 18 U.S.C. § 924(a)(2) (1994).

117 *See Hearings on H.R. 26 and H.R. 445*, *supra* note 12 (opening statement of Rep. McCollum), *available in* <http://commdocs.house.gov/committees/judiciary/hju58106.000/hju58106_0f.htm> [hereinafter *McCollum Opening Statement*].

118 *See* 142 CONG. REC. S10,378 (daily ed. Sept. 12, 1996) (statement of Sen. Wellstone). For a discussion of the policy argument underlying the Lautenberg Amendment, see *infra* Part III.B.

In prepassage discussion of the Lautenberg Amendment in the *Congressional Record*, perhaps the most notable issues are not those addressed by legislators, but those that apparently escaped deliberation. Although the Amendment diverged from all previous provisions of the GCA by stating explicitly that the public-interest exception would not apply to government entities when domestic violence misdemeanors were involved, discussion of this significant change in federal gun control law ensued only after the law's passage.

This unprecedented restriction is arguably the most important change in the GCA effected by the Lautenberg Amendment. However, news accounts published after the passage of the law suggest that this feature was not part of Senator Lautenberg's original proposal. These accounts further suggest that the removal of the public-interest exception in cases of domestic violence misdemeanor convictions was actually a strategic effort to undermine the legislation.[119] For example, one report astonishingly claims that the exemption was removed not by gun control advocates, but rather by Representative Bob Barr, a Republican from Georgia and a well-known opponent of federal gun control legislation.[120] This news report quotes Senator Lautenberg as charging the Republicans with removing the exemption "'in the dark of the night'" so that the law would contain a "'poison pill'" that would become a basis for public opposition.[121] The controversy over the removal of the public-interest exception has been exacerbated by other reports which indicate that Representative Barr was in fact unwilling to claim responsibility for lifting the exception.[122]

II

CHALLENGES TO THE LAUTENBERG AMENDMENT

The prepassage legislative silence when Senator Lautenberg's bill was introduced to Congress stands in stark contrast to the high-pitched fervor that has followed the Amendment's passage. Since its enactment, the Lautenberg Amendment has been the target of severe criticism.[123] Despite the strong Congressional endorsement of the bill evidenced by the Senate vote, lobbyists and members of Congress quickly attempted to curtail the impact and reach of the new law.[124]

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119 *See, e.g.*, David Pace, AP, Jan. 8, 1997, *available in* 1997 WL 2492802.

120 *See id.*

121 *Id.* (quoting Sen. Lautenberg).

122 *See, e.g.*, Suro & Pan, *supra* note 36.

123 *See, e.g.*, Kerr, *supra* note 36.

124 Within a few months of the Amendment's passage, three bills were introduced in the House of Representatives to counter the effects of the Amendment: H.R. 1009, 105th Cong. (1997), introduced by Representative Helen Chenoweth, repeals the law in its entirety; H.R. 26, 105th Cong. (1997), introduced by Representative Bob Barr, eliminates the retroactive effect of the law; and H.R. 445, 105th Cong. (1997), introduced by Representa-

At the same time, police organizations and individual officers began challenging the law in federal courts.[125]

A. Legislative Challenge—The Stupak Bill

The Lautenberg Amendment is facing several legislative challenges. One proposal focuses exclusively on the Lautenberg Amendment's elimination of the public-interest exception for domestic violence misdemeanants. Introduced by Representative Bart Stupak on January 9, 1997 to the House Judiciary Committee, House Bill 445 provides that firearm prohibitions applicable by reason of a domestic violence misdemeanor conviction would not apply to government entities.[126] The effect of this amendment would be to exempt military and police personnel with domestic violence misdemeanor convictions from the GCA's disqualification categories. Under the proposed bill, members of the military and the police with domestic violence misdemeanor convictions may continue to use weapons in an official capacity.

Although there has been no movement on this bill since the adjournment of the 1998 Congressional session,[127] subcommittee hearings were held in March 1997 to discuss changes to the gun ownership ban on domestic violence misdemeanants.[128] Organizations such as the National Coalition Against Domestic Violence[129] and the National Network to End Domestic Violence[130] testified in support of the current law. In addition, one police organization, the National Black Police Association, broke ranks from other police organizations and spoke in favor of the elimination of the public-interest exception.[131]

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tive Bart Stupak, creates an on-duty exemption for law enforcement officers and the military.

125 *See* cases cited *supra* note 35.

126 *See* H.R. 445, 105th Cong. (1997).

127 *United States Bill Tracking: Domestic Violence Misdemeanor Applicability, available in* Westlaw, 1997 US H.B. 445 (SN). For another informative source of federal bill tracking, see *THOMAS Bill Summary & Status: 105th Congress, 1997-1998* (visited Nov. 23, 1999) <http://thomas/loc.gov/bss/d105query.html>.

128 *See McCollum, Opening Statement, supra* note 117.

129 *See Hearings on H.R. 26 and H.R. 445, supra* note 12 (written testimony of Rita Smith, Executive Director, National Coalition Against Domestic Violence), *available in* 1997 WL 8219766 [hereinafter *Smith Testimony*].

130 *See id.* (statement of Donna F. Edwards, Executive Director, National Network to End Domestic Violence), *available in* <http://commdocs.house.gove/committees/judiciary/hju58106.000/hju58106_Of.htm> [hereinafter *Edwards Testimony*].

131 *See id.* (statement of Ronald E. Hampton, Executive Director, National Black Police Association), *available in* <http://commdocs.house.gov/committees/judiciary/hju58106.000/hju58106_Of.htm> [hereinafter *Hampton Testimony*].

Testifying in favor of the Stupak Bill were the National Association of Police Organizations[132] and the Fraternal Order of Police.[133]

B. Federal Court Challenges—A Recent Circuit Split

To date there are two federal court of appeals decisions on the Lautenberg Amendment as it pertains to members of the police force. *Hiley v. Barrett*[134] and *Fraternal Order of Police v. United States* ("*FOP I*")[135] originally reached opposite conclusions on whether the Lautenberg Amendment violates the Equal Protection Clause of the Fifth Amendment, thereby temporarily creating a circuit split. However, the circuit split soon disappeared when the District of Columbia Circuit vacated its decision in *FOP I*, and reversed its holding on the equal protection question in *FOP II*; the *FOP II* court held that the Lautenberg Amendment does not violate the Equal Protection Clause.

