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Violence Against Women Act of 1994: The Proper Federal Role in Policing Domestic Violence

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NOTE

THE VIOLENCE AGAINST WOMEN ACT OF 1994: THE PROPER FEDERAL ROLE IN POLICING DOMESTIC VIOLENCE

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INTRODUCTION

When one considers the legal response to the problem of domestic violence, one traditionally thinks of state laws pertaining to assault and related crimes[1] or of orders of protection that local criminal and family courts issue.[2] Local or state police officers and county sheriff's

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1 In New York, for instance, state and local police often charge perpetrators of domestic violence with general offenses under the state penal law that are not specific to domestic situations. *See, e.g.*, People v. Kheyfets, 665 N.Y.S.2d 802, 803 (Sup. Ct. 1997) (noting that for two domestic violence incidents, police charged the defendant with criminal conduct, harassment, assault, menacing, criminal mischief, and aggravated criminal contempt); People v. Singleton, 532 N.Y.S.2d 208, 209 (Crim. Ct. 1988) (noting that in a domestic violence incident, police charged the defendant with attempted assault, aggravated harassment, harassment, criminal trespass, endangering the welfare of a child, and criminal contempt). The offense is classified as a domestic incident if those involved are related by blood or marriage, former marriage, or have a child in common. *See* N.Y. CRIM. PROC. LAW § 530.11(1) (McKinney 1995 & Supp. 1998); N.Y. JUD. LAW § 812(1) (McKinney Supp. 1998). The victim may start a proceeding related to a domestic incident in either family court or criminal court if the charge involves aggravated harassment in the second degree, assault in the second or third degree, attempted assault, disorderly conduct, harassment in the first or second degree, menacing in the second or third degree, or reckless endangerment in the first or second degree. *See* N.Y. CRIM. PROC. LAW § 530.11(1); N.Y. JUD. LAW § 812(1). Otherwise, prosecutors may bring actions related to domestic incidents in criminal court. *See* N.Y. CRIM. PROC. LAW § 530.11(1) (limiting the jurisdiction of family courts for criminal matters to certain enumerated offenses); N.Y. JUD. LAW § 812(1) (same). The state also has a pro-arrest policy, stating that police officers must prosecute all felony offenses, whether or not the victim cooperates, and must prosecute all misdemeanor offenses if the victim so requests. *See* N.Y. CRIM. PROC. LAW § 140.10(4) (McKinney Supp. 1998). According to a New York State Police training bulletin:

> The new mandatory arrest provision of the Family Protection and Domestic Violence Intervention Act of 1994 went into effect January 1, 1996. The intent of the mandatory arrest policy is to take the burden of the decision to arrest from victims who may be ill prepared due to social, economic, psychological, safety, and/or other pressures or constraints.

Order of Protection Registry—Mandatory Arrests, NYSPIN NEWSL. (New York St. Police, Albany, N.Y.), Oct.-Dec. 1995, at 4. By its terms, this Act only applies to domestic violence crimes.

2 *See generally* 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 (1993) (discussing who may file for orders of protection and under what circumstances). While orders vary from state to state, either family court—if the offender and victim have been married or have a child in common—or local criminal court—provided the offender faces criminal charges—will issue them. *See, e.g.*, N.Y. CRIM. PROC. LAW § 530.12 ("When a criminal action is pending involving a complaint charging any [domestic] crime or violation . . . the court . . . may issue a temporary order of protection."); N.Y. JUD. LAW § 812 (McKinney Supp. 1998) ("The family court and the criminal courts shall have concurrent jurisdiction over any [domestic violence] proceeding."). The orders may be temporary, pending court resolution of the matter, a certain duration with an expiration date attached, or permanent. *See* Klein & Orloff, *supra*, at 1085. Courts set the terms, and the order may include general directions that the offender must refrain from harassing or intimidating the victim, must refrain from all contact with the victim (including contact via third persons), or must remain more than a certain distance from the victim. *See id.* at 918-21. The orders often will protect not only the victim, but also immediate family members or significant others

deputies respond to most of these incidents,[3] increasing the perception that domestic violence is strictly a local problem.[4] Police officers investigating a battery that a husband or boyfriend committed are probably unaware of the implications that the Commerce Clause of the United States Constitution[5] has on certain domestic violence cases. Many police officers are unaware that under appropriate circumstances the United States Attorney's Office can prosecute a case in federal district court.[6] Today, even Federal Bureau of Investigation ("FBI") agents receive training on the investigation of domestic vio-

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whom the incident leading to the grant of the order of protection has affected. *See id.* at 919-20. If the offender violates the order, police can arrest and charge him for criminal violation of the order or for contempt of court. *See, e.g.*, CRIM. PROC. LAW § 530.12(11) (describing the penalties for violating the order). For a discussion of protection orders and federal firearms offenses, see Barbara J. Hart, Firearms and Protection Order Enforcement: Implications for Full Faith and Credit and Federal Criminal Prosecutions, Address Before the National College of District Attorneys (Oct. 15, 1996), *available at* <http://www.clegroup.com/aba/dv/firearm1.htm>.

3 *See, e.g.*, BUREAU OF JUSTICE STATS., U.S. DEP'T OF JUSTICE, No. NCJ-149259, DOMESTIC VIOLENCE: VIOLENCE BETWEEN INTIMATES 5 (1994) (explaining how police agencies deal with domestic disputes). A notable exception to local enforcement involves incidents occurring on military bases or other federal property, where federal law enforcement agents have primary jurisdiction. For instance, military police assume the role of local police officers on military bases, which contain dependant housing.

4 *See* Charles E. Roberts & Michael A. Mason, The FBI and Domestic Violence 5 (1997) (unpublished manuscript, on file with author). Assistant United States Attorney for the Northern District of New York Charles E. Roberts shared this manuscript (cowritten with Supervisory Senior Resident Agent Michael A. Mason of the FBI's Syracuse, New York office) with the author. Assistant United States Attorney Roberts also provided the author with his appellate brief for *United States v. Von Foelkel*, 136 F.3d 339 (2d Cir. 1998), and shared his insights into the constitutionality of the Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 8, 18 & 42 U.S.C.).

5 U.S. CONST. art. 1, § 8, cl. 3. Congress primarily relied on its authority under the Commerce Clause to enact the Violence Against Women Act ("VAWA"). *See infra* Part I.B.

6 Despite my service as a police officer in a progressive department when VAWA went into effect, I remained ignorant of the federal statutes pertaining to domestic violence until I clerked for the United States Attorney Office for the Northern District of New York in 1997. My subsequent informal canvas of police officers in four upstate New York departments failed to locate anyone who was aware that domestic violence could be a federal offense under VAWA. In late 1997, however, the New York State Police issued a training bulletin including information about VAWA's full faith and credit provision located at 18 U.S.C. § 2265 (1994). *See NCIC Protection Order File*, NYSPIN NEWSL. (New York St. Police, Albany, N.Y.), Oct.-Dec. 1997, at 2.

Some argue that regardless of available criminal statutes, local police officers often view arrest as a last resort in domestic violence situations. *See, e.g.*, Machaela M. Hoctor, *Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California*, 85 CAL. L. REV. 643, 649-50 (1997) ("Police treatment of domestic abuse calls has traditionally consisted of not responding at all, purposefully delaying response, . . . or, when officers did respond, attempting to talk to or separate the parties so they could 'cool off.'"); *Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1535-38 (1993) (discussing arrest policies and police practice in cases of domestic violence); Barbara Fedders, Note, *Lobbying for Mandatory-Arrest Policies: Race, Class, and the Politics of the Battered Women's Movement*, 23 N.Y.U. REV. L. & SOC. CHANGE 281, 281 (1997).

lence offenses that have interstate elements,[7] thanks to the Violence Against Women Act of 1994 ("VAWA").[8]

During the late 1980s and early 1990s, Congress became increasingly concerned with the grim statistics regarding the national impact of domestic violence.[9] For instance, an act of domestic violence involving an adult occurs every fifteen seconds in the United States, making it the most frequently committed crime in the country.[10] Women bear the brunt of this violence. Men occasionally are the victims,[11] but ninety-two percent of incidents reported to the National Crime Victimization Survey between 1987 and 1991 involved acts of violence that men had committed against their female partners.[12]

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7 *Cf.* Roberts & Mason, *supra* note 4, at 1-4 (justifying the FBI's involvement in certain domestic violence cases).

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

9 *See, e.g.*, Kerrie E. Maloney, Note, *Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provision of the Violence Against Women Act After* Lopez, 96 COLUM. L. REV. 1876, 1878-83 (1996) (referring to FBI statistics and congressional reports and concluding that "[v]iolence against women in the United States constitutes a national epidemic mandating national intervention," which prompted Congress to respond with VAWA); Johanna R. Shargel, Note, *In Defense of the Civil Rights Remedy of the Violence Against Women Act*, 106 YALE L.J. 1849, 1849-50 (1997) (referring to Senate reports and Department of Justice statistics, asserting that "[v]iolence currently poses the most significant threat to women's rights as equal citizens" and noting that Senator Joseph Biden called violence against women "a 'national tragedy'").

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

11 *See* Suzanne K. Steinmetz & Joseph S. Lucca, *Husband Battering*, *in* HANDBOOK OF FAMILY VIOLENCE 233, 236-38 (Vincent B. Van Hasselt et al. eds., 1988).

12 *See* RONET BACHMAN, U.S. DEP'T OF JUSTICE, NO. NCJ-145325, VIOLENCE AGAINST WOMEN: A NATIONAL CRIME VICTIMIZATION SURVEY REPORT 6 (1994). Men may underreport violent acts that women commit against them because many men perceive that society expects them to be the strong, dominant party in their intimate relationships. *See* Steinmetz & Lucca, *supra* note 11, at 239. Fearing ridicule, men may be less willing to go to law enforcement authorities, *see id.* at 238, or may feel that they are supposed to endure abuse and "tough it out" to protect the relationship. This phenomenon may be especially true of men suffering abuse in homosexual relationships. *See* DAVID ISLAND & PATRICK LETELLIER, MEN WHO BEAT THE MEN WHO LOVE THEM 88-104 (1991). Law enforcement officers investigating domestic incidents may be less willing to document complaints by male victims because they share these biases, *see* Nancy E. Murphy, Note, *Queer Justice: Equal Protection for Victims of Same-Sex Domestic Violence*, 30 VAL. U. L. REV. 335, 336 n.9 (1995), do not believe the male was the actual victim, *see id.* at 335-36, or lack both sensitivity training in this area and pressure from victim advocate groups to take action because most of the education efforts focus on women. *See, e.g.*, Elizabeth M. Schneider, *Introduction: The Promise of the Violence Against Women Act of 1994*, 4 J.L. & POL'Y 371, 375 (1996) (noting that VAWA in part was the product of massive efforts to educate the public regarding the problems of violence against *women*).

Pressures on women to avoid reporting domestic violence, *see* Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1231-40 (1993), along with police insensitivity in responding to these complaints, *see* Susan E. Bernstein, Note, *Living Under Siege: Do Stalking Laws Protect Domestic Violence Victims?*, 15 CARDOZO L. REV. 525, 526 n.8 (1993), may greatly suppress the number of reported incidents involving violence against women. Total occurrences of domestic violence against both men and women are almost certainly much higher than re-

During that time, intimates perpetrated approximately 572,000 acts of violence per year against women.[13] These figures might represent only the tip of the iceberg because estimates place the actual number of women battered by their husbands or boyfriends at approximately four million a year.[14]

Victims who do come forward often find little support in the local courts.[15] For instance, in several states, raping a spouse either is not a crime or the perpetrator receives a reduced sentence upon conviction.[16] Furthermore, existing efforts at intervention have proven inadequate, and the data show that we cannot treat domestic violence as a private or local matter.[17] Victims of domestic violence are three times more likely than victims of other assaults to become victims again within six months.[18] In total, domestic violence accounts for more injuries to women than any other source, including all automobile accidents, muggings, and stranger rapes combined.[19] The FBI reported that in 1990 thirty percent of all female homicide victims were killed by their husbands or boyfriends.[20] "An estimated 1,432 women were killed by intimates in 1992."[21] Circumstances do not improve for many of the victims who leave the abusive relationship. Approxi-

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ported. *See* BACHMAN, *supra*, at 6 (maintaining that domestic violence against women is underreported, but that a woman is still ten times more likely to be a victim than a man). Even ignoring the question of ratios, the total number of assaults and homicides of women by male intimates is shocking. *See supra* text accompanying notes 9-11; *infra* text accompanying notes 13-23; *see also* Fedders, *supra* note 6, at 281 n.1 (citing statistics that show that women are six times more likely than men to be the victims of violence by an intimate); Roberts & Mason, *supra* note 4, at 2 (referring to congressional findings for the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 80 Stat. 1796 (codified in scattered sections of U.S.C.), that 2000 women are raped and 90 women are murdered by men and that men perpetrate 90% of the homicides).

Though the language of VAWA is gender neutral, this Note refers to perpetrators of domestic violence using the male pronoun and victims using the female pronoun because of the title of the Violence Against Women Act and the fact that the statistics point to the preponderance of male offenders and female victims in domestic violence cases. Part II.E, *infra*, discusses whether courts, in fact, should give this Act a gender-neutral interpretation.

13 *See* BUREAU OF JUSTICE STATS., *supra* note 3, at 2.

14 *See* Roberts & Mason, *supra* note 4, at 2.

15 *See* Patricia L. Micklow, *Domestic Abuse: The Pariah of the Legal System*, *in* HANDBOOK OF FAMILY VIOLENCE, *supra* note 11, at 407, 413-17.