1. *The Eleventh Circuit*—Hiley v. Barrett

In 1990 William Hiley started his employment as a deputy sheriff in Fulton County, Georgia.[136] At that time, the sheriff's department issued a firearm to Hiley in accordance with its employment requirement.[137] Five years later, Hiley pled no contest to a misdemeanor charge of domestic violence, resulting in twelve months of probation.[138] A year after Hiley's sentencing, Congress passed the Lautenberg Amendment.[139] In response, the Bureau of Alcohol, Tobacco, and Firearms (ATF) issued a statement to all state and local law enforcement officials, suggesting that they take "'appropriate action'" upon discovering employees subject to the new weapons prohibition.[140] Soon thereafter, the Fulton County Sheriff, Jacqueline Bar-

132 *See Johnson Testimony, supra* note 103.

133 *See Hearings on H.R. 26 and H.R. 445, supra* note 12 (statement of Bernard H. Teodorski, National Vice President Grand Lodge, Fraternal Order of Police), *available in* <http://commdocs.house.gov/committees/judiciary/hju58106.000/hju58106_Of.htm> [hereinafter *Teodorski Testimony*].

134 155 F.3d 1276 (11th Cir. 1998). The court of appeals affirmed the district court's decision to uphold the Lautenberg Amendment in a one sentence opinion: "This case is affirmed for the reasons stated in the district court's thorough and well-reasoned order . . . ." *Barrett*, 155 F.3d at 1277. As a result, this Note's discussion of the case attributed to the 11th Circuit will cite to the district court opinion. *See* National Ass'n of Gov't Employees v. Barrett, 968 F. Supp. 1564 (N.D. Ga. 1997), *aff'd sub nom.* Hiley v. Barrett, 155 F.3d 1276 (11th Cir. 1998).

135 152 F.3d 998 (D.C. Cir.), *reh'g granted*, 159 F.3d 1362 (D.C. Cir. 1998) (per curiam), *rev'd on reh'g*, 173 F.3d 898 (D.C. Cir.), *cert. denied*, 68 U.S.L.W. 3249 (U.S. Oct. 12, 1999) (No. 99-106).

136 *See Barrett*, 968 F. Supp. at 1568.

137 *See id.*

138 *See id.* At the time, Hiley informed the Sheriff's Department of his conviction. The Department took no action against Hiley. *See id.*

139 *See id.*

140 *Id.* (citing ATF's open letter to state and local law enforcement officials).

rett, fired Hiley.[141] As a member of a peace officers' union, the National Association of Government Employees (NAGE), Hiley brought suit for permanent injunctive relief enjoining enforcement of 18 U.S.C. § 922(g)(9) against any NAGE member.[142] Hiley asserted three distinct equal protection claims:[143]

> Plaintiff . . . assert[s] that § 922(g)(9) violates the Equal Protection Clause . . . by: (1) irrationally distinguishing between persons convicted of misdemeanor crimes of domestic violence and persons convicted of other types of misdemeanor crimes of violence; (2) irrationally allowing felons, but not domestic violence misdemeanants, to possess a firearm once their civil rights have been restored under the laws of the relevant state; and (3) discriminating against domestic violence misdemeanants who are law enforcement officers.[144]

The court commenced its analysis by identifying rational basis review as the appropriate level of scrutiny for all three equal protection claims, since the claims involved neither a fundamental right nor a suspect class.[145]

Turning to the first equal protection challenge—the law irrationally distinguishes between domestic violence misdemeanants and other types of misdemeanants—the court quoted Senator Lautenberg's statement from the *Congressional Record*: "'[T]he presence of a gun dramatically increases the likelihood that domestic violence will escalate into murder.'"[146] The court held that reduction of the likelihood of domestic violence was a legitimate goal and that in distinguishing between domestic violence misdemeanants and other misdemeanants, Congress created a rational legislative classification in order to bring about this purpose.[147] Furthermore, the court argued, even if Congress were to eventually disarm all criminal misdemean-

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141 *See id.* Her notification letter to Hiley stated that "'[i]f an employee authorized to carry a County-issued firearm and ammunition is affected by [§ 922(g)(9)], the employee may not possess any firearm or ammunition . . . .'" *Id.* (alteration in original)).

142 *See id.* at 1568-69.

143 *See id.* at 1572-75. In addition to the equal protection arguments, the court rejected Hiley's Commerce Clause, substantive due process, ex post facto, bill of attainder, and Tenth Amendment claims. *See id.* at 1572, 1575-78.

144 *Id.* at 1572.

145 *See id.* at 1573. Equal protection analysis and levels of scrutiny are discussed *infra* Part III.A.

146 *Barrett*, 968 F. Supp. at 1573 (quoting 142 CONG. REC. S11,227 (daily ed. Sept. 25, 1996) (statement of Sen. Lautenberg)).

147 *See id.* ("The court does not doubt that limiting the ability of a domestic violence misdemeanant to possess a firearm is reasonably related to Congress' purpose of protecting public safety by keeping firearms out of the hands of potentially dangerous or irresponsible persons.").

ants, the legislature is permitted to address problems "'one step at a time'"[148] without violating equal protection.

The court also rejected Hiley's second equal protection claim that state firearm restoration laws and 18 U.S.C. § 922 produce an anomaly when applied to domestic violence misdemeanants as opposed to felons.[149] Under both the felony provision of the GCA as well as the domestic violence misdemeanor provision added by the Lautenberg Amendment, if state law provides for the loss of civil rights and then those civil rights are subsequently restored, the disqualifying provisions will cease to apply.[150] Since the majority of states do not deprive individuals of their civil rights based on misdemeanor convictions, they cannot restore these rights to trigger the exemption. As a result, Hiley argued, "the statute produces an anomaly whereby certain felons may be able to possess firearms, but domestic violence misdemeanants will not."[151] However, the Court held that even if this anomaly occurs, it is the result of differing state laws; this anomaly does not present an equal protection problem according to the court's analysis.[152] Rather, it is the unavoidable consequence of a federal exemption dependent upon varying state laws.[153]

Finally, the court addressed Hiley's third equal protection argument that the law unfairly burdens police officers.[154] Unlike other careers, police work requires officers to legally possess a firearm. Hiley argued that the law discriminates against the police by forcing only police officers with domestic violence misdemeanor convictions out of their jobs.[155] As with Hiley's two other claims, the court rejected this contention, stating that constitutional concerns are not raised simply because a rational classification produces uneven effects.[156] Uneven effects are only constitutionally problematic if they result from discriminatory intent.[157] Since the court found no congressional intent to discriminate against law enforcement officers, it held that Hiley's third claim failed to prove an equal protection violation.[158]

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148 *Id.* (quoting Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955)).

149 *See id.* 1573-74.

150 *See id.* at 1574. For the felony civil rights restoration provision, see 18 U.S.C. § 921(a)(20) (1994). For the domestic violence misdemeanor civil rights restoration provision, see 18 U.S.C. § 921(a)(33) (Supp. III 1997).

151 *Barrett*, 968 F. Supp. at 1574.