16 *See* S. REP. No. 103-138, at 42 (1993).

17 As the Senate Committee on the Judiciary observed, "State remedies have proven inadequate to protect women against violent crimes .... Women often face barriers of law, of practice, and of prejudice not suffered by other victims of discrimination." *Id.* at 49.

18 *See* BUREAU OF JUSTICE STATS., *supra* note 3, at 2.

19 *See* Evan Stark & Anne Flitcraft, *Violence Among Intimates: An Epidemiological Review*, *in* HANDBOOK OF FAMILY VIOLENCE, *supra* note 11, at 293, 301. For discussion of the methodology of domestic violence surveys, see Robert Geffner et al., *Research Issues Concerning Family Violence*, *in* HANDBOOK OF FAMILY VIOLENCE, *supra* note 11, at 457; Richard J. Gelles, *Methodological Issues in the Study of Family Violence*, *in* PHYSICAL VIOLENCE IN AMERICAN FAMILIES 17 (Murray A. Straus & Richard J. Gelles eds., 1990); Murray A. Straus, *The National Family Violence Surveys*, *in* PHYSICAL VIOLENCE IN AMERICAN FAMILIES, *supra*, at 3.

20 *See* DATA SHEET, *supra* note 10, at 2 (citing FBI statistics for 1990).

21 *Id.* at 1 (citing BUREAU OF JUSTICE STATS., *supra* note 3).

mately three-quarters of spousal attacks occur between persons who either are divorced or separated.[22] When victims do try to break away, their problems often follow them—even when they cross state lines.[23]

Against this backdrop, Congress passed the Violence Against Women Act of 1994.[24] This Note argues that the Act is constitutional and addresses the practical problems involved in its implementation. Part I discusses the provisions of VAWA and assesses their constitutionality. It describes the constitutional challenge that the initial test cases posed to VAWA's criminal provisions, but concludes that subsequent decisions indicate that these provisions seem more and more certain to pass constitutional muster. This Part also explains how a seemingly local issue can fall under Commerce Clause regulation and how Congress can exercise the commerce power to create the most effective weapon to fight the problem of domestic violence while enhancing public respect for federal law enforcement. It examines several of the recent Second, Fourth, Sixth, and Eighth Circuit opinions, as well as district court decisions, in cases challenging the authority of Congress to pass this Act under its Commerce Clause powers.

Part II discusses the implementation of VAWA and the government's efforts to federalize[25] domestic violence laws. This Part examines several problems with the enforcement of VAWA and with the foreseeable adverse impact on the federal courts, suggesting some solutions to these problems. The Note concludes that Congress validly enacted VAWA, that the law has a necessary place within the federal law enforcement scheme, and that the federal courts can implement it

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22 *See id.*

23 *See infra* note 25.

24 The Senate Report on the bill stated: "The Violence Against Women Act represents an essential step in forging a national consensus that our society will not tolerate violence against women. . . . [N]owhere is the habit of violence harder to break than in the home. Until the 20th century, our society effectively condoned family violence . . . ." S. REP. NO. 103-138, at 41 (1993).

25 *See* Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 652 (1997) (defining federalization as "the enactment of federal legislation that allows prosecution in federal court of offenses that the states can also prosecute"). An Associate Professor at Cornell Law School and Assistant United States Attorney for the Northern District of New York, Steven Clymer provided the author with insights into federal criminal statutes and charging decisions.

Although VAWA has significant overlap with state domestic violence laws, one of its goals is to allow the prosecution of cases that might otherwise escape state prosecution because the actors cross state lines. *See* S. REP. NO. 103-138, at 43, 62. In addition, "VAWA does not encroach on traditional areas of state law; it complements them by recognizing a societal interest in ensuring that persons have a civil right to be free from gender-based violence . . . ." Doe v. Doe, 929 F. Supp. 608, 616 (D. Conn. 1996). States strongly supported the enactment of VAWA. *See* Letter from Robert Abrams, Attorney General of New York, to Jack Brooks, Chair of the House Judiciary Committee 2 (July 22, 1993) (on file with author) (expressing strong state support from the National Association of Attorneys General for the passage of the Violence Against Women Act because "the problem of violence against women is a national one, requiring federal attention, federal leadership, and federal funds").

successfully. The nation already pays a huge price for domestic violence, and VAWA furthers Congress's legitimate goal of addressing domestic violence constitutionally. Despite some inevitable problems, VAWA is the most workable, presently available solution to a problem that the states alone cannot address effectively.[26] VAWA's criminal provisions thus represent the proper federal role in policing domestic violence.

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26 For instance, in my prior tenure as a law enforcement officer, I investigated a series of domestic assaults occurring in the Northern District of New York that involved a married couple who had moved to New York from another state. During one incident, the perpetrator, while intoxicated, nearly succeeded in running over both me and another police officer before driving at high speed through the middle of town during rush hour. Because the perpetrator had no New York criminal record, he served only a few days in jail.

After the victim separated from the perpetrator, he visited her house on Christmas Eve and became intoxicated and violent. I arrived to find the victim and her two young children sheltering inside a vehicle while the perpetrator smashed the windshield with a piece of firewood. I discussed with the victim the possibility of her moving out of the state while the perpetrator was in jail, and she stated matter of factly that even if she moved across the country, he would find her. She observed that at least the local police in the Northern District of New York were aware of her ongoing struggles, and she had an order of protection that was valid in the state.

The victim then moved in next door to the police station in the hope of receiving protection. The perpetrator nonetheless drove to this location, on a suspended license, and began ramming the victim's vehicle with his own—even though the victim's vehicle sat in a parking lot between her home and the police station. The victim finally did leave the state, returning to New York only when the state finally incarcerated the perpetrator for a significant length of time for an assault on his new girlfriend. The victim reports that the effects on her children have been long lasting and that both require counseling. This situation is not unique. The perpetrator's mentality in this case was similar in many respects to the defendant's in *Von Foelkel*, discussed *infra* Part I.C.3(b).

The interstate protection that VAWA offers, along with its stiff penalties, could have allowed for quicker incarceration of the perpetrator if the victim had an order of protection in another state. The ability to enforce the New York protection order in another state under VAWA also could have increased the incentive for the victim to relocate earlier to the potential safety of another state. *See* Melanie L. Winskie, Note, *Can Federalism Save the Violence Against Women Act?*, 31 GA. L. REV. 985, 989 (1997) (noting that domestic violence "discourages women from interstate travel"). In his letter, Robert Abrams commented:

> We continue to believe the essential elements of [VAWA] are sorely needed.
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> . . . .
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> In each of our states, we have experienced the results of the widespread incidence of violence against women . . . . State and local governments, law enforcement agencies, courts, schools, domestic violence shelters and safe homes have borne the tremendous burdens caused by gender-based violence. States have sought to meet the needs of the victims of this violence as well as to prosecute vigorously those who engage in violence against women.
>
> We believe however, that the current system for dealing with violence against women is inadequate. Our experience as Attorneys General strengthens our belief that the problem of violence against women is a national one . . . .

Letter from Robert Abrams to Jack Brooks, *supra* note 25, at 1-2. The letter concludes that VAWA should be enacted. *See id.* at 2.

I
THE CONSTITUTIONALITY OF VAWA

A. The Main Provisions of VAWA[27]

Congress passed VAWA as part of the federal Violent Crime Control and Law Enforcement Act of 1994.[28] This Note focuses on the five criminal provisions codified at 18 U.S.C. §§ 2261-2265 and briefly discusses the civil rights remedies provision codified at 42 U.S.C. § 13981.

Section 2261 prohibits interstate domestic violence.[29] This section makes it a felony for an actor to cross state lines[30] with "the intent to injure, harass, or intimidate that person's spouse or intimate partner," if in so doing, he "intentionally commits a crime of violence and thereby causes bodily injury" to that spouse or significant other.[31] Section 2261 also prohibits a perpetrator from committing the same acts

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27 For a discussion of associated programs, including $1.2 billion in federal funding for the prevention of domestic violence and VAWA's amendments to the Immigration and Naturalization Act, see William G. Bassler, *The Federalization of Domestic Violence: An Exercise in Cooperative Federalism or a Misallocation of Federal Judicial Resources?*, 48 RUTGERS L. REV. 1139, 1141-48 (1996). In fiscal year 1995, the federal government appropriated $26 million dollars to state programs "to reduce violence against women" under Title IV of VAWA. VIOLENCE AGAINST WOMEN PROGRAM OFF., U.S. DEP'T OF JUSTICE, FACT SHEET, VIOLENCE AGAINST WOMEN (1994). These federal grants included the provision that a quarter of the money go to each of the following areas: law enforcement, prosecution, and nonprofit victim services, with the remaining quarter available for use at the state's discretion. *See id.* The state could use the money to improve victim assistance services, train law enforcement officers, develop better domestic violence policies, and hire more law enforcement and prosecution staff for programs targeted at domestic violence. *See id.* Average state eligibility for fiscal year 1995 was $426,000. *See id.* The grants also mandated certain state practices, including a domestic violence victim exemption from court filing fees. *See id.* For a discussion of the impact of VAWA on immigration proceedings, see, for example, *Pincilotti v. Reno*, No. C-95-2143 MHP, 1996 WL 162980 (N.D. Cal. Mar. 11, 1996) (discussing the effect of VAWA on deportation hearings).

28 Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of U.S.C.). VAWA includes seven subtitles, of which the major ones are: Subtitle A, Safe Streets for Women, which increases sentences for repeat offenders who commit sex crimes, now codified in scattered sections of U.S.C.; Subtitle B, Safe Homes for Women, which includes the sections now codified at 18 U.S.C. §§ 2261-2265 (1994 & Supp. II 1996); Subtitle C, Civil Rights for Women, creating a federal course of action for crimes of violence motivated by gender, now codified at 42 U.S.C. § 13981 (1994); and Subtitle D, Equal Justice for Women in the Courts, which provides funding to counter gender biases in the state and federal courts through training, now codified at 42 U.S.C. §§ 13991-14002 (1994 & Supp. II 1996). For a discussion of these subtitles, with an emphasis on 18 U.S.C. § 2265, see Catherine F. Klein, *Full Faith and Credit: Interstate Enforcement of Protection Orders Under the Violence Against Women Act of 1994*, 29 FAM. L.Q. 253, 254-57 (1995).

29 *See* 18 U.S.C. § 2261 (1994 & Supp. II 1996); *see also* Klein, *supra* note 28, at 268-69 (discussing the new crimes created by VAWA).

30 VAWA defines "[c]rossing a state line" as "travel[ing] across a State line or enter[ing] or leav[ing] Indian Country." *E.g.*, 18 U.S.C. § 2261(a)(1) (1994). For purposes of clarity, this Note's references to crossing state lines include entering or leaving Indian Country. Similarly, its references to state courts and state court orders include Indian tribal courts and Indian tribal court orders.

31 *Id.*

after he "causes [his] spouse or intimate partner to cross a State line . . . by force, coercion, duress, or fraud."[32] Section 2261A, added in 1996, expands VAWA to prohibit interstate stalking[33] by punishing a person who "travels across a State line . . . with the intent to injure or harass another person, and in the course of, or as a result of, such travel places that person in reasonable fear of the death of, or serious bodily injury . . . to," the victim or her immediate family.[34] This section also covers these acts if committed within the special maritime and territorial jurisdiction of the United States.[35]

Section 2262 prohibits the interstate violation of a state court's order of protection "that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons" the order covers.[36] As with § 2261, the actor's conduct falls within the statute either when he crosses a state line or when he causes his spouse or intimate partner to do so.[37]

Section 2263 allows the victim in a prosecution under VAWA the "opportunity to be heard regarding the danger posed by the defendant" during a pretrial detention hearing.[38] The court will consider the victim's testimony when determining whether to release the defendant pending trial.[39]

Section 2264 provides for restitution to the victim, regardless of any other civil or criminal penalties the law provides.[40] This section holds the perpetrator liable for the "full amount of the victim's losses"[41] in the following areas: "medical services relating to physical, psychiatric, or psychological care"; "physical and occupational therapy or rehabilitation"; "necessary transportation, temporary housing, and child care expenses"; "lost income"; "attorneys' fees, plus any costs incurred in obtaining a civil protection order"; and "any other losses suffered by the victim as a proximate result of the offense."[42] After

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32 *Id.* § 2261(a)(2).

33 *See id.* § 2261A (Supp. II 1996); *see also id.* § 875(c) (1994) (prohibiting the making of threats to injure or kidnap by telephone across state or national lines, as enacted in 1948). For an example of prosecution under 18 U.S.C. § 875(c), see *United States v. Sovie*, 122 F.3d 122 (2d Cir. 1997).

34 18 U.S.C. § 2261A.

35 *See id.* Unlike § 2261, § 2261A does not refer to the actor's former or current spouse or to his significant other. Perhaps this is a drafting error, or perhaps this section would apply even to perpetrators who have not been involved in a domestic relationship with the victim.

36 *Id.* § 2262(a)(1)(A)(i) (1994).

37 *See id.* § 2262(a)(1)-(2) (1994 & Supp. II 1996).

38 *Id.* § 2263 (1994).

39 *See id.*

40 *See id.* § 2264 (1994 & Supp. II 1996).

41 *Id.* § 2264(b)(1) (Supp. II 1996).