152 *See id.* (citing United States v. Collins, 61 F.3d 1379, 1383 (9th Cir. 1995)).

153 *See id.* (citing McGrath v. United States, 60 F.3d 1005, 1009 (2d Cir. 1995)).

154 *See id.* at 1575.

155 *See id.*

156 *See id.* (citing Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979)).

157 *See id.*

158 *See id.*

2. *The District of Columbia Circuit*—Fraternal Order of Police v. United States

a. *Facts*

The Fraternal Order of Police (FOP), an association of law enforcement officers, brought suit challenging the new provisions of the GCA introduced by the Lautenberg Amendment.[159] As part of their complaint, the FOP plaintiffs filed affidavits of two members with domestic violence misdemeanor convictions.[160] FOP claimed that application of the Lautenberg Amendment, specifically 18 U.S.C. § 922(g)(9), injured and will continue to injure the two officers as well as other FOP members "by infringing on their constitutional rights to possess firearms, impeding their ability to serve as law enforcement officers, dimmishing their job-related responsibilities, and resulting, for some of them, in termination of their employment."[161]

The Fraternal Order of Police, like Hiley in *Barrett*, argued that 18 U.S.C. § 922(g)(9) violated the Equal Protection Clause.[162] Actually, the FOP made two of the same equal protection claims as Hiley. First, FOP argued that the law "irrationally target[s] a single class of misdemeanants who had committed crimes of violence, and . . . discriminat[es] against law enforcement officers who have been convicted of misdemeanors of domestic violence."[163] Additionally, FOP argued that § 922(g)(9) infringed upon its members' right to bear arms.[164] The FOP claimed that the right to bear arms was a fundamental right for equal protection purposes in an attempt to persuade the court to review the Lautenberg Amendment provisions under strict scrutiny, rather than under rational basis review.[165]

b. *District Court Holding*

The district court summarily dismissed FOP's argument that the law implicated a fundamental right for equal protection purposes and refused to apply strict scrutiny.[166] The court then analyzed the two

159 *See* Fraternal Order of Police v. United States, 981 F. Supp. 1, 2 (D.D.C. 1997), *rev'd*, 152 F.3d 998 (D.C. Cir.), *reh'g granted*, 159 F.3d 1362 (D.C. Cir. 1998) (per curiam), *aff'd on reh'g*, 173 F.3d 898 (D.C. Cir.), *cert. denied*, 68 U.S.L.W. 3249 (U.S. Oct. 12, 1999) (No. 99-106).

160 *See id.* at 3.

161 *Id.* (citing plaintiff's complaint).

162 *See id.* at 4.

163 *Id.*

164 *See id.*

165 Whether or not the Second Amendment triggers strict scrutiny for equal protection purposes is discussed *infra* Part III.A.1.

166 *See Fraternal Order of Police*, 981 F. Supp. at 4 ("There is no constitutionally protected right to keep and bear a firearm, however, that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia.'" (quoting United States v.

equal protection claims under rational basis review.[167] The court rejected both of these claims, employing reasoning identical to that used by the Georgia district court in *Barrett*.[168] Thus, on the claim that the law irrationally preferenced those who commit non-domestic-violence misdemeanors over those who commit domestic violence misdemeanors, the court wrote:

> The state of facts which provides a rational basis for the classification at issue here is not only "reasonably conceivable" but was identified in the Senate: The sponsor of Section 922(g)(9), Senator Frank Lautenberg, observed that a person "who attempts or threatens violence against a loved one has demonstrated that he or she poses an unacceptable risk."[169]

On the second equal protection claim, the court held that the disparate impact on police officers was irrelevant to constitutional analysis, since the law was facially neutral and the FOP did not prove a discriminatory purpose.[170]

c. FOP I

A three judge panel of the District of Columbia Circuit reversed the district court decision.[171] Although the circuit court ultimately analyzed the case under the least exacting standard of equal protection review, it did not dismiss the Second Amendment issue as easily as the lower court.[172] Finding the Second Amendment issue "intriguing," and noting the recent increase in scholarly debate as to the nature of the right to bear arms, the court nonetheless found it unnecessary to "attempt to resolve the status of the Second Amendment right."[173] This inquiry was unnecessary, according to the court, because the Lautenberg Amendment fell "into the narrow class of

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Miller, 307 U.S. 174, 178 (1939))). For a discussion of *Miller*, see *infra* notes 201-05 and accompanying text.

167 *See Fraternal Order of Police*, 981 F. Supp. at 5 ("Section 922(g)(9) must be upheld if the classification it establishes is 'rationally related to achievement of a legitimate governmental interest.'" (quoting United States Dep't of Agric. v. Moreno, 413 U.S. 528, 533 (1973))).

168 Although the court decided this case only three months after the Eleventh Circuit's similar analysis of a closely related claim, the D.C. district court made no mention of the *Barrett* decision.

169 *Fraternal Order of Police*, 981 F. Supp. at 5 (quoting 142 CONG. REC. S11,227 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg)).

170 *See id.*

171 *See* Fraternal Order of Police v. United States, 152 F.3d 998, 1000 (D.C. Cir. 1998), *rev'g* 981 F. Supp. 1 (D.D.C. 1997), *reh'g granted*, 159 F.3d 1362 (D.C. Cir. 1998) (per curiam), *rev'd on reh'g*, 173 F.3d 898 (D.C. Cir.), *cert. denied*, 68 U.S.L.W. 3249 (U.S. Oct. 12, 1999) (No. 99-106).

172 *See id.* at 1002.

173 *Id.*

provisions that fail even the most permissive, 'rational basis,' review."[174]

The court held that there is no rational basis for distinguishing between police officers who commit domestic violence misdemeanors and those who commit more violent felonies.[175] The court reasoned that "[t]he 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."[176] In order to remedy the equal protection violation, the court struck down the provision of the Lautenberg Amendment that explicitly precluded the public interest exception from applying to the case of a domestic violence misdemeanor disqualification.[177] In other words, the court resolved the underinclusiveness of this statutory exception not by nullifying it with respect to domestic violence felons, but by extending it to include domestic violence misdemeanants.[178]

d. FOP II

Following the original *FOP I* decision, the United States requested, and was granted, a rehearing by the District of Columbia Circuit.[179] In granting rehearing, the court once again focused on the anomaly created by the public interest exception to the Lautenberg Amendment and ordered the parties to address the following question:

> [W]hether it is proper for the court to consider, as part of an equal protection challenge, a form of discrimination (between domestic violence misdemeanants and domestic violence felons) not explic-

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174 *Id.* (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985)).