42 *Id.* § 2264(b)(3)(A)-(F) (1994).

the court convicts an actor under VAWA, it must issue a restitution order.[43]

Section 2265 provides that courts nationwide shall give full faith and credit to all valid protection orders that state courts issue.[44] This requirement means that all jurisdictions shall enforce any order of protection that one state court validly issues, if violated within the territory of another state, "as if it were the order of the enforcing State."[45] This section includes procedural protections that require the issuing court to have "jurisdiction over the parties and matter under the law of such State."[46] It also requires the issuing court to afford the affected individuals due process by providing "reasonable notice and opportunity to be heard" before granting the order or within a reasonable time thereafter, if the order is ex parte.[47] Unlike the other VAWA criminal provisions, § 2265 does not require that the offender cross a state line with criminal intent or that he cause the victim to do so.[48]

Finally, an especially controversial section of the Act, codified at 42 U.S.C. § 13981, creates "a Federal civil rights cause of action for victims of crimes of violence motivated by gender."[49] Under this section, "[a] person . . . who commits a crime of violence motivated by gender" and deprives the victim of her civil right to be free from crimes of violence "shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate."[50] Section 13981 has generated extensive debate and litigation that is largely beyond the scope of this Note.[51]

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43 *See id.* § 2264(b)(4) (1994 & Supp. II 1996); *see also* United States v. Hayes, 135 F.3d 133, 136-38 (2d Cir. 1998) (applying this section).

44 *See* 18 U.S.C. § 2265 (1994). This section is a critical part of VAWA because "[p]rior to the enactment of VAWA, the majority of states did not afford full faith and credit to protection orders issued in sister states. . . . [I]n order to receive protection in the foreign state, a victim had to petition the foreign state's court for a new protection order." Klein, *supra* note 28, at 254-55 (footnote omitted).

45 18 U.S.C. § 2265(a).

46 *Id.* § 2265(b)(1).

47 *Id.* § 2265(b)(2); *accord* Klein, *supra* note 28, at 256.

48 *See* 18 U.S.C. § 2265. The perpetrator thus could cross a state line without intent to harm the victim, who is protected by the order, but the government still could prosecute him if he later harms her. For a discussion of the jurisdictional underpinnings of this section, see Klein, *supra* note 28, at 255-57.

49 42 U.S.C. § 13981(a) (1994). This section is controversial because of the broad remedies it provides victims of domestic violence. *See* Shargel, *supra* note 9, at 1851 & n.15. Many have paid attention to these remedies because they go beyond protecting the physical safety of the victim by addressing their economic rights and giving them the impetus to sue. *See id.* n.15.

50 42 U.S.C. § 13981(c).

51 *See, e.g.*, Anisimov v. Lake, 982 F. Supp. 531 (N.D. Ill. 1997) (upholding statute); Brzonkala v. Virginia Polytechnic & State Univ., 935 F. Supp. 779 (W.D. Va. 1996), *rev'd*, 132 F.3d 949 (4th Cir. 1997), *reh'g en banc granted and vacated*, (Feb. 5, 1998) (The Fourth Circuit initially upheld the statute, but then reheard the case en banc in March 1998. An

B. Federal Criminal Statutes, the Commerce Clause, and *Lopez*

Because there is no general federal police power,[52] Congress had to rely extensively on the Commerce Clause[53] for the authority to enact VAWA.[54] Congress has authority to pass criminal statutes only in

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opinion is expected before the end of the year. *See* Letter from Hon. Diana Gribbon Motz, United States Circuit Judge, United States Court of Appeals for the Fourth Circuit, to author (April 29, 1998) (on file with author)); Doe v. Doe, 929 F. Supp. 608 (D. Conn. 1996) (upholding statute); Bassler, *supra* note 27, at 1148-60; Lisa A. Carroll, Comment, *Women's Powerless Tool: How Congress Overreached the Constitution with the Civil Rights Remedy of the Violence Against Women Act*, 30 J. MARSHALL L. REV. 803, 806-08 (1997); Maloney, *supra* note 9; Shargel, *supra* note 9; Carolyn Peri Weiss, Recent Development, *Title III of the Violence Against Women Act: Constitutionally Safe and Sound*, 75 WASH. U. L.Q. 723, 724-26, 734-39 (1997).

52 *See, e.g.*, United States v. Lopez, 514 U.S. 549, 552, 567 (1995) (stating that "[t]he Constitution creates a Federal Government of enumerated powers" and that "general police power" is "retained by the States"); United States v. Dewitt, 76 U.S. (9 Wall.) 41, 45 (1869); Norman Abrams, *Federal Criminal Law Enforcement*, *in* 2 ENCYCLOPEDIA OF CRIME AND JUSTICE 779, 779 (Sanford H. Kadish ed., 1983); Clymer, *supra* note 25, at 656.

53 U.S. CONST. art. I, § 8, cl. 3 (empowering Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

54 The Equal Protection Clause, U.S. CONST. amend. XIV, § 5, might provide grounds for lawsuits against a police department that systematically acts to deprive women of their rights under the law. *See* Jay S. Bybee, *Insuring Domestic Tranquility:* Lopez, *Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1, 63-67 (1997); Susanne M. Browne, Note, *Due Process and Equal Protection Challenges to the Inadequate Response of the Police in Domestic Violence Situations*, 68 S. CAL. L. REV. 1295, 1314-33 (1995); Laura S. Harper, Note, *Battered Women Suing Police for Failure to Intervene: Viable Legal Avenues After* Deshaney v. Winnebago County Department of Social Services, 75 CORNELL L. REV. 1393, 1398-1400 (1990); Carolyne R. Hathaway, Case Comment, *Gender Based Discrimination in Police Reluctance to Respond to Domestic Assault Complaints*, 75 GEO. L.J. 667, 677-90 (1986); Lauren L. McFarlane, Note, *Domestic Violence Victims v. Municipalities: Who Pays When the Police Will Not Respond?*, 41 CASE W. RES. L. REV. 929, 934-52 (1991); Chris A. Rauschl, Comment, Brzonkala v. Virginia Polytechnic and State University*: Violence Against Women, Commerce, and the Fourteenth Amendment—Defining Constitutional Limits*, 81 MINN. L. REV. 1601, 1626-28 (1997); Daniel P. Whitmore, Note, *Enforcing the Equal Protection Clause on Behalf of Domestic Violence Victims: The Impact of* Doe v. Calumet City, 45 DEPAUL L. REV. 123, 135-41 (1995). It is questionable whether the Equal Protection Clause justifies affirmative police-power legislation because no state action is involved. *Cf.* Rauschl, *supra*, at 1626 (noting that the Equal Protection Clause does not allow "Congress to reach purely private conduct"). Some argue, however, that state *in*action is sufficient grounds for federal intervention under the Fourteenth Amendment when officials are not evenly enforcing rights protected under state law. *See* Winskie, *supra* note 26, at 1028-29. Regardless of whether this analysis is correct in terms of Congress's authority to pass VAWA, these patterns of official inactivity help demonstrate that VAWA makes good sense from a public policy standpoint. For a discussion of the Equal Protection Clause in a number of contexts, including gender, see LOIS G. FORER, UNEQUAL PROTECTION (1991).

The civil rights section of VAWA specifically states that its enactment was "[p]ursuant to the affirmative power of Congress . . . under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution [the Commerce Clause] . . . to promote public safety, health, and activities affecting interstate commerce." 42 U.S.C. § 13981(a) (1994); *see* Maloney, *supra* note 9, at 1876; Megan Weinstein, Recent Development, *The Violence Against Women Act After* United States v. Lopez*: Defending the Act from Constitutional Challenge*, 12 BERKELEY WOMEN'S L.J. 119, 119 n.2 (1997). The civil rights remedies provision, unlike the criminal provisions, does not include the jurisdictional nexus of crossing state lines. *Compare* 18 U.S.C. § 2261 (allowing federal government intervention only if the offense relates to interstate travel), *with* 42 U.S.C. § 13981 (allowing a

the limited areas that do not overlap with state criminal laws.[55] One area is the regulation of interstate commerce under the Commerce Clause.[56] Though a seemingly limited mandate, Congress's power to regulate under the Commerce Clause historically has been far reaching.[57] Until recently, the Supreme Court upheld federal statutes, allegedly authorized by the Commerce Clause, that demonstrated only the most tenuous links to interstate commerce.[58] For example, Congress could regulate solely intrastate activities under this power if it could show that the activities had a substantial effect on interstate commerce.[59] For several decades, appellants unsuccessfully challenged criminal statutes that Congress had passed under authority of the Commerce Clause.[60]

The Supreme Court's interpretation of congressional Commerce Clause authority changed in *United States v. Lopez*[61] when a convicted

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victim to recover from any person "who commits a crime of violence motivated by gender," regardless of whether the offense involved interstate travel). Several cases have addressed the constitutionality of the civil rights remedies provision. *See, e.g.*, Anisimov v. Lake, 982 F. Supp. 531 (N.D. Ill. 1997) (upholding provision); Seaton v. Seaton, 971 F. Supp. 1188 (E.D. Tenn. 1997) (upholding provision); Doe v. Hartz, 970 F. Supp. 1375 (N.D. Iowa 1997) (upholding provision); Brzonkala v. Virginia Polytechnic & State Univ., 935 F. Supp. 779 (W.D. Va. 1996) (finding provision unconstitutional), *rev'd*, 132 F.3d 949 (4th Cir. 1997), *reh'g en banc granted and vacated*, (1998); Doe v. Doe, 929 F. Supp. 608 (D. Conn. 1996) (upholding provision).

55 *See* THE FEDERALIST No. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961) ("The powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which are to remain in the State Governments are numerous and indefinite."); Clymer, *supra* note 25, at 645 n.1 (noting that "[u]nder the Constitution, Congress has explicit power to criminalize only counterfeiting," maritime crimes, crimes against other nations, crimes committed on federal property, and treason). Congress passed the Interstate Commerce Act, Ch. 104, 24 Stat. 379 (1887), followed by the Sherman Antitrust Act, Ch. 647, 26 Stat. 209 (1890). "These laws ushered in a new era of federal regulation under the commerce power." *Lopez*, 514 U.S. at 554.

56 *See* Clymer, *supra* note 25, at 656.

57 *See id.* at 658.

58 *See id.* at 664-65; Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 677-82 (1995). *Lopez* clarified the proper test within this category, requiring that the regulated activity "substantially affect" interstate commerce, and not merely "affect" it. *Lopez*, 514 U.S. at 559.

59 *See* Perez v. United States, 402 U.S. 146, 154-57 (1971); *see also Lopez*, 514 U.S. at 560 (describing *Wickard* as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity"); Wickard v. Filburn, 317 U.S. 111 (1942) (representing the high-water mark of upholding federal economic regulation of solely intrastate activity under the Commerce Clause).

60 *See, e.g.*, *Perez*, 402 U.S. at 156-57 (upholding a federal antiloansharking statute despite the term "commerce" appearing nowhere in the statute and absent a showing that the defendant's activities had any connection to interstate commerce); Clymer, *supra* note 25, at 656-58 (observing that until *Lopez*, "*Perez* suggested that Congress has almost unlimited power to enact federal criminal legislation under the Commerce Clause").

61 514 U.S. 549 (1995). At the time that *Lopez* was prosecuted, the language of the statute provided: "It shall be unlawful for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone," which was defined as the space within 1000 feet of a school. 18 U.S.C. § 922(q)(2)(A) (1994). When the Supreme Court heard *Lopez*, the Act was located at § 922(q)(1)(A), but Congress

defendant successfully challenged a provision of the Gun-Free School Zone Act of 1990 ("GFSZA").[62] *Lopez* overturned the conviction of a defendant who knowingly possessed a firearm within 1000 feet of a school.[63] The *Lopez* Court found the statute deficient in several respects. The statute did not require a finding that the weapon involved had traveled in interstate commerce.[64] Moreover, before passing the statute, Congress made no findings regarding the effects of firearms on education or how gun-related violence in schools affects the nation's ability to compete in foreign commerce.[65] Thus, the Court held that GFSZA exceeded Congress's authority under the Commerce Clause because it "neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce."[66] This Note briefly will review several points made in *Lopez* that bear on an understanding of VAWA's constitutionality.

1. *Interstate/Intrastate Distinctions*

Lopez separated the types of regulation that Congress may enact under the Commerce Clause into three categories, which form an important framework for analyzing statutes that Congress passes under its authority.[67] "First, Congress may regulate the channels of interstate commerce."[68] Second, Congress may regulate the "instrumentalities of interstate commerce," which include "persons or things in interstate commerce, even though the threat may come only from intrastate activities."[69] Finally, Congress may regulate activities that have

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changed it to § 922(q)(2)(A) in 1994. *See* Violent Crime Control and Law Enforcement Act of 1994 § 320904, Pub. L. No. 103-322, 108 Stat. 1796, 2125.

62 Pub. L. No. 101-647, 104 Stat. 4844 (codified as amended at 18 U.S.C. § 922(q)).

63 *See Lopez*, 514 U.S. at 551 & n.1.

64 *See* 18 U.S.C. § 922(q)(2)(A).

65 *See Lopez*, 514 U.S. at 552 ("The Court of Appeals for the Fifth Circuit . . . held that, in light of what it characterized as insufficient congressional findings and legislative history, 'section 922(q) . . . is invalid as beyond the power of Congress under the Commerce Clause.' . . . [W]e now affirm." (citations omitted)).

66 *Id.* at 551.

67 *See id.* at 558-59; Maloney, *supra* note 9, at 1905-08.

68 *Lopez*, 514 U.S. at 558. These channels include the roadways and navigable waters of the United States, and the federal government has broad powers to regulate activities that use those channels. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258, 261 (1964) (holding that the federal government can enforce civil rights statutes in a locally owned and operated restaurant because it serves interstate customers); United States v. Darby, 312 U.S. 100, 114-23 (1941) (stating that the NLRB has authority to regulate wages and hours if the goods manufactured using lower labor standards are then shipped in interstate commerce because these goods would unfairly compete with those produced elsewhere); The Daniel Ball, 77 U.S. (10 Wall.) 557, 565-66 (1870) (holding that the federal power to regulate under the Commerce Clause extends to navigable waters as channels of interstate commerce); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 193-97 (1824) (declaring that Congress, not the states, regulates use of navigable waters).

69 *Lopez*, 514 U.S. at 558; *see, e.g.*, Perez v. United States, 402 U.S. 146, 150 (1971) (noting that though the case dealt primarily with the regulation of intrastate loansharking because of its substantial effect on interstate commerce, Congress could regulate the mis-

a "substantial relation" to interstate commerce—"those activities that substantially affect interstate commerce."[70]

In *Lopez*, the Court analyzed GFSZA under the third category—activities substantially affecting interstate commerce—and found it unconstitutional.[71] In finding the GFSZA unconstitutional, the *Lopez* Court relied on four factors.[72] First, it examined whether the Act regulated economic activity or only criminal conduct,[73] discussing *Wickard v. Filburn*.[74] In *Wickard*, a farmer faced a penalty for violating a federal statute governing the consumption of wheat, even though the farmer grew and consumed the wheat entirely on his own farm.[75] The *Wickard* Court held that in the aggregate these acts could affect interstate commerce, despite occurring solely at the local level.[76] In *Lopez*, the Court refused to extend this precedent to noneconomic regulation, reasoning that GFSZA was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[77] It explained that without a showing that the regulated activity was a necessary part of a larger framework of economic regulation, the Act "cannot . . . be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce."[78] The Court in *Lopez* seemed to hold that when the regulated activity takes place solely at the intrastate level, courts will sustain only direct economic regulation and not criminal statutes under the substantially related category of Commerce Clause regulation.[79]

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use of the interstate channels of commerce or could act to protect interstate shipments from theft or to prevent the destruction of instrumentalities of interstate commerce such as airplanes); Houston, E. & W. Tex. Ry. Co. v. United States, 234 U.S. 342, 353-54 (1914) (holding that Congress may regulate railway rates when railway companies penalize interstate travel by making it more expensive to travel across state lines than to move in intrastate travel); Southern Ry. Co. v. United States, 222 U.S. 20, 26-27 (1911) (finding that Congress may impose safety regulations on railway cars used in interstate transportation).

70 *Lopez*, 514 U.S. at 558-59.

71 *See Lopez*, 514 U.S. at 555-68 (noting that 18 U.S.C. § 922(q) does not involve "a regulation of the use of the channels of interstate commerce" and was not intended to protect an instrumentality of interstate commerce or a person or thing moving in interstate commerce and finding that it did not "substantially affect" interstate commerce).

72 *See* Weinstein, *supra* note 54, at 122-23.

73 *See Lopez*, 514 U.S. at 559-62.

74 317 U.S. 111 (1942).

75 *See id.* at 114-15.

76 *See id.* at 128-29.

77 *Lopez*, 514 U.S. at 561. "Even *Wickard* . . . involved economic activity in a way that the possession of a gun in a school zone does not." *Id.* at 560.

78 *Id.* at 561; *see* Weinstein, *supra* note 54, at 122-23.

79 *See* Weinstein, *supra* note 54, at 122-23. This distinction indicates that if VAWA addresses solely intrastate domestic violence, it cannot be sustained by the argument that domestic violence in one state has a substantial effect on interstate commerce. This Note discusses two arguments against this interpretation, *see infra* Part I.C.2. First, it might be an

The majority in *Lopez* did suggest that some criminal statutes could be upheld under this category. The Court noted, for instance, that criminal statutes might survive scrutiny if they are "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[80] As the Court admitted it can be difficult to determine "whether an intrastate activity is commercial or noncommercial."[81] It concluded that, while some uncertainty is inevitable, Congress's authority to regulate under the Commerce Clause has "judicially enforceable outer limits."[82] One can read *Lopez* as merely reminding Congress that limits exist, without delineating precisely what those limits are.

Notably, the Court faulted Congress for failing to provide findings on the record regarding the effect on interstate commerce of gun possession in school zones.[83] This point would be superfluous if the holding were as broad as it first seems because the Court would not want economic-impact data if it meant to reject GFSZA simply because of its focus on criminal sanctions. The Court might be willing to consider statutes such as GFSZA as part of a larger scheme of economic regulation, despite the use of criminal sanctions. The Court's further criticism that the statute failed to connect the firearms in question with movement through interstate commerce, however, could indicate its willingness to analyze the statute as a category-one regulation—the channels of interstate commerce.[84]

With respect to the other two categories of Commerce Clause regulation, the statute did not explicitly tie the regulated conduct to a threat against either the channels of interstate commerce or persons or property traveling in interstate commerce. Therefore, the Court had no reason, once it explained the framework of Commerce Clause jurisprudence, to employ these categories in its analysis.[85] Unlike

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overly broad reading of the decision in *Lopez*. Second, VAWA, in fact, addresses acts of domestic violence that cross state lines.

80 *Lopez*, 514 U.S. at 561. A narrow reading of the opinion suggests that the Court simply wants to see specific findings about how the statute furthers a larger regulatory scheme. This reading could help reconcile the Court's approval of the criminal sanctions for intrastate loansharking upheld in *Perez v. United States*, 402 U.S. 146 (1971), which the majority cited repeatedly in *Lopez*. *See Lopez*, 514 U.S. at 557-59, 563. The Court seemed to make this criticism when it stated "§ 922(q) has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." *Id.* at 562.

81 *Lopez*, 514 U.S. at 566.

82 *Id.*

83 *See id.* at 562.

84 *See id.* at 563 ("[T]o the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here.").

85 *See id.* at 559.

GFSZA, the channels and instrumentalities categories are particularly relevant to an understanding of why the criminal provisions of VAWA should survive constitutional scrutiny.

2. *The Jurisdictional Nexus*

The Court criticized GFSZA for not containing a "jurisdictional element which would ensure, through case-by-case inquiry, that the firearm" involved in the offense had moved in interstate commerce, avoiding prosecution of solely intrastate offenders.[86] One commentator observed that the statute easily could meet this jurisdictional element because the Court would require only a finding that the firearm, that the ammunition, or that even the gunpowder had traveled in interstate commerce before or while the defendant possessed them.[87] This finding would enable Congress to regulate the firearms and the accessories, which had moved through the channels of interstate commerce. Congress consequently would avoid the need to demonstrate that the activity has a substantial effect on interstate commerce. In effect, the Court warned Congress to include a jurisdictional nexus in its criminal statutes to survive a *Lopez* challenge.[88]

3. *Deference to Congress Under the Rational Basis Test*

The *Lopez* Court was unwilling to defer to Congress's judgment that the regulated activity posed a harm to interstate commerce because Congress had made no such findings on the record.[89] Under the rational basis test, the Court typically defers to the wisdom of the legislature if a rational basis for the statute could exist, regardless of whether the hypothesized rationale in fact motivated Congress to enact the statute.[90] In *Lopez*, however, the Court refused to accept the Government's arguments that a rational legislature could have intended the statute to address various impacts on the national economy. To accept this argument, the Court reasoned it "would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general

86 *Id.* at 561.

87 *See* Clymer, *supra* note 25, at 662-64.

88 *See id.* at 661.

89 *See Lopez*, 514 U.S. at 562.

90 *See, e.g.*, Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981) ("The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding."). *But cf. Lopez*, 514 U.S. at 556-57 (discussing that rational basis has "outer limits"); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) ("[I]n the light of our dual system of government [Commerce Clause power] may not be extended so as to embrace effects upon interstate commerce so indirect and remote that . . . [it] would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.").

police power of the sort retained by the States."[91] The Court argued that by following the broad and ex post "'costs of crime'" justifications the Government had put forward, "Congress could regulate . . . all violent crime[s] . . . regardless of how tenuously they relate to interstate commerce."[92] *Lopez* indicates that the Court will grant only limited deference to Congress when dealing with Commerce Clause, police-power regulation. The Court seems to scrutinize more closely criminal rather than economic regulations that Congress passes under authority of the Commerce Clause.

4. *Resulting Framework for Post-*Lopez *Constitutional Analysis*

Apparently, *Lopez* poses only minor obstacles to Congress's authority to enact criminal statutes under the Commerce Clause. In addition to clarifying the analytical framework discussed above, however, the case makes three important changes that arguably effect "a minor constitutional revolution."[93] *Lopez* marks a shift away from past holdings that Congress may regulate any activities generally affecting interstate commerce.[94] The Court now actually may hold Congress to a standard that requires intrastate conduct to "'substantially affect' interstate commerce" before Congress can regulate it.[95] Although Congress's power to regulate under the Commerce Clause is still nominally subject to the rational basis test, *Lopez* announces a tougher standard for this review.[96] The Court's refusal to defer to the possible motivations of a reasonable legislature in passing the Act and its criticism of Congress's lack of findings provide further evidence that the Court used this tougher form of the rational basis test. That the Court again imposed outer limits on congressional authority under the Commerce Clause breathed life into a principle that has existed for the better part of a century in theory, but not in practice.[97] A criminal statute that does not regulate the channels

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91 *Lopez*, 514 U.S. at 567.

92 *Id.* at 564.

93 Merritt, *supra* note 58, at 676; *see* Robert F. Nagel, *Real Revolution*, 13 GA. ST. U. L. REV. 985, 992 (1997) ("That the central government's regulatory power is effectively unlimited was conventional academic wisdom until *Lopez* . . . ."); *see also* Deborah Jones Merritt, *The Fuzzy Logic of Federalism*, 46 CASE W. RES. L. REV. 685, 689-90 (1996) (observing that there is no distinct boundary between what is and what is not commerce and that the line reflects social policy choices that are within the authority of Congress, and not the courts, to set).

94 *See* Merritt, *supra* note 58, at 677-82.

95 *Lopez*, 514 U.S. at 558-59.

96 *See* Merritt, *supra* note 58, at 677, 682-83; *see also* Weinstein, *supra* note 54, at 123 (arguing that this tougher standard still falls far below the intermediate levels of scrntiny applied in some equal protection cases).

97 *See* Stephen R. McAllister, Lopez *Has Some Merit*, 5 KAN. J.L. & PUB. POL'Y, Spring 1996, at 9, 10-11; Merritt, *supra* note 58, at 677, 689-90; Robert F. Nagel, *The Future of Federalism*, 46 CASE W. RES. L. REV. 643, 661 (1996) (arguing that commentators who question the federal regulatory role are "looking for the future in the wrong place" when looking to *Lopez*).

or instrumentalities of interstate commerce, but does regulate intrastate activity, must clearly demonstrate that the intrastate activity has substantial effects on interstate commerce. It also must be a necessary part of a greater regulatory scheme. To have the greatest chance of surviving scrutiny, the statute should identify a jurisdictional nexus whereby the channels of interstate commerce at least are tangentially involved in the prohibited act. As demonstrated below, the criminal provisions of VAWA do have this requisite nexus and do not regulate solely intrastate activities.

C. *Lopez* Challenges to VAWA

The previous sections of this Part presented VAWA's provisions and analyzed the changes in Commerce Clause jurisprudence following *Lopez*. This section addresses how *Lopez* has affected VAWA. First, it discusses the nature of the *Lopez* challenge to VAWA, specifically focusing on the struggle some courts have had with the *Lopez* formula and on the increase in challenges to VAWA. Second, it presents and analyzes the arguments that have persuaded some courts that VAWA is unconstitutional. Finally, it parses the analyses of four cases in which courts have rebuffed *Lopez* challenges to VAWA.