175 *See id.* at 1002-1003. The Eleventh Circuit in *Barrett* also examined the Lautenberg Amendment for potential equal protection violations. In *Barrett*, the court framed the equal protection question differently and found no infirmity. *See* National Ass'n of Gov't Employees v. Barrett, 968 F. Supp. 1564, 1572-75 (N.D. Ga. 1997), *aff'd sub nom.* Hiley v. Barrett, 155 F.3d 1276 (11th Cir. 1998); *see also* discussion *supra* Part II.B.1 (discussing the *Barrett* case).

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

177 *See id.* ("We think the most appropriate remedy is consequently to hold that § 925 is unconstitutional insofar as it purports to withhold the public interest exception from those convicted of domestic violence misdemeanors.").

178 The court could have chosen other remedial options. Instead of expanding the exemption to domestic violence misdemeanants, the court could have eliminated the felon exemption altogether or just in the case of domestic violence felons. Either of these options would remedy the statute's underinclusivity and cure the constitutional flaw. *See* Evan H. Caminker, Note, *A Norm-Based Remedial Model for Underinclusive Statutes*, 95 YALE L.J. 1185, 1185 (1986) (discussing the court's options of either invalidating a provision or enlarging the statute's coverage according to "the legislative purposes animating the underlying statutory scheme"); Note, *The Effect of an Unconstitutional Exception Clause upon the Remainder of a Statute*, 55 HARV. L. REV. 1030, 1032 (1942) [hereinafter Note].

179 *See* Fraternal Order of Police v. United States, 159 F.3d 1362 (D.C. Cir. 1998) (per curiam).

> itly asserted in the trial court or in counsel's briefs on appeal, when the issue was raised in oral argument and . . . the merits of the equal protection challenge in that form.[180]

The circuit court ultimately reversed its earlier conclusion on the merits of this equal protection issue.[181]

At first blush, the court's opinion reads like an affirmance of its earlier holding:

> Treating misdemeanants more harshly than felons seems irrational in the conventional sense of that term. . . . [H]ere Congress . . . [is] imposing a lesser disability on the felons, whom the state legislators had singled out for more severe treatment. Thus the usual proposition that Congress is entitled to address a problem "one step at a time" is not self-evidently applicable.[182]

Given this statement, one would expect that the court would continue to uphold the *FOP I* decision, which considered it irrational to exempt felons, but not domestic violence misdemeanants, from federal gun control laws and thus extended the exemption to both. Instead, the court in rather timid fashion stated that "on reflection" it is "not unreasonable for Congress" to have created the felon-misdemeanant anomaly.[183] The court speculated that Congress created this anomaly because "nonlegal restrictions such as formal and informal hiring practices may . . . prevent felons from being issued firearms covered by § 925(a)(1) in a large measure of the remaining cases."[184] In other words, police and military organizations would be unlikely to hire felons in the first place. Unfortunately, the court was vague in this factual speculation and offered no further guidance as to what specific facts would save the Lautenberg Amendment from the seeming irrationality of the felon-misdemeanant anomaly.[185]

Given the temporary circuit split on this question, the District of Columbia Circuit's timid reversal, and the strong likelihood that other circuits will reexamine this issue, it is necessary to explore whether these courts appropriately framed and answered the equal protection question. The following section undertakes this task.

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180 *Id.* The use of this equal protection classification schema is discussed *infra* Part III.A.2.

181 *See* Fraternal Order of Police v. United States, 173 F.3d 898, 908 (D.C. Cir.), *aff'g on reh'g* 981 F. Supp. 1 (D.D.C. 1997), *cert. denied*, 68 U.S.L.W. 3249 (U.S. Oct. 12, 1999) (No. 99-106).

182 *Id.* at 903 (citation omitted).

183 *Id.*

184 *Id.* at 904.

185 For an elaboration upon what the *FOP II* court likely meant, see *infra* Part III.A.2.

III

THE LEGALITY AND POLICY OF DISARMING ALL BATTERERS

A. Equal Protection Analysis: Is the Lautenberg Amendment Unconstitutional?

Barrett, FOP I, and *FOP II* engage in traditional equal protection analysis, as applied to the federal government through the Due Process Clause of the Fifth Amendment.[186] Under the traditional analysis, the court first determines the applicable level of scrutiny by deciding whether a suspect class,[187] such as race, alienage, or national origin, or a fundamental right,[188] such as the right to free speech, vote, or interstate travel, is involved. If the law implicates either a suspect class or a fundamental right then strict scrutiny requires the government to prove that the legislative classification is necessary to advance a compelling governmental interest.[189] If neither a suspect class nor a fundamental right is involved, the court applies rational basis review, which requires only that the law is rationally related to a legitimate government interest.[190] The outcome of an equal protection analysis typically depends on the level of scrutiny applied.[191] Laws reviewed under strict scrutiny are usually struck down,[192] while those reviewed under the more lenient rational basis test often survive.[193] In cases where the Court has struck down classifications under rational basis review, they usually detected an illegitimate discriminatory purpose underlying a facially neutral classification.[194]

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186 U.S. CONST. amend. V. The Fifth Amendment places the same restrictions on federal action that the Fourteenth Amendment does on state exercises of power. *See* Buckley v. Valeo, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." (citations omitted)). Interestingly, the plaintiff in *Barrett* mistakenly argued that the Lautenberg Amendment provisions violate the Fourteenth Amendment. The court chose to ignore this error and proceeded with its analysis in accordance with the Fifth Amendment. *See* National Ass'n of Gov't Employees v. Barrett, 968 F. Supp. 1564, 1572 n.10 (N.D. Ga. 1997), *aff'd sub nom.* Hiley v. Barrett, 155 F.3d 1276 (11th Cir. 1998).

187 *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-13 to 16-14, at 1465-74 (2d ed. 1988).

188 *See id.* §§ 16-7 to 16-12, at 1454-65.

189 *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

190 *See* TRIBE, *supra* note 187, § 16-2, at 1440.

191 *See id.* § 16-6, at 1451.

192 *See* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (describing strict scrutiny as "'strict' in theory and fatal in fact"). *But see* Korematsu v. United States, 323 U.S. 214 (1944) (upholding forced internment of Japanese Americans during World War II, despite strict scrutiny triggered by race-based classification).

193 *See* TRIBE, *supra* note 187, § 16-2, at 1440.

194 *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631-36 (1996) (using rational basis review to strike down an amendment to a state constitution that withdrew legal protection from homosexuals); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 435 (1985) (invalidating a zoning ordinance under rational basis review that targeted a group home for the mentally retarded); United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534-36

The cases discussed above reviewed the provisions of the Lautenberg Amendment under the rational basis test. Except for *FOP I*, the provisions passed constitutional muster under this lenient test. This section will discuss whether the courts applied the appropriate standard, and if so, whether the Lautenberg Amendment provisions should have survived rational basis review.

1. *Is There a Fundamental Right to Bear Arms that Triggers Strict Scrutiny?*

The Second Amendment provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[195] The scope and meaning of this amendment has been vehemently debated among constitutional scholars.[196] There are two camps in this debate. Some scholars argue that the Second Amendment guarantees a private, individual right to bear arms and restricts the federal government's ability to regulate guns.[197] Other scholars, however, maintain that the Second Amendment is concerned only with the protection of state militias;[198] therefore, the Second Amendment allows states and the federal government to freely regulate private usage of firearms.[199]

Despite these competing theoretical viewpoints among scholars, nearly all federal and state courts agree that the Second Amendment does not guarantee an individual private right to bear arms, unrelated

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(1973) (applying rational basis review to invalidate a provision of the Food Stamp Act that was designed to preclude hippie communes).

195 U.S. CONST. amend. II.

196 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 895 (3d ed. 2000) ("Whether the Second Amendment might restrain various forms of gun control is a topic that has attracted much academic and popular, if not judicial, attention.").

197 *See, e.g.*, STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 8-9 (1984); JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 161-64 (1994); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1162-64 (1991); Michelle Capezza, Comment, *Controlling Guns: A Call for Consistency in Judicial Review of Challenges to Gun Control Legislation*, 25 SETON HALL L. REV. 1467, 1471-78 (1995); Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms,"* LAW & CONTEMP. PROBS., Winter 1986, at 151, 162; Don B. Kates, Jr., *Gun Control: Separating Reality from Symbolism*, 20 J. CONTEMP. L. 353, 359-65 (1994); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983); Sanford Levinson, Comment, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 643-45 (1989).

198 *See* Levinson, *supra* note 197, at 644.

199 *See, e.g.*, Carl T. Bogus, *Race, Riots, aud Guns*, 66 S. CAL. L. REV. 1365, 1387-88 (1993); Wendy Brown, *Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's* The Embarrassing Second Amendment, 99 YALE L.J. 661, 665 (1989); Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5, 57 (1989); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 614 (1991).

to a state's right to maintain a militia.[200] In reaching this consensus, lower courts have essentially followed the Supreme Court's 1939 ruling and reasoning in *United States v. Miller*,[201] the only Supreme Court case that substantially grappled with the fundamental nature of the Second Amendment.

In *Miller*, the Court ruled on the constitutionality of the National Firearms Act of 1934 ("Firearms Act").[202] It held that the Second Amendment did not bar prosecution under the Firearms Act.[203] In this case, the plaintiff Miller was indicted under the Firearms Act for the interstate transport of an unregistered, sawed-off shotgun.[204] The Court wrote:

> In 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.[205]

The Court required a strong evidentiary connection between the weapon regulation and the preservation of a militia. Without such a connection, the Court refused to extend the protection of the Second Amendment.

The issue of whether firearm regulations trigger strict scrutiny for equal protection purposes also has been settled. In *Lewis v. United States*,[206] the Supreme Court, citing *Miller*, held that the Second Amendment right to bear arms does not trigger a strict scrutiny analysis.[207] In this case, the issue was whether a statute prohibiting felons

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200 *See* Ehrman & Henigan, *supra* note 199, at 40 ("Indeed, the proposition that the second amendment does not guarantee each individual a right to keep and bear arms for private, non-militia purposes may be the most firmly established proposition in American constitutional law.").

201 307 U.S. 174 (1939).

202 Act of June 26, 1934, ch. 757, 48 Stat. 1236 (amended 1968). The Firearms Act was the first federal statute regulating possession or use of firearms. *See* Brendon J. Healey, *Plugging the Bullet Holes in U.S. Gun Law: Ammunition-Based Proposal for Tightening Gun Control*, 32 J. MARSHALL L. REV. 1, 9 (1999).

203 *See Miller*, 307 U.S. at 178.

204 *See id.* at 175.

205 *Id.* at 178.

206 445 U.S. 55 (1980).

207 *See id.* at 65-66 & n.8; *see also* United States v. Ransom, 515 F.2d 885, 891 (5th Cir. 1975) (stating that a federal statute that prohibits convicted felons from receiving possessing, or transporting firearms in commerce is rational); United States v. Craven, 478 F.2d 1329, 1338-39 (6th Cir. 1973) (analyzing gun control legislation under rational basis test); United States v. Day, 476 F.2d 562, 568 (6th Cir. 1973); United States v. Synnes, 438 F.2d 764, 771 n.9 (8th Cir. 1971) ("[T]he right to bear arms is not the type of fundamental right to which the 'compelling state interest' standard attaches."), *vacated on other grounds*, 404 U.S. 1009 (1972); United States v. Karnes, 437 F.2d 284, 287 (9th Cir. 1971) ("[N]one are engaged in conduct—possession of firearms—that should be fostered or protected, nor

from owning firearms was unconstitutional if a felon's previous conviction was obtained in violation of his constitutional right to counsel.[208] The Court refused to apply strict scrutiny, because "legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties."[209]

The District of Columbia Circuit in *FOP I* labeled the nature of the Second Amendment guarantee as "intriguing."[210] In *FOP II*, the court suggested the possibility that the *Miller* test might be inapplicable.[211] Despite these statements, *Miller* and *Lewis* resolved the Second Amendment debate on the correct standard to invoke for an equal protection analysis. Therefore, current federal court review of the Lautenberg Amendment provisions under the rational basis test is an appropriate choice.

2. *Should the Lautenberg Amendment Fail Rational Basis Review?*

Although the question of which standard of review the Amendment should be held to has been settled, the inquiry into the constitutionality of the Lautenberg Amendment provisions is not complete. The question remains whether the Amendment should withstand the lenient rational basis test. As previously discussed, *FOP I* held that the Amendment should not withstand rational basis review, while *FOP II* and *Barrett* concluded the opposite.[212] In reaching these determinations, the courts used different classification schemes. Unlike *Barrett*, the District of Columbia Circuit in *FOP I* and *FOP II* described the Lautenberg Amendment as distinguishing police officers convicted of domestic violence felonies from police officers convicted of domestic violence misdemeanors.[213] Under this classification scheme, the

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are the rights at issue of the type that could not be constitutionally regulated by any statute, nor is the interest here similar to any of those that are presently considered basic." (footnote omitted)).

208 *See Lewis*, 445 U.S. at 56.

209 *Id.* at 65 n.8.

210 Fraternal Order of Police v. United States, 152 F.3d 998, 1002 (D.C. Cir.), *reh'g granted*, 159 F.3d 1362 (D.C. Cir. 1998) (per curiam), *rev'd on reh'g*, 173 F.3d 898 (D.C. Cir.), *cert. denied*, 68 U.S.L.W. 3249 (U.S. Oct. 12, 1999) (No. 99-106).