1. *The Nature of the* Lopez *Challenge to VAWA*

Given the resulting uncertainty among judges and commentators following *Lopez*, it is hardly surprising that defense attorneys began mounting numerous *Lopez* challenges to federal statutes that Congress had passed under authority of the Commerce Clause,[98] including chal-

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98 *See, e.g.*, United States v. Griffin, No. 96-4803, 1998 WL 20696, at *1 (4th Cir. Jan. 22) (rejecting a *Lopez* challenge to 18 U.S.C.A. § 922(q)(1) (West Supp. 1998), prohibiting possession of a firearm by a felon), *cert. denied*, 118 S. Ct. 2071 (1998); United States v. Wilson, 133 F.3d 251, 255-57 (4th Cir. 1997) (upholding a challenge to the validity of a regulation, 33 C.F.R. § 328.3(a)(3) (1993), enacted pursuant to the Clean Water Act, 33 U.S.C. §§ 1311(a), 1319(c)(2)(A) (1994)); Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949, 964-74 (4th Cir. 1997) (holding that VAWA's civil rights remedies provisions did not exceed constitutional authority), *reh'g en banc granted and vacated*, (Feb. 5, 1998); Belflower v. United States, 129 F.3d 1459, 1460-62 (11th Cir. 1997) (upholding a prosecution under an arson statute, 18 U.S.C. § 844(i) (Supp. II 1996), in violation of which defendant placed a bomb in a deputy sheriff's patrol car, which was used to patrol channels of interstate commerce), *cert. denied*, 118 S. Ct. 2308 (1998); United States v. Cardoza, 129 F.3d 6, 10-13 (1st Cir. 1997) (upholding the prosecution of a felon who possessed a bullet in contravention of 18 U.S.C. §§ 921(a)(17)(A), 922(g)(1) (1994) without a showing that the bullet "substantially affected" interstate commerce); United States v. Bailey, 123 F.3d 1381 (11th Cir. 1997) (upholding the constitutionality of 18 U.S.C. § 922(o) (1994), prohibiting possession and transfer of machine guns); United States v. Romero, 122 F.3d 1334, 1339 (10th Cir. 1997) (rejecting a challenge to the federal car-jacking statute, 18 U.S.C. § 2119 (1994 & Supp. II 1996)), *cert. denied*, 118 S. Ct. 1310 (1998); United States v. Farrish, 122 F.3d 146, 148-49 (2d Cir. 1997) (rejecting a *Lopez* challenge to a prosecution under the Hobbs Act, 18 U.S.C. § 1951 (1994)), *cert. denied*, 118 S. Ct. 1056 (1998); United States v. Zizzo, 120 F.3d 1338, 1350-51 (7th Cir.) (rejecting a *Lopez* challenge to a federal statute prohibiting gambling business over a certain size when forbidden by state or local law, 18 U.S.C. § 1955), *cert. denied*, 118 S. Ct. 566 (1997); United States v.

lenges to criminal prosecutions under VAWA. Unlike GFSZA, the criminal provisions of VAWA generally[99] contain the jurisdictional elements of crossing a state line or of committing a crime within the special maritime and territorial jurisdiction of the United States.[100] By including these jurisdictional elements, Congress specifically tailored the criminal provisions of VAWA to interstate offenses or to offenses falling completely outside state jurisdiction. Therefore, courts should not analyze these provisions under *Lopez*'s third category—an activity having a substantial effect on interstate commerce.[101] *Lopez* challenges to VAWA are inappropriate because Congress did not rely on the substantial effects of the proscribed activity when it enacted VAWA.[102]

VAWA's requirement that the offender either cross a state line or cause his victim to do so indicates that *Lopez*'s second category simi-

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Crump, 120 F.3d 462, 465-66 (4th Cir. 1997) (denying a challenge to a statute prohibiting the use and carrying of a firearm during a drug crime prosecutable under 18 U.S.C. § 924(c)(1)); United States v. Trupin, 117 F.3d 678, 682-85 (2d Cir. 1997) (rejecting a challenge to 18 U.S.C. § 2315, prohibiting possession of stolen goods that have crossed state or national lines), *cert. denied*, 118 S. Ct. 699 (1998); United States v. Lewis, 115 F.3d 1531, 1539 (11th Cir) (refusing to consider a challenge to a federal kidnapping statute, 18 U.S.C. § 1201 (1994 & Supp. II 1996)), *reh'g en banc denied*, 124 F.3d 1301 (11th Cir. 1997), *and cert. denied* 118 S. Ct. 733 (1998); United States v. Johnson, 114 F.3d 476, 479-80 (4th Cir.) (upholding a federal child support collection statute, 18 U.S.C.A. § 228 (West Supp. 1998)), *cert denied*, 118 S. Ct. 258 (1997); United States v. Bailey, 112 F.3d 758, 765-66 (4th Cir.) (upholding VAWA, 18 U.S.C. § 2261(a) (1994 & Supp. II 1996)), *cert. denied*, 118 S. Ct. 240 (1997); United States v. Ekinci, 101 F.3d 838, 844 (2d Cir. 1996) (finding constitutional under Commerce Clause powers the Drug Abuse Prevention and Control Act, 21 U.S.C. § 860 (1994), which like the Gun Free School Zone Act at issue in *Lopez*, provided an enhanced penalty for the trafficking of controlled suhstance in interstate commerce within 1000 feet of a school); Proyect v. United States, 101 F.3d 11 (2d Cir. 1996) (upholding a federal statute prohibiting the manufacture of marijuana, 21 U.S.C. § 841(a)(1), even though it did not require an intent to distribute the marijuana in interstate commerce); United States v. Garcia, 94 F.3d 57, 64-65 (2d Cir. 1996) (upholding portions of the statute struck down in *Lopez* that prohibit possession of firearms by felons, 18 U.S.C. § 922(g) (1994 & Supp. II 1996)).

99 The exception is 18 U.S.C. § 2265's full faith and credit provision. *See* Klein, *supra* note 28, at 255-59.

100 For instance, § 2261 requires the offender to cross a state line or cause the victim to cross a state line, *see* 18 U.S.C. § 2261(a) (1994), while § 2262 prevents the interstate violation of a protection order, *see id.* § 2262(a) (1994 & Supp. II 1996). The definition section at § 2266 also states that "'travel across State lines'" does not include the travel by a member of an Indian tribe across state lines when his tribal boundaries extend across those lines. *Id.* at § 2266 (1994).

The special jurisdiction by definition exists outside the territorial limits of any state and on federal installations within a state. Section 2261A, interstate stalking, also refers to this territory. *See id.* § 2261A (Supp. II 1996). For another example, see *id.* § 7 (1994 & Supp. II 1996) (defining the special maritime and territorial jurisdiction of the United States through numerous examples, including ships at sea outside the territorial waters of a state, aircraft in flight while outside the jurisdiction of a state, or federal military installations within a state).

101 *But see* Mary C. Carty, Comment, Doe v. Doe *and the Violence Against Women Act: A Post-*Lopez, *Commerce Clause Analysis*, 71 ST. JOHN'S L. REV. 465, 475-80 (1997) (arguing that VAWA is of questionable constitutional validity).

102 *See supra* note 71 and accompanying text (noting that unlike VAWA, Congress predicated GFSZA on substantial effects).

larly does not apply.[103] This second category applies solely to intrastate activities that have a substantial impact on the instrumentalities of interstate commerce or on persons traveling in interstate commerce.[104] This category does not apply to VAWA because the criminal provisions of this Act require that the offender either travel across state lines or cause his victim to do so.[105]

To analyze properly the criminal provisions of VAWA, a court should look to *Lopez*'s first category—congressional regulation of the channels of interstate commerce.[106] In *United States v. Von Foelkel*,[107] the United States made this argument to the Second Circuit.[108] Congress's greatest authority under Commerce Clause jurisprudence is the regulation of criminal activities that affect the channels of interstate commerce. Because the statute requires interstate travel, it makes a prima facie showing of jurisdictional nexus.[109] Even the *Lopez*

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103 A district court that struck down 18 U.S.C. § 2262 (1994 & Supp. II 1996) as unconstitutional found that "[t]his case clearly does not implicate the second category of permissible legislation" covering the "'protection of the instrumentalities of commerce.'" United States v. Wright, 965 F. Supp. 1307, 1311 (D. Neb.) (quoting Perez v. United States, 402 U.S. 146, 150 (1971)), *rev'd*, 128 F.3d 1274 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 1376 (1998). On appeal, however, the Eighth Circuit upheld VAWA's constitutionality as a proper regulation of the channels of interstate commerce. *See* United States v. Wright, 128 F.3d 1274, 1276 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 1376 (1998).

104 Classic examples of this category include statutes upheld in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding the public accommodations provision of the Civil Rights Act of 1964 by requiring a motel operator to serve racial minorities, even though his business was solely intrastate, because this activity in the aggregate could deter interstate travel), and *Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding the Civil Rights Act of 1964 as applied to restaurants operating solely within one state if they receive a substantial amount of the food via interstate commerce).

105 This assertion is not to say that the courts will strike down statutes regulating solely intrastate activity as a result of *Lopez*. As many courts have realized in the wake of *Lopez*, the Court "did not purport to overrule those cases that have upheld application of the Commerce Clause power to wholly intrastate activities." United States v. Genao, 79 F.3d 1333, 1337 (2d Cir. 1996). The Ninth Circuit agreed, holding that in *Lopez*, "rather than limiting the applicability of the Commerce Clause, the Court simply declined to expand the breadth of Congress' power to regulate under the Commerce Clause to include the Gun Act." United States v. Kim, 94 F.3d 1247, 1249 (9th Cir. 1996); *see* Brief for Appellee at 32-34, United States v. Von Foelkel, 136 F.3d 339 (2d Cir. 1998) (No. 97-1167).

106 The Court never meant to blur the requirements of one type of Commerce Clause regulation into another. For instance, five days after *Lopez* was handed down, the Court ruled on the appeal from the conviction of a gold mining operation under a section of the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. § 1962(a) (1994). *See* United States v. Robertson, 514 U.S. 669 (1995). The Court decided that the Government was not required to show that the mine affected interstate commerce, but only that it was an enterprise engaged in foreign or interstate commerce. *See id.* at 671-72. The three categories of Commerce Clause regnlation in *Lopez* are "analytically distinct." United States v. Pappadopoulos, 64 F.3d 522, 526 (9th Cir. 1995).

107 136 F.3d 339 (2d Cir. 1998).

108 *See* Brief for Appellee at 32-34, *Von Foelkel* (No. 97-1167).

109 Regarding a challenge to 18 U.S.C. § 2261 (1994 & Supp. II 1996), one court noted that "[t]he challenged statutory provision arose in an area [in] which Congressional power is exceedingly broad." United States v. Gluzman, 953 F. Supp. 84, 88 (S.D.N.Y. 1997), *aff'd*, 154 F.3d 49 (2d Cir. 1998).

Court acknowledged that "'[t]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.'"[110]

Why then have any *Lopez* challenges to VAWA's criminal provisions succeeded,[111] and why do defendants continue to bring them?[112] These challenges have succeeded and have continued partly because of the uproar the *Lopez* decision created and because of the resulting uncertainty about how broadly to read the decision.[113] In addition, a couple of successful challenges in the district courts, which managed to play on this confusion, have given defendants some language that seems compelling when taken out of context.[114] *Lopez*'s three distinct categories of permissible regulation under the Commerce Clause further compound the problem because courts often quote them out of context.[115] Also, if taken at face value, the language courts use in describing and analyzing the three categories could lead to very different outcomes with respect to the constitutionality of VAWA's criminal provisions.[116] Perhaps because of law enforcement officers' initial low level of awareness of VAWA,[117] the United States brought relatively few prosecutions in federal court during the first three years after VAWA's enactment.[118] Finally, in 1997 three courts of appeals—the Second, the Fourth, and the Eighth

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110 United States v. Lopez, 514 U.S. 549, 558 (1995) (quoting Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 256 (1964) (citation omitted)).

111 *See* United States v. Bailey, 112 F.3d 758 (4th Cir.), *cert. denied*, 118 S. Ct. 240 (1997); United States v. Wright, 965 F. Supp. 1307 (D. Neb.), *rev'd*, 128 F.3d 1274 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 1376 (1998).

112 *See, e.g.*, *Von Foelkel*, 136 F.3d at 339; *Gluzman*, 953 F. Supp. at 84.

113 *Cf.* Merritt, *supra* note 58, at 674-77 (noting that *Lopez* created both uproar and uncertainty).

114 For example, in dismissing a prosecution under 18 U.S.C. § 2262(a)(1) (1994 & Supp. II 1996), one district court stated that "[a]n interstate movement does not necessarily involve or otherwise have an impact or effect on interstate commerce, an indispensable and fundamental requirement for the constitutionality of legislation such [as this] and a jurisdictional element for violation of the statute." *Wright*, 965 F. Supp. at 1308.

115 For instance, in *Wright* the court discussed the three categories of legislation under the Commerce Clause. *See* 965 F. Supp. at 1310-15. In its analysis, the court borrowed the requirement of showing a substantial effect on interstate commerce from category three, dealing with the regulation of solely intrastate activities, and applied it in a category-one situation involving a regulation of the channels of interstate commerce. *See id.* at 1314-15. It thus required a showing of a substantial effect on interstate commerce in deciding the constitutionality of § 2262, which requires the offender to use the interstate channels by crossing state lines. *See* 18 U.S.C. § 2262.

116 *Compare Wright*, 965 F. Supp. at 1310-15 (confusing two of the *Lopez* categories and holding that § 2262 is unconstitutional), *with Gluzman*, 953 F. Supp. at 90-91 (applying the first *Lopez* category and holding that § 2261 is constitutional because "it is triggered only if an individual crosses a state line with the intent to injure, harass, or intimidate his or her spouse or intimate partner").

117 *See supra* note 6.

118 *See, e.g.*, United States v. Bailey, 112 F.3d 758, 765 (4th Cir.) (writing in May, 1997 that the only precedent available in the federal courts relating to VAWA dealt with the civil

Circuits—upheld prosecutions under VAWA.[119] Of the three, only the Fourth and the Eighth Circuits explicitly ruled that Congress's use of the commerce power to enact a criminal provision of VAWA was constitutional.[120] While the defendant did not challenge the constitutionality of VAWA in the initial Second Circuit case, both the Second and the Sixth Circuits explicitly held that criminal provisions of VAWA were constitutional the following year.[121]

The number of challenges to VAWA's constitutionality appears to be growing as prosecutors bring more cases under the Act.[122] As the next section demonstrates, some district courts are receptive to the argument that VAWA is unconstitutional, which gives defense attorneys the impetus to challenge it. Constitutional challenges to VAWA also may be numerous because defendants, with relative ease, can raise them for the first time on appeal. In addition, by raising a constitutional challenge on appeal, an attorney gives the appearance that she is diligently representing her client.[123] Because constitutional challenges based on subject matter jurisdiction affect the jurisdiction of the trial court to convict the defendant, the defendant cannot waive them and may raise them at any time.[124] Even if litigated at

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rights remedies provision, 42 U.S.C. § 13981(c) (1994), and not the criminal provisions), *cert. denied*, 118 S. Ct. 240 (1997). For a discussion of law enforcement's response to VAWA's full faith and credit provisions, see *infra* Part II.D.