211 *See* Fraternal Order of Police v. United States, 173 F.3d 898, 906 (D.C. Cir.), *cert. denied*, 68 U.S.L.W. 3249 (U.S. Oct. 12, 1999) (No. 99-106) ("Since *Miller* dealt with Congress's authority to prohibit ownership of short-barreled shotguns, FOP could have challenged the test's applicability by arguing that it serves only to separate weapons covered by the amendment from uncovered weapons. It did not do so, and we thus assume the test's applicability.").

212 *See supra* Part II.B.

213 *See Fraternal Order of Police*, 173 F.3d at 901-04 (focusing on the felon-misdemeanant distinction); *Fraternal Order of Police*, 152 F.3d at 1002 ("[The amendment] thus allows the states to arm police officers convicted of violent felonies, and even crimes of domestic violence *so long as those crimes are felonies*, while withholding this privilege with respect to domestic violence misdemeanors.").

Lautenberg Amendment appears more troubling than what *Barrett*'s classification scheme—distinguishing domestic violence misdemeanants from other kinds of misdemeanants—would suggest. This comparison is, however, misleading and factually vacuous. Neither the police nor the military will generally hire someone with a felony conviction. Therefore, the argument is inapplicable. The District of Columbia Circuit in *FOP II* recognized this logic, but failed to carefully articulate the constitutional ramifications of this observation.[214] Thus, it is necessary to elaborate on this observation and its implications.

Under traditional rational basis review, statutory classifications are presumptively constitutional.[215] The validity of a law depends only on the court's ability to conceive of a "state of facts that could provide a rational basis for the classification."[216] Furthermore, it is constitutionally permissible for a legislature to approach a problem "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."[217]

One need look no further than *Williamson v. Lee Optical of Oklahoma*,[218] one of the pivotal cases in this area, to realize that the Lautenberg Amendment provisions should survive rational basis review. In *Williamson*, the Supreme Court upheld a statute that effectively prohibited opticians from fitting lenses without a prescription from an ophthalmologist.[219] One of the challenges against the statute was its exemption of sellers of ready-to-wear glasses, while inexplicably including opticians within its provisions.[220] Despite the seeming irrationality of the statute's underinclusiveness, the Court upheld the validity of the legislation. In support of its position, the Court wrote that "[t]he prohibition of the Equal Protection Clause goes no further than the invidious discrimination."[221] Because invidious discrimination did not drive the exemption, the Court was unconcerned with the state legislature's motivation for selectively excluding sellers of ready-to-wear glasses. The Court noted, "For all this record shows, the ready-to-wear branch of this business may not loom large in Oklahoma or may present problems of regulation distinct from the other branch."[222] Thus, although inclusion of sellers of ready-to-wear glasses rather than opticians within the statutory schema was a logical

214 *See Fraternal Order of Police*, 173 F.3d at 903-04 (alluding to the nonlegal restrictions preventing felons from acquiring firearms).

215 *See, e.g.*, Lyng v. International Union, 485 U.S. 360, 370 (1988).

216 FCC v. Beach Communications, Inc. 508 U.S. 307, 313 (1993).

217 Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955).

218 348 U.S. 483 (1955).

219 *See id.* at 484-88.

220 *See id.* at 488-89.

221 *Id.* at 489.

222 *Id.*

alternative, the Court hypothesized that there may simply not be enough of them doing business in the state to pose a problem worth regulating.

Similarly, the Lautenberg Amendment provisions satisfy the components of rational basis review because there is no evidence of discriminatory intent. As evidenced by the congressional debate over the Amendment, Congress did not intend to discriminate against police officers who commit domestic violence misdemeanors. Rather, Congress's motivation in removing the public-interest exception for domestic violence misdemeanants—permissible under the rational basis standard—conceivably came from the high incidence of domestic violence assaults prosecuted as misdemeanors. In other words, Congress focused on the most prevalent area of domestic violence: crimes classified as misdemeanors.

More significantly, however, *Williamson*'s reasoning suggests that the *FOP I* schema—police officers convicted of domestic violence misdemeanors versus police officers convicted of domestic violence felonies—is a red herring. Examining the reasoning of *Williamson* prompts the following question: Does the problem of police officers who commit domestic violence felonies "loom large" in the United States?[223] Most likely, the answer is no. It is unlikely that the police or the military will hire someone with a felony conviction, including a domestic violence felony.[224] This concern, presumably, is the "formal and informal hiring practices"[225] that the *FOP II* court mentioned when justifying the reversal of its original decision.

However, the same is not true regarding the hiring practices of the police and the military with respect to those convicted of domestic violence misdemeanors. The majority of domestic violence charges and prosecutions are misdemeanors, but the police and the military only screen those with felony convictions. Given this situation, it is reasonable that Congress recognized the danger of armed police and military personnel with domestic violence misdemeanor convictions. Congress merely filled a gap by blocking those with domestic violence misdemeanor convictions in these areas of employment from access to guns as was already policy for domestic violence felonies. The cate-

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223 *Id.*

224 *See, e.g., Teodorski Testimony, supra* note 133 ("Departments do not . . . hire or retain any officer who has a history of domestic abuse. . . . What the new law does is unfairly penalizes good officers who made a single mistake, paid the cost of that mistake, and went on with their lives."); *see also* Kerri Fredheim, Comment, *Closing the Loopholes in Domestic Violence Laws: The Constitutionality of 18 U.S.C. § 922(g)(9)*, 19 PACE L. REV. 445, 499 (1999) (reporting that the United States Department of Justice, the New York City Police Department, and the Los Angeles Police Department have a policy of automatic discharge of any officer who is convicted of any felony).

225 Fraternal Order of Police v. United States, 173 F.3d 898, 904 (D.C. Cir.), *cert. denied*, 68 U.S.L.W. 3249 (U.S. Oct. 12, 1999) (No. 99-106).

gory of police officers convicted of domestic violence felonies, which was referenced by the *FOP I* court in striking down the elimination of the public interest exception by the Lautenberg Amendment, does not create an equal protection problem because the class is significantly small.

The Lautenberg Amendment's statutory scheme is rational for still another reason: it fulfills an additional gap-filling role. Most states have laws barring felons from possessing firearms.[226] However, only New York provides for a government-interest exemption for police and military personnel, regardless of their felony convictions.[227] While nearly all states bar felons from gun ownership, most do not completely bar domestic violence misdemeanants from owning firearms.[228] By enacting the Lautenberg Amendment, Congress filled this gap.

FOP I relied on a deceptive schema and deviated from the traditional permissiveness of rational basis review by striking down the domestic violence provisions of the Lautenberg Amendment. Although, the appellate court remedied the situation in *FOP II*, its exploration of the appropriate rational basis analysis was insufficient. A more thorough analysis of the inclusion of police and military personnel within the Lautenberg Amendment is necessary.