119 *See* United States v. Wright, 128 F.3d 1274 (8th Cir. 1997) (upholding a conviction under § 2262(a)(1)), *cert. denied*, 118 S. Ct. 1376 (1998); United States v. Casciano, 124 F.3d 106 (2d Cir.) (upholding a conviction under § 2262(a)(1), though the constitutionality of the statute itself was not challenged by the defendant), *cert. denied*, 118 S. Ct. 639 (1997); *Bailey*, 112 F.3d at 758 (upholding a conviction after the defendant challenged the constitutionality of § 2261(a)).

120 *See Wright*, 128 F.3d at 1276 (noting that because § 2262(a)(1) requires the crossing of a state line with threatening intent, it "falls within Congress's authority 'to keep the channels of interstate commerce free from immoral and injurious uses'" (quoting Caminetti v. United States, 242 U.S. 470, 491 (1917))); *Bailey*, 112 F.3d at 766 ("We are of opinion the statute [18 U.S.C. § 2261(a)] is valid.").

121 *See* United States v. Page, 136 F.3d 481 (6th Cir.), *reh'g en banc granted and vacated*, 143 F.3d 1049 (6th Cir. 1998); United States v. Von Foelkel, 136 F.3d 339 (2d Cir. 1998); United States v. Gluzman, 953 F. Supp. 84 (S.D.N.Y. 1997), *aff'd*, 154 F.3d 49 (2d Cir. 1998).

122 This increase is evidenced by the prosecutions discussed in this Part, compared with the lack of precedent the *Bailey* court found. *See* 112 F.3d at 765; *cf.* United States v. Robinson, 119 F.3d 1205, 1216 & n.8 (5th Cir. 1997) (noting that in general, courts face a "guerilla campaign now being waged against federal statutes in the name of *Lopez*"), *cert. denied*, 118 S. Ct. 1104 (1998).

123 *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1997) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

124 *See* FED. R. CRIM. P. 12(b)(2); *Wright*, 128 F.3d at 1274-75 (noting that the court "reviews *de novo* the constitutionality of a federal statute," in general and in the context of a challenge to VAWA); United States v. Kahlon, 38 F.3d 467, 469 (9th Cir. 1994); United States v. Musacchia, 900 F.2d 493, 503 (2d Cir. 1990).

the trial court level, courts of appeals can review the challenges de novo.[125]

2. *Finding VAWA Unconstitutional*

One party's successful argument in district court[126] proceeded as follows:[127] In *Lopez*, the Supreme Court found unconstitutional a federal criminal statute that Congress had enacted under the authority of the Commerce Clause because the statute's prohibition of gun possession near schools intruded on the police power reserved to the states. The proscribed activity, no matter how reprehensible, did not substantially impact interstate commerce.[128] Similarly, Congress passed the challenged VAWA provision under the Commerce Clause, and the Government has not shown that the interstate violation of a protection order, for example, substantially impacts interstate commerce.[129] In fact, the activity in question is entirely noncommercial, whereas in *Lopez* one at least could argue that someone sold the guns in interstate commerce.[130] Rejecting this argument, the Court still found GFSZA unconstitutional, and Congress has an even weaker justification for enacting VAWA. Therefore, Congress overreached its authority in attempting to prohibit domestic violence, which is not a commercial activity, rendering VAWA unconstitutional.[131]

This argument makes three critical errors. First, it confuses the requirements of *Lopez*'s third category of regulation—that the intrastate activity have substantial effect on interstate commerce—with the requirements of the first category, which simply regulate the channels of interstate commerce.[132] Assuming *arguendo* that the clause requires a link between the regulated activity and the national economy, the argument iguores the congressional findings about violence against women,[133] which may provide an adequate basis for demonstrating that domestic

125 *See, e.g.*, Ornelas v. United States, 517 U.S. 690, 699 (1996) (asserting that challenges under the Fourth Amendment should be reviewed de novo by appellate courts); McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 493 (1991) (stating that constitutional and statutory determinations are subject to de novo review); United States v. Rambo, 74 F.3d 948, 951 (9th Cir. 1996) (reviewing de novo the constitutionality of 18 U.S.C. § 922(o) (1994)).

126 *See* United States v. Wright, 965 F. Supp. 1307, 1315 (D. Neb.), *rev'd*, 128 F.3d 1274 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 1376 (1998); *see also infra* text accompanying notes 148-56 (discussing the *Wright* decisions). The argument was successful in the district court, but not before the Eighth Circuit. *See Wright*, 128 F.3d at 1276.

127 *See, e.g.*, Brief for Appellant at 21-23, United States v. Von Foelkel, 136 F.3d 339 (2d Cir. 1998) (No. 97-1167) (referring to the analysis of the district court in *Wright*).

128 *See id.* at 22.

129 *See Wright*, 965 F. Supp. at 1311-12.

130 *See* Clymer, *supra* note 25, at 662-63.

131 *See Wright*, 965 F. Supp. at 1315.

132 *See supra* notes 58, 68.

133 *See supra* text accompanying notes 9-23.

violence *does* substantially affect interstate commerce.[134] The argument against the constitutionality of VAWA neglects the comprehensive effort, which necessarily includes the criminal provisions, the Act makes to address this economic effect.[135] Nonetheless, this argument incorrectly applies *Lopez* to require a showing that intrastate activity has an effect on interstate commerce when none is necessary.[136]

The second error is the expansion of the "substantially affecting commerce" approach by implying that a commercial purpose is necessary for Congress legitimately to regulate an activity under the Commerce Clause. The argument misreads Commerce Clause jurisprudence, from the Mann Act[137] and the Hobbs Act[138] to the core of modern civil rights as expressed in *Heart of Atlanta Motel, Inc. v. United States.*[139] The jurisprudence has dictated that "'[c]ommerce among the States . . . consists of intercourse and traffic between their citizens, and includes the transportation of persons and property[,]' . . . whether [or not] the transportation is commercial in character."[140]

The final error is the misinterpretation of precedent. Following the *Lopez* decision and despite a similar challenge, the Second Circuit rejected the commercial purpose argument and upheld a conviction for child pornography and sexual activity with a minor. The defendant in *United States v. Sirois*[141] challenged his conviction under the

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134 *See, e.g.*, S. REP. No. 103-138, at 54-55 (1993) (noting the effects of domestic violence on interstate commerce and the national economy); Peter J. Liuzzo, Comment, Brzonkala v. Virginia Polytechnic and State University*: The Constitutionality of the Violence Against Women Act—Recognizing that Violence Targeted at Women Affects Interstate Commerce*, 63 BROOK. L. REV. 367, 369-74 (1997).

135 *See infra* notes 341-42 and accompanying text.

136 *See supra* notes 67-79 and accompanying text.

137 The Mann Act, originally codified at 18 U.S.C. §§ 397-398, 401, 404, and later referred to as the White-Slave Traffic Act, codified at 18 U.S.C. §§ 2421-2424 (1994), aimed primarily at interstate prostitution, but the Court applied it to Mormons transporting women across state lines for polygamous marriages in *Cleveland v. United States*, 329 U.S. 14, 18 (1946). In *Caminetti v. United States*, 242 U.S. 470 (1917), the Court again upheld the regulation of interstate commerce on purely moral and protective, not commercial, grounds under the Mann Act: "[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses . . . is no longer open to question." *Id.* at 491.

138 The Hobbs Act, 18 U.S.C. § 1951, prohibits the interference with commerce by threats or violence. This Act survived post-*Lopez* scrutiny in *United States v. Robinson*, 119 F.3d 1205, 1212-15 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1104 (1998).

139 379 U.S. 241 (1964).

140 *Id.* at 256 (quoting Hoke v. United States, 227 U.S. 308, 320 (1913) (citations omitted)); *see also* Brief for Appellee at 34-38, United States v. Von Foelkel, 136 F.3d 339 (2d Cir. 1998) (No. 97-1167) (arguing that regulation under the Commerce Clause can be aimed at "moral and protective purposes," not just commercial ones, and that VAWA is "the '90's equivalent of the Mann Act: using the commerce clause to protect women [by enacting] a morally (not commercially) based law with a jurisdictional requirement of interstate travel").

141 87 F.3d 34 (2d Cir. 1996).

federal statutes[142] by arguing that he had lacked a commercial purpose. He argued that the statute was overbroad because it could apply to those acting both with and without a commercial purpose.[143] The Second Circuit held that under the *Lopez* analysis, it was sufficient that the statute "clearly requires an identifiable interstate nexus," such as crossing a state line.[144] It did not matter whether the statute applied to commercial producers of child pornography or to those engaged in trading it for nonfinancial private purposes.[145] Because of this nexus, the statute fell under *Lopez*'s first category, and "[i]t is well-established that Congress can regulate activities that involve interstate or international transportation of goods and people, regardless of whether the transportation is motivated by a 'commercial purpose.'"[146] The Supreme Court seems to agree, recently holding that the "transportation of persons across state lines . . . has long been recoguized as a form of 'commerce.'"[147]

Despite this argument's problems, the district court in *United States v. Wright*[148] sustained the challenge to a provision of VAWA based on the commercial purpose requirement, giving defendants some hope that courts might hold VAWA unconstitutional. The court in *Wright* conducted a *Lopez* analysis of 18 U.S.C. § 2262(a)(1) and found it unconstitutional because the court believed there were many ways to move across state lines without moving in interstate commerce.[149] The court came to this conclusion because VAWA's criminal provisions make "no mention of commerce or economic activity."[150] The court's reasoning fails to recognize that the simple act of crossing a state line is itself an act of commerce under Com-

142 *See* 18 U.S.C. § 2251(a) (child pornography); *id.* § 2422 (sexual activity with a minor).

143 *See Sirois*, 87 F.3d at 39-40.

144 *Id.* at 40.

145 *See id.*

146 *Id.*; *see also* United States v. 12 200-Ft. Reels of Super 8mm. Film, 413 U.S. 123, 125 (1973) (holding that Congress can "prohibit the importation of obscene material from abroad [under the Commerce Clause], even if it is imported for personal use rather than commercial distribution"); United States v. Meacham, 115 F.3d 1488, 1495-96 (10th Cir. 1997) (rejecting a defendant's challenge that he was not primarily motivated by a commercial purpose after he was convicted under a statute prohibiting interstate transportation of a minor in interstate commerce for immoral purposes, 18 U.S.C. § 2423).

147 Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 572-73 (1997) (applying dormant Commerce Clause analysis to state's penalization of a summer camp that catered primarily to out-of-state children under a tax exemption statute); *see also* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 549-50 (1944) ("Not only, then, may transactions be commerce though non-commercial; they may be commerce though illegal and sporadic, and though they do not utilize common carriers or concern the flow of anything more tangible than electrons and information.").

148 965 F. Supp. 1307, 1311 (D. Neb.), *rev'd*, 128 F.3d 1274 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 1376 (1998).

149 *See id.* at 1313-14.

150 *Id.* at 1313.

merce Clause jurisprudence.[151] This interpretation is not necessarily intuitive; it follows only from close attention to the language of *Lopez* and to the long evolution of Commerce Clause jurisprudence.[152] The Eighth Circuit later reversed the district court's decision in *Wright*, reasoning that "[i]f crossing state lines for noncommercial purposes is not interstate commerce [that can be regulated under *Lopez* category one], . . . the validity of a number of statutes besides § 2262(a)(1) would be in doubt."[153] The Eighth Circuit decided that this conclusion was not required.

The district court's argument in *Wright* debates issues of social policy regarding what the federal government's role in the criminal arena *should* be, rather than relying on the law. The lower court's argument iguores the long history of Commerce Clause legislation that the Supreme Court has upheld.[154] Although the wisdom of these measures may be open to discussion, the democratically elected Congress enacted VAWA.[155] These federalism debates, while of interest academically, fail to consider the current state of jurisprudence and legislation and ask the courts to play an inappropriate role in evaluating the wisdom of congressional acts.[156] *Lopez* has set the outer limits, but the courts still should play an extremely limited role in judging the wisdom of congressional acts.

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151 *See supra* Part I.B.2.

152 In the civil arena, a district court found VAWA's civil rights provisions unconstitutional in *Brzonkala v. Virginia Polytechnic & State University*, 935 F. Supp. 779 (W.D. Va. 1996), *rev'd*, 132 F.3d 949 (4th Cir. 1997), *reh'g en banc granted and vacated*, (Feb. 5, 1998). The court held that 18 U.S.C. § 13981 (1994) was neither a regulation of the channels of interstate commerce nor a regulation of the instrumentalities of commerce. *See* 935 F. Supp. at 786. The court found that domestic violence is an intrastate activity that has not a direct substantial effect on interstate commerce, but only an incidental one, and therefore, the court struck VAWA down. *See id.* at 791. The Fourth Circuit reversed this holding nearly a year-and-a-half later, although that opinion was in turn vacated after a rehearing en banc. *See* Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949 (4th Cir. 1997), *reh'g en banc granted and vacated*, (Feb. 5, 1998). For general discussion of this case, see Danielle M. Houck, Note, *VAWA After* Lopez*: Reconsidering Congressional Power Under the Fourteenth Amendment in Light of* Brzonkala v. Virginia Polytechnic and State University, 31 U.C. DAVIS L. REV. 625 (1998); Liuzzo, *supra* note 134; Rauschl, *supra* note 54.

153 United States v. Wright, 128 F.3d 1274, 1275 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 1376 (1998).

154 *See* United States v. Lopez, 514 U.S. 549, 625-27 (1995) (Breyer, J., dissenting).

155 For the argument that *Lopez* does little to affect Congress's ability to legislate in this area, see Clymer, *supra* note 25, at 660 ("Although the case has received considerable attention, at present it appears that *Lopez* will have little impact on federalization of criminal law. Lower courts have almost uniformly distinguished *Lopez* rather than applying it to invalidate criminal laws passed pursuant to the Commerce Clause." (footnotes omitted)).

156 *See* Roberts & Mason, *supra* note 4, at 5 (admonishing federal law enforcement officers and prosecutors by stating that if those who feel that VAWA prosecutions are "'not really a federal case'" should realize that "[t]he same thing was probably said shortly after the wire and mail fraud statutes were passed").

United States v. Kirk[157] upholds the constitutionality of the federal regulation of machine guns[158] by following the law instead of making policy. Congress enacted the statute under the Commerce Clause, and the Fifth Circuit analyzed the prohibited conduct as an intrastate activity with a substantial effect on interstate commerce. Part of the panel stated that even after *Lopez*, "we must continue to apply the rational basis test, which asks courts not to set aside congressional acts as exceeding the Commerce Clause power if the Congress *could have found* that the relevant intrastate activity has a substantial effect on interstate commerce."[159] The Fifth Circuit in *Lopez* originally had found GFSZA unconstitutional in part because of no congressional findings of substantial effect.[160] The statute in *Kirk* includes no legislative findings, but the Fifth Circuit nonetheless found it constitutional in a per curiam decision because it saw a possible rational basis.[161] Despite any perceived strengthening of the rational basis standard after *Lopez*, the *Kirk* decision illustrates that courts continue to refrain from judging the wisdom of legislative policy. As the Fifth Circuit stated, "we must discipline our scrutiny to ensure that we are about the business of judicial review and not the business of social policy."[162] The fact that the *Lopez* controversy originated in the Fifth Circuit adds symbolic weight to the *Kirk* opinion.

3. *Upholding VAWA*

Four additional cases subjected VAWA's criminal provisions to more appropriate *Lopez* analysis and found them constitutional: *United States v. Bailey*,[163] *United States v. Von Foelkel*,[164] *United States v. Page*,[165] and *United States v. Gluzman*.[166]

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157 105 F.3d 997 (5th Cir.) (en banc) (equally divided court) (per curiam), *cert. denied*, 118 S. Ct. 47 (1997).

158 *See* 18 U.S.C. § 922(o) (1994).

159 *Kirk*, 105 F.3d at 999 (Higginbotham, J., concurring) (empbasis added).

160 *See* United States v. Lopez, 2 F.3d 1342, 1366 (5th Cir. 1993), *aff'd*, 514 U.S. 549 (1995).

161 *See Kirk*, 105 F.3d at 1005 (Higginbotham, J., concurring); *see also* Amy H. Nemko, Case Note, *Saving FACE: Clinic Access Under a New Commerce Clause*, 106 YALE L.J. 525, 528-29 (1996) (noting that courts have upheld a federal law prohibiting violence and blockades at centers providing reproductive health services in part because of a greater connection to interstate commerce than found in *Lopez*).

162 *Kirk*, 105 F.3d at 999 (Higginbotham, J., concurring).

163 112 F.3d 758 (4th Cir.), *cert. denied*, 118 S. Ct. 240 (1997).

164 136 F.3d 339 (2d Cir. 1998).

165 136 F.3d 481 (6th Cir.), *reh'g en banc granted and vacated*, 143 F.3d 1049 (6th Cir. 1998).

166 953 F. Supp. 84 (S.D.N.Y. 1997), *aff'd*, 154 F.3d 49 (2d Cir. 1998).

a. United States v. Bailey

Bailey is the first court of appeals decision to address squarely the constitutionality of one of VAWA's criminal provisions.[167] It analyzes an interstate stalking conviction under 18 U.S.C. § 2261(a) and finds this provision constitutional.[168] The defendant in *Bailey* argued that § 2261(a) did not involve regulation of the channels of interstate commerce, claiming instead that the appropriate analytical framework was whether his intrastate activity substantially affected interstate commerce—a third category argument.[169] The Fourth Circuit rejected this contention and held instead that the line of cases using moral grounds to uphold federal criminal statutes involving regulation of interstate activities controlled.[170] The Fourth Circuit found support for its position in earlier decisions upholding the Mann Act,[171] whose regulations are similar to the criminal provisions of VAWA.[172] Although the Fourth Circuit may have been quick to dismiss the analytical framework of *Lopez*, it reached the correct result. By analogizing to the Mann Act, which regulates the crossing of state lines for immoral purposes, the court essentially analyzed the disputed provision of VAWA as a channels-of-commerce, first-category regulation.[173] As long as the jurisdictional nexus of crossing a state line is present, the federal regulation involves commerce, regardless of whether the regulated act has a commercial effect.[174]

b. United States v. Von Foelkel

Von Foelkel is an interesting Second Circuit case that involves the nation's third conviction under 18 U.S.C. § 2262(a)(1).[175] The defendant directly challenged the constitutionality of § 2262(a)(1), relying heavily on the district court decision of *United States v. Wright*.[176] The

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167 *See Bailey*, 112 F.3d at 765. The Fifth Circuit addressed a tangential issue in *United States v. Hornsby*, 88 F.3d 336, 338-39 (5th Cir. 1996) (upholding the sentencing of a defendant convicted under 18 U.S.C. § 2261(a)(2) (1994) according to the sentencing guidelines for kidnapping, U.S. SENTENCING GUIDELINES MANUAL § 2A4.1 (1996), and for a career offender, *id.* § 4B1.1 (West Supp. 1998), because these were the closest related guidelines).

168 *See Bailey*, 112 F.3d at 765-66.

169 *See id.* at 766.

170 *See id.*

171 For a discussion of both Mann Act cases cited in *Bailey*, see *supra* note 137.

172 *See Bailey*, 112 F.3d at 766.

173 *See supra* note 68.

174 *See supra* notes 141-53 and accompanying text.

175 *See* Roberts & Mason, *supra* note 4, at 15.

176 *See* Brief for Appellant at 20-23, United States v. Von Foelkel, 136 F.3d 339 (2d Cir. 1998) (No. 97-1167). The appellant submitted the brief before the Eighth Circuit reversed *Wright*, *see* United States v. Wright, 128 F.3d 1274 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 1376 (1998).

facts of *Von Foelkel*[177] appear to test the limits under which a court will sustain a prosecution under § 2262(a)(1).

Defendant Stephan Paul Doll Von Foelkel married a young woman from Brazil and moved to Florida, where they had a child. In Florida, he began to abuse her: he assaulted her, and he stalked her before kidnapping their two-year-old son and leaving the country in a small sailboat. Authorities located him in the Azores Islands, where they served him a copy of a Florida state court-issued divorce decree, which included an order of protection designed to keep him away from his ex-wife and their son.[178] After finding defendant, his ex-wife regained custody of their son, and with help from local law enforcement, changed both her and her son's names, obtained new social security numbers, and moved to upstate New York. Despite these efforts, defendant appeared on the lawn next door to her house four years later. She notified the county sheriff's office, which had observed the defendant near her son's school. Von Foelkel also frequented local art supply stores, presumably because his ex-wife was an artist. The county sheriff's office then told her that local law did not permit them to intervene because he had not yet committed a crime in New York.[179] At most, they could question Von Foelkel about his activities, which they attempted without success, and refer the matter to the U.S. Marshall's Office.[180]

Federal agents arrested Von Foelkel for the violation of an interstate order of protection under VAWA § 2262(a)(1). After the arrest, agents found a log in the defendant's possession, indicating that he "'watched school sports'"[181] and providing additional evidence that he had been near his son's school in violation of the Florida order of protection. Because of the high likelihood that defendant would injure his ex-wife, the United States Attorney made the decision to charge the defendant before Von Foelkel did more to provide evidence of his criminal intent. This decision to charge Von Foelkel represented using VAWA proactively to protect a victim of past domestic violence before new harm could occur and exemplified using VAWA

177 The facts of the case are set out in *Von Foelkel*, 136 F.3d at 340-41; *United States v. Von Foelkel*, No. Crim.A.96-CR-283(RSP), 1997 WL 67795, at *1 (N.D.N.Y. Feb. 10, 1997); Brief for Appellant at 3-15, United States v. Von Foelkel, 136 F.3d 339 (2d Cir. 1998) (No. 97-1167); Brief for Appellee at 3-24, *Von Foelkel* (No. 97-1167); Roberts & Mason, *supra* note 4, at 15-16.

178 This broad and permanent order of protection stated that the defendant was to stay away from his ex-wife's residence, to stay away from their son's school, and to refrain from "abusing, threatening, or harassing her." Roberts & Mason, *supra* note 4, at 15. The Florida order of protection was far broader in scope and duration than those of many states. *See infra* note 261.

179 *See* Roberts & Mason, *supra* note 4, at 15-16.

180 *See id.*

181 *Id.* at 15.

with respect for and as a supplement to the role of local law enforcement.[182]

Von Foelkel argued that he never had committed a criminal act and that the Government had insufficient evidence to support his conviction.[183] He also argued that VAWA was unconstitutional.[184] Because the defendant had not yet committed a crime under New York law, the facts imply that the government arrested and prosecuted him because of what he might do, not what he actually had done. This implication falters because even though those involved with the case believed Von Foelkel had the intent to harm his ex-wife and again abduct his son,[185] the government did not prosecute him under the section of the Act addressing domestic violence, but under the section prohibiting an interstate violation of a protection order.[186] Thus, *Von Foelkel* does not stand for the frightening implication that the government can use VAWA to punish innocent conduct based on a prediction of future acts. The legality of the conviction instead rested on several factual matters concerning both the validity and the service of the order of protection[187] and whether the defendant had violated its terms.[188] Although the United States Attorney chose to prosecute Von Foelkel in response to the fears of the victim, of the prosecutor, and of local law enforcement agents who had spoken with Von Foelkel, the district court properly resolved the factual issues at trial without speculating about the defendant's future acts.[189] The prosecution appropriately used federal resources, applying them in conjunction with local law enforcement efforts.

Von Foelkel predicated his constitutional challenge to VAWA[190] on the district court decision of *United States v. Wright*,[191] the leading case holding VAWA unconstitutional. In the fall of 1997, the Eighth Circuit reversed *Wright*,[192] and in *Von Foelkel*, the Second Circuit re-

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182 *See id.* ("The police referred the case to the U.S. Marshal, who investigated the case.").

183 *See* Brief for Appellant at 19, 38-41, United States v. Von Foelkel, 136 F.3d 339 (2d Cir. 1998) (No. 97-1167).

184 *See id.* at 20-23.

185 *See* Brief for Appellee at 16, *Von Foelkel* (No. 97-1167).

186 *See Von Foelkel*, 136 F.3d at 341; Brief for Appellee at 2, *Von Foelkel* (No. 97-1167).

187 *See supra* text accompanying notes 44-48.

188 This section perhaps would be of greater concern if the perpetrator could be arrested before violating the order of protection, such as when he crossed the state line. Even though the perpetrator's criminal intent must be established at that time, however, the subsequent violation of the order of protection also must be shown.

189 *See* United States v. Von Foelkel, No. Crim.A.96-CR-283(RSP), 1997 WL 67795, at *3-6 (N.D.N.Y. Feb. 10, 1997).

190 *See Von Foelkel*, 136 F.3d at 341; Brief for Appellant at 20-23, *Von Foelkel* (No. 97-1167).

191 *See* Brief for Appellant at 20-23, *Von Foelkel* (No. 97-1167).

192 *See* United States v. Wright, 128 F.3d 1274, 1276 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 1376 (1998).

ferred to the reversal with little additional comment.[193] The Eighth Circuit's decision articulated the following principles: (1) the court should review the constitutionality of a statute de novo,[194] (2) Congress could have enacted § 2262(a)(1) under its power to regulate and to protect both the instrumentalities of interstate commerce and the people moving in interstate commerce,[195] and (3) a court can uphold a statute under this category of regulation despite the defendant's acting without a commercial purpose.[196] The Eighth Circuit upheld § 2261(a)(1) on these grounds, reasoning that an analysis of the substantial effect of domestic violence on interstate commerce would have been inappropriate because the statute contains a jurisdictional nexus,[197] meaning that it directly regulated interstate commerce.[198] The court rejected the defendant's *Lopez* challenge and his Tenth Amendment claim[199] in just three pages,[200] indicating that VAWA's criminal provisions, which contain this jurisdictional nexus, are on extremely solid constitutional ground.

According to the Assistant United States Attorney who argued the *Von Foelkel* appeal to the Second Circuit, the defendant simply relied on the district court opinion in *Wright* to demonstrate VAWA's unconstitutionality. The defendant found himself with no support for this proposition when the Eighth Circuit reversed that decision.[201] It is interesting to note that when the defendant argued that the federal government had moved into areas traditionally protected by the states, the circuit judges hearing the case replied that the constitutionality of VAWA seemed well established to them.[202] The defendant since has moved for a rehearing en banc, adopting the arguments that the appellant is presenting for the appeal of *United States v. Gluzman*.[203]

c. United States v. Page

In *Page*, the Sixth Circuit upheld § 2261(a)(1)-(2), although it held that an act of violence committed prior to moving the victim

193 *See Von Foelkel*, 136 F.3d at 341 ("We hold, like the Eighth Circuit, that Section 2262(a)(1) is a valid exercise of Congress's authority under the Commerce Clause.").