B. Eliminating the Public Interest Exception: A Policy Argument

As the numerous challenges to the Lautenberg Amendment demonstrate, the Amendment is under legislative and judicial scrutiny. A particular concern is that a court finding the felon-misdemeanant anomaly sufficiently troubling may strike the Lautenberg Amendment in its entirety, thereby eliminating the protections given to domestic assault victims through gun control.[229] Regardless of how reviewing courts resolve the constitutional issue, a fundamental question remains: Purely from a policy perspective, should the police and the military be included under the purview of a gun ban that disarms domestic assailants? In order to appropriately answer this question, it is necessary to explore the policy arguments suggesting a general need for a domestic violence gun ban. Advocates of tough domestic violence law argue that several factors—recidivism, escalation of violence, increased danger of attacks involving firearms, and prosecution

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226 *See* Fraternal Order of Police v. United States, 152 F.3d 998, 1003 (D.C. Cir.), *reh'g granted*, 159 F.3d 1362 (D.C. Cir. 1998) (per curiam), *rev'd on reh'g*, 173 F.3d 898 (D.C. Cir.), *cert. denied*, 68 U.S.L.W. 3249 (U.S. Oct. 1999) (No. 99-106).

227 *See* N.Y. PENAL LAW § 265.20(a)(1) (McKinney 1989).

228 For a survey of state gun control and domestic violence laws, see *supra* Part I.A.

229 *See* Note, *supra* note 178, at 1030 ("By far the most common fate of statutes containing unconstitutional exceptions is complete destruction.").

of domestic violence as a misdemeanor—make the Lautenberg Amendment a necessary tool to combat domestic violence.[230]

Domestic violence assault, rarely an isolated incident, is a crime of high recidivism rates, characterized by escalation of verbal and physical abuse over time.[231] As this violence escalates, the likelihood that the violent incidents will involve the use of a weapon also increases.[232] An estimated one in ten domestic violence incidents involves a gun.[233] Although guns are not the only weapons used in domestic violence, those assaults involving guns are twelve times more likely to result in death than all other domestic assaults.[234] Because of the high rate of recidivism and the rapid escalation of violence, prior domestic assault convictions act as accurate predictors of which abusers are at high risk of perpetrating domestic violence assaults using weapons.[235]

Furthermore, the felony provisions of the GCA inadequately address the issue of domestic violence. Many state statutes and prosecution practices classify domestic violence as a misdemeanor, even though ninety percent of stranger assault cases with the same severity of assault and resulting injury lead to a felony classification.[236] As a result of this discrepancy, the GCA prior to the Lautenberg Amendment contained a loophole for domestic batterers. Senator Paul Wellstone made this policy argument when speaking in support of the Lautenberg Amendment on the floor of the Senate:

> The problem . . . is . . . if you beat up or batter your neighbor's wife, it is a felony. If you beat up or batter, brutalize your own wife or your own child, it is a misdemeanor.
>
> If the offense is a misdemeanor, then under the current law there is a huge loophole. We do not let people who have been convicted of a felony purchase that firearm. What the Senator from

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230 *See Edwards Testimony, supra* note 130.

231 *See* BJS FINDINGS, *supra* note 6, at 2 (documenting that one in five victims of domestic abuse reported three or more serious assaults within a six-month period); *see also Edwards Testimony, supra* note 130 ("[D]omestic violence is a crime which is often characterized by a pattern of abusive behavior, verbal and physical, which escalates in frequency and severity over time. Recidivism rates for domestic violence are extraordinarily high.").

232 *See* Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 1155 (1993) (citations omitted).

233 *See* PATSY A. KLAUS & MICHAEL R. RAND, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATS., SPECIAL REPORT: FAMILY VIOLENCE (1984).

234 *See Edwards Testimony, supra* note 130 (citing L.E. Saltzman et al., *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 JAMA 22 (1992)).

235 In 1994, 28% of all women murdered were killed by their husbands or boyfriends. *See Edwards Testimony, supra* note 130.

236 *See* Joan Zorza, *Women Battering: High Costs and the State of the Law*, 28 CLEARINGHOUSE REV. 383, 386-87 (1994) (citation omitted).

> New Jersey is trying to do is plug this loophole and prohibit someone convicted of domestic abuse, whether felony or misdemeanor, [from] purchasing a firearm.[237]

Thus, Congress viewed the Lautenberg Amendment as a necessary and natural extension of the GCA that insures weapon disqualification whether or not the assault occurs within or outside of the context of domestic violence.

Given the general policy arguments underlying the Lautenberg Amendment, should a gun ban that disarms domestic assailants include police and military personnel? A comparison of the following two passages of congressional testimony illuminates the debate. The first is a statement by the National Vice President of the Grand Lodge of the Fraternal Order of Police. The second, describing a separate and unrelated domestic violence incident, is by the Executive Director of the National Coalition Against Domestic Violence:

> Lieutenant Dale Barsness of the Minneapolis, Minnesota Police Department pled guilty in 1991 to a fifth degree domestic assault against his wife. Lieutenant Barsness, head of the department's homicide unit, was forced to give up his firearm in December, as were three other officers in that department, two of them who had over 20 years of experience on the force a single blemish on their record.[238]
>
> Mary's husband, a law enforcement investigator, held two guns to her head, to "demonstrate" how a man accused of killing his wife had done it. He foiled her attempts to get help by listening to her calls on the police scanner. Her restraining order allowed him to keep his gun. Finally arrested a few weeks ago, the paperwork at [his] arraignment mistakenly had someone else's name on it, and was thrown out. She wonders if his friends are engineering the paperwork problems.[239]

These passages capture the essence of the debate surrounding the Lautenberg Amendment as it pertains to the removal of the public interest exception from the domestic violence misdemeanor provisions. Police and military members argue that the gun control provisions should exclude them because enforcement will result in the firing or dismissal of a substantial number of officers and soldiers. However, according to advocates of the Lautenberg Amendment, this argument merely suggests that a large number of police and military are committing acts of domestic violence.

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237 142 CONG. REC. S10,379 (daily ed. Sept. 12, 1996) (statement of Sen. Wellstone). *See also id.* at S10,380 (daily ed Sept. 12, 1996) (statement of Sen. Feinstein).

238 *Teodorski Testimony, supra* note 133.

239 *Smith Testimony, supra* note 129. During her testimony, Smith condemned the Republican "majority . . . [which] prevented battered women from personally testifying [at this hearing] about the impact of the Barr and Stupak proposals." *Id.*

Several well-documented factors suggest that the Lautenberg Amendment should include the police and the military within the gun ban provisions. First, members of the police and the military have a high incidence of domestic violence. One study on domestic violence in police families concluded that forty-one percent of police officers admitted to using physical violence during marital conflicts.[240] This rate is significantly higher than that of a random sample of the nonpolice population.[241] Similar findings in the military estimate that the incidence of domestic violence is as much as five times higher in the armed forces than in the civilian population.[242] Additionally, members of the military are often involved in domestic abuse that is more violent, more likely to involve lethal force, and more likely to involve the use of a weapon than that perpetrated by civilians.[243] Easy access to guns in the military has led to fatalities in domestic violence incidents, as illustrated by the recent example of three women killed by their intimates within a two-year period on a single army base in Kentucky.[244] Since the perpetrators in the police and the military use guns to commit domestic violence at a higher rate than those among the general public, the exclusion of the police and the military from the Lautenberg Amendment would seriously undermine its efficacy.

Second, the perpetrator's membership in the police or the military leads to high rate of underreporting of the domestic assaults, which is already common in the civilian context.[245] Women battered

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240 *See Edwards Testimony, supra* note 130 (citing P. Neidig et al., *Interspousal Aggression in Law Enforcement Families: A Preliminary Investigation*, 15 POLICE STUD. 30-38 (1992)); Lonald D. Lott, *Deadly Secrets: Violence in the Police Family*, FBI L. ENFORCEMENT BULL., Nov. 1, 1995, at 12, *available in* 1995 WL 15080114 ("[P]olice officers [are] more prone than average citizens to alcoholism, domestic violence, divorce, and suicide."); *see Rivera Live: How Police Officers Handle Domestic Violence Caused at the Hands of Fellow Officers*, (CNBC television broadcast, Aug. 1, 1997), *available in* 1997 WL 12600310 [hereinafter *Rivera Live*] (stating that an LAPD study of domestic violence involving police "revealed an old boys network in which officers repeatedly got away with domestic violence, which simply was not treated seriously"); *see also Hampton Testimony, supra* note 131 ("[P]olicing has the highest proportion of batteries of all U.S. occupations.").

241 *See Edwards Testimony, supra* note 130.

242 *See 60 Minutes: The War at Home* (CBS television broadcast, Jan. 17, 1999), *available in* 1999 WL 6014509 [hereinafter *The War at Home*] (reporting that domestic violence by military men is not adequately addressed by the military).

243 *See* Joan Zorza, *Must We Stop Arresting Batterers?: Analysis and Policy Implications of New Police Domestic Violence Studies*, 28 NEW ENG. L. REV. 929, 983 (1994) ("Soldiers are more often violent and are more likely to use lethal force against their wives than are civilian men. Soldiers are also more likely to use weapons against their female partners than are civilians.").

244 *See The War at Home, supra* note 242.

245 *See* Zorza, *supra* note 243, at 982 ("Battered women's advocates report that military wives, and especially those of officers, are considerably fearful of reporting domestic violence or recurrences of such violence, believing that it would seriously [a]ffect their husband's career."); *Smith Testimony, supra* note 129 (discussing underreporting in the police context); *Rivera Live, supra* note 240.

by members of the police or the military who seek outside intervention must request help from the batterers' coworkers, friends, colleagues, or superiors. The difficulty of overcoming this obstacle suggests the seriousness of the domestic violence crimes that are reported.

A third, interrelated factor involves the so-called "code of silence,"[246] by which members of the police ignore and cover-up law violations by other fellow officers—an occurrence that seems particularly likely in the context of domestic violence.[247] The "code of silence" further deters women abused by members of the police or the military from reporting assaults.[248] When victims do bring charges, prosecutors with strong personal connections to the batterer and his police department often undermine the cases and do not pursue departmental punishments.[249] The difficulty of overcoming these significant obstacles by the victims of domestic assaults perpetrated by the members of the police and the military points to the seriousness and severity of the assaults that lead to misdemeanor convictions.

These factors suggest that the policy considerations underlying the Lautenberg Amendment extend equally well, if not more convincingly, to members of the police and the military who commit acts of domestic violence. Thus, Congress should remedy the felon-misdemeanant anomaly, which poses a risk to the Amendment by leaving it ripe for continued constitutional challenge, by eliminating the public-interest exception for all instances of domestic violence. Congress should make it explicit that no member of the police or the military who is convicted of any act of domestic violence—felony or misdemeanor—shall be permitted to have access to firearms.

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246 Lott, *supra* note 240.

247 *See id.*

248 *See Edwards Testimony, supra* note 130 ("The code of silence among officers makes victims reluctant to come forward.").

249 *See Smith Testimony, supra* note 129. A television commentator reported anecdotes revealed by a Los Angeles Police Department report on this issue:

> One police officer received a 15-day suspension for slapping his wife and then threatened to commit suicide and was described in an evaluation as a quote, "problem free employee," end quote. Another officer who raped his girlfriend only received an official reprimand. Later that year, the officer sexually abused a woman with a handgun and received another reprimand. He was neither arrested nor criminally charged in either incident. . . And perhaps the most outrageous example involves an officer who had been drinking in a bar with his wife, then was involved in a hit-and-run accident. After the crash, the officer struck his wife and broke her nose. Despite the crimes of public drunkenness, assualt, fleeing the scene of an accident and failure to have his car insured the officer's punisbment was a 10-day suspension.

Rivera Live, supra note 240.

CONCLUSION

The Lautenberg Amendment recognizes that domestic violence usually involves recurring and escalating acts of violence that will more likely result in murder if the abuser has access to firearms. It further recognizes that despite the severity of the physical assault, domestic violence is most often charged and prosecuted as a misdemeanor crime.

Nonetheless, the current law under the Lautenberg Amendment, which courts should continue to review under a rational basis analysis, is seriously flawed. Although there are arguments to show that the Amendment as it is should survive equal protection's most lenient scrutiny, as a policy matter Congress is seriously undermining its own objectives by allowing the felon-misdemeanant anomaly to stand. The law is open for continuing challenge and thus it risks the possibility that a court might ultimately resolve the felon-misdemeanant anomaly by striking the law in its entirety.

The firearms ban following any domestic violence conviction should include police and military members. As the executive director of a national police organization argued before the House Subcommittee on Crime, not only are police and military statistically more likely to perpetrate acts of domestic violence than the civilian population, these acts are likely more violent and more likely to involve the use of weapons.[250] Given these realities, excluding the police and the military is irrational and ultimately undermines the efficacy of the Lautenberg Amendment. Congress should clarify the necessity of including the police and the military within the Amendment's provision by explicitly stating that there will be no public-interest exception for domestic violence convictions of any kind, misdemeanor or felony. To act differently would eviscerate an important piece of legislation with the potential to save the lives of individuals who would otherwise have to take their chances with armed abusers.

250 *See Hampton Testimony, supra* note 131.