194 *See Wright*, 128 F.3d at 1274; *supra* note 124.

195 *See supra* note 69.

196 *See Wright*, 128 F.3d at 1275.

197 *See supra* Part I.B.2.

198 *See Wright*, 128 F.3d at 1275.

199 *See id.* at 1276 (rejecting defendant's argument that VAWA unconstitutionally intrudes on police powers reserved to the states in violation of the Tenth Amendment).

200 *See id.* at 1274-76.

201 *See* Telephone Interview with Charles E. Roberts, Assistant United States Attorney for the Northern District of New York (Apr. 29, 1998) (notes on file with author).

202 *See id.*

203 *See id.*

across state lines did not violate § 2261(a)(2).[204] The court reasoned that the principle of lenity precluded the defendant's conviction, which the Government pursued on the theory that he had committed the violence prior to the travel, because the statute specifically requires that harm must occur during or as a result of forced interstate travel.[205]

d. United States v. Gluzman

The district court decision in *Gluzman* offers another analysis of the constitutionality of 18 U.S.C. § 2261 after *Lopez*.[206] The court clarified that unlike GFSZA, § 2261 involves the regulation of the channels of interstate commerce.[207] Because the statute involves the crossing of state lines with criminal intent, it "avoids the constitutional deficiencies identified in *Lopez* where the interstate nexus was nonexistent and the activity to be regulated was purely local."[208] The Second Circuit affirmed the *Gluzman* decision in August 1998.[209]

Consequently, provided that courts undertake the proper analysis, the criminal provisions of VAWA are constitutional both because they include jurisdictional nexus and because Congress found a connection between domestic violence and interstate commerce. The sections of VAWA that relate to abduction across state lines afford further grounds for upholding the statute as a regulation protecting interstate travel. Finally, the provisions regarding the enforcement of protection orders in other states rest on the Constitution's Full Faith and Credit Clause,[210] giving VAWA another imprimatur of constitutionality.[211]

D. VAWA Contrasted with the Female Genital Mutilation Act: An Illustration of the Value of *Lopez*

Given the foregoing analysis, one might ask whether *Lopez* accomplishes anything beyond highlighting the parameters that Congress must follow to enact criminal statutes under Commerce Clause authority. Nevertheless, the language in *Lopez* supports this interpretation, and despite its limited effect, *Lopez* still proves useful in analyzing

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204 *See* United States v. Page, 136 F.3d 481, 485 (6th Cir.) ("Violence occurring before interstate travel cannot provide a basis for conviction under the statute."), *reh'g en banc granted and vacated*, 143 F.3d 1049 (6th Cir. 1998).

205 *See id.* at 484-85.

206 *See* United States v. Gluzman, 953 F. Supp. 84, 87-92 (S.D.N.Y. 1997), *aff'd*, 154 F.3d 49 (2d Cir. 1998).

207 *See id.* at 89.

208 *Id.*; *accord* McAllister, *supra* note 97, at 12 (arguing that VAWA's jurisdictional nexus probably renders it constitutional, at least as applied).

209 *See* United States v. Gluzman, 154 F.3d 49 (2d Cir. 1998).

210 U.S. CONST. art. IV, § 1.

211 *See* Klein, *supra* note 28, at 254-57.

modern statutes.[212] As the dust of *Lopez* settles, it seems self-evident that outer limits of Commerce Clause power exist, but those limits are ambiguous.

The Female Genital Mutilation Act ("FGMA")[213] provides one example of the utility of *Lopez*, even under this narrow reading. FGMA, which bears a superficial resemblance to VAWA, serves to illustrate that a narrow reading of *Lopez* still can render some federal regulation under the Commerce Clause unconstitutional. The *Lopez* analysis of FGMA shows, by contrast, why VAWA's criminal provisions are constitutional.

Congress passed FGMA in 1996 with the goal of ending "the practice of female genital mutilation . . . carried out by members of certain cultural and religious groups within the United States"[214] on females under eighteen years of age.[215] The Act criminalizes this practice.[216] Congress passed the FGMA "under section 8 of article 1, the necessary and proper clause, section 5 of the fourteenth Amendment, as well as under the treaty clause"[217] of the Constitution.[218]

FGMA does not fit under either of *Lopez*'s first two categories of Commerce Clause regulation because it does not implicate the channels or the instrumentalities of interstate commerce.[219] The third category—a purely local activity that creates a substantial effect on interstate commerce[220]—also does not justify FGMA because no findings for this statute demonstrate that it has a substantial effect on interstate commerce. Although a lack of findings alone may not be dispositive, it seems highly unlikely that any court will find an ex post rational basis. FGMA also fails to demonstrate how its sanctions could be a necessary part of a larger scheme of economic regulation. This statute closely resembles GFSZA, which the Supreme Court took issue

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212 *See supra* Part I.B.4.

213 18 U.S.C. § 116 (Supp. II 1996). Female genital mutilation is defined as the knowing circumcision, excision, or infibulation of "the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years." *Id.* § 116(a). Congress passed the prohibition on female genital mutilation as part of the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified in scattered sections of U.S.C.).

214 18 U.S.C. § 116 (congressional findings).

215 *See id.* § 116(a).

216 *See id.*

217 *Id.* § 116 (congressional findings).

218 These findings take a buck-shot approach to justifying how Congress might have the authority to pass the FGMA, perhaps hoping that something will hit the mark when a court analyzes it. The reference to "section 8 of article I" of the Constitution presumably refers to the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3.

219 *See supra* notes 68-69 and accompanying text. The statute is also silent with respect to the crossing of a state line, thereby removing the jurisdictional nexus present in VAWA.

220 *See supra* Part I.B.1.

with in *Lopez*,[221] and likely would fail a *Lopez* challenge to the extent that it relies on the Commerce Clause.[222]

The critical differences between the criminal provisions of VAWA and FGMA illustrate why VAWA is constitutional under the Commerce Clause. VAWA provides the jurisdictional nexus of crossing state lines[223] and presents findings that the intrastate activities create effects on interstate commerce. FGMA fails to take either of these actions. This difference highlights that *Lopez* can play an important role in setting the outer limits of federal police powers without rendering statutes such as VAWA unconstitutional.

II
ENFORCEMENT PROBLEMS

If VAWA is constitutional under the Commerce Clause, what enforcement problems does VAWA pose? This Note argues that the following two general types of problems result from VAWA: those facing prosecutors and those facing courts.

The first type of problem arises when United States Attorney Offices consider whether to begin prosecutions under VAWA. How can these offices ensure that they are filling in the gaps left by state enforcement of domestic violence laws[224] instead of devoting resources to problems that the states can handle? Are there any constitutional limitations on prosecuting cases under VAWA when state charges are also available? Although these issues arise in every federal criminal prosecution, the United States Department of Justice ("DOJ") must address these concerns because of both the attention on VAWA following *Lopez*[225] and the widely held view that domestic violence poses fundamentally a local problem.[226] DOJ must act quickly because defendants are likely to challenge VAWA from every possible angle before its application becomes well established.[227] DOJ must seek to maintain public respect for the federal role in law enforcement and to encourage good relationships with state and local law enforcement officers, who will work more closely with federal prosecutors as a result of VAWA.[228] Additionally, VAWA poses challenges for prosecutors be-

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221 *See supra* note 65.

222 If FGMA is constitutional, it must be because of congressional power residing outside the Commerce Clause. Congress offered several alternative bases for enacting FGMA. *See* 18 U.S.C. § 116 (congressional findings). Discussion of these alternative grounds for upholding FGMA is beyond the scope of this Note.

223 *See supra* note 100 and accompanying text.

224 *See supra* note 25.

225 *See supra* notes 111-22.

226 *See supra* notes 1-4 and accompanying text.

227 See *supra* note 98 for evidence of the challenges that are taking place.

228 In *Von Foelkel*, county sheriff deputies conducted the criminal investigation, working as part of a county-wide task force on domestic violence, which worked in turn with the United States Attorney's Office. In discussions I had with the Assistant United States Attor-

cause they will need to authorize more thorough investigations into the suspect's intent before they can bring many cases to trial. This Note examines some of the difficulties that prosecutors will face in using VAWA[229] and suggests steps that prosecutors can take to address these problems.

The second type of problem arises when the case gets to court. How should courts deal with issues arising from the enforcement of orders of protection from distant states? Should the government only enforce VAWA when the victims of domestic violence are women? What about cases of same-sex domestic abuse? Can the already overburdened federal court system handle the new demands of VAWA? This Note examines how courts in the Second Circuit have handled order-of-protection issues and suggests that the government should enforce VAWA in a gender-neutral manner. This Note concludes that the additional strains that VAWA will place on the federal courts are a necessary cost of implementing the intent of Congress. District courts should handle criminal and civil cases under VAWA like any other federal cause of action. This policy will send the message to victims and to perpetrators that the federal government will treat domestic violence seriously.

A. Charging Decisions and Equal Protection

Because state or local law enforcement services seem universally available, the argument that the nonfederal system is sufficient to handle problems of domestic violence may appear especially strong when the conduct falls under both state and federal statutes. In part, however, the inability of state and local law enforcement to handle all types of domestic violence cases justifies VAWA's criminal statutes in the first place.[230] But VAWA is not, and should not be, the solution to *all* problems of domestic violence.[231] It simply offers a solution "in

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ney who prosecuted the case, he noted that this cooperation is likely to be a common occurrence since state and local police officers, who outnumber their federal counterparts, often will be the first to receive calls relating to domestic violence. *See supra* note 26 (recounting the degree of comfort that a domestic violence victim found in knowing that the local police were at least aware of her situation).

229 For example, issues of juror disqualification arise during voir dire because of personal experience jurors have with domestic violence. Roberts and Mason caution prosecutors not to underestimate this problem. *See* Roberts & Mason, *supra* note 4, at 2-3.

230 *See* S. REP. No. 103-138, at 42 (1993).

231 *See* Roberts & Mason, *supra* note 4, at 4 ("As with any criminal statute, [the United States Attorney's Office] cannot prosecute all cases. The federal role is to supplement, not supplant local prosecutions . . . ."). Those involved with federal statutes of this nature should be aware that "[w]hen Congress criminalizes conduct already denounced as criminal by the States, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction.'" United States v. Lopez, 514 U.S. 549, 561 n.3 (1995) (quoting United States v. Enmons, 410 U.S. 396, 411-12 (1973) (internal citations omitted)). Appropriate guidelines for the exercise of prosecutorial discretion would help minimize this impact.

truly egregious cases with an interstate connection, where local prosecution is not possible or meaningful."[232]

Moreover, the federal government has limited resources for the investigation and prosecution of crime.[233] Because domestic violence is a problem that only recently has achieved national attention, it is likely that many within and without federal law enforcement initially will claim that the prosecution of domestic violence is "'not a federal case.'"[234] This attitude, coupled with the relative novelty of VAWA prosecutions, makes it especially important that the federal government act rationally in deciding which cases it will prosecute under VAWA and which it will leave to the states. Making rational decisions will enhance respect both for the federal role in investigating and prosecuting crimes of domestic violence and for the principles of equal protection and state autonomy.

Given the selective nature of VAWA prosecutions, how will the individual U.S. Attorney Offices act to ensure fair and appropriate enforcement of the statute on a system-wide basis? While DOJ sets the policies for these offices,[235] it does not tell them when to proceed with federal prosecution in cases in which states alternatively may bring charges.[236]

Professor Steven Clymer has suggested that due to the disparities in punishment between the state and federal systems, it may be unconstitutional to charge similarly situated defendants under the federal, rather than local, system without a rational basis for doing so.[237] He recommends amending federal charging procedures to ensure fairness.[238] This choice of forum is likely to become an issue in VAWA prosecutions, given the high volume of state domestic violence prosecutions and the heavy sentences available in the federal system.[239] A policy outlining criteria to determine which offenses fall under both VAWA and state statutes should shield the U.S. Attorney Offices from

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232 Roberts & Mason, *supra* note 4, at 4.

233 State and local governments have approximately 15,000 police agencies employing nearly 475,000 officers, compared with 50 federal law enforcement agencies employing approximately 10,000 investigators. *See* JEROLD H. ISRAEL ET AL., CRIMINAL PROCEDURE AND THE CONSTITUTION 15-16 (2d ed. 1997). Compare also the number of state and local prosecutor's offices, numbering around 2500, with the 94 United States Attorney's Offices. *See id.* at 21-24.

234 Roberts & Mason, *supra* note 4, at 5; *see also* Engle v. Isaac, 456 U.S. 107, 128 (1982) ("The States possess primary authority for defining and enforcing the criminal law.").

235 *See* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.000 (1997).

236 *See* Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 U. KAN. L. REV. 503, 533 (1995) ("[T]he Justice Department reported that it would do little more than instruct U.S. Attorneys to consult local prosecutors before setting their own individual guidelines.").

237 *See* Clymer, *supra* note 25, at 688-93.

238 *See id.* at 714-17.

239 The decision whether to prosecute at the federal level also will involve docket-management issues. *See infra* Part II.F.

challenges in the courts[240] and in the realm of public opinion. Suitable criteria for making the decision include the relative evidence available for each jurisdiction and the relative protections each jurisdiction affords the victim.[241]

There also may be strategic reasons for proceeding in state, rather than federal, court. For instance, in *United States v. Page* the Sixth Circuit held that it could not sustain on a "continuing violation" theory a conviction under VAWA for an assault that the defendant had committed before transporting the victim across state lines.[242] The court did hold that the conviction would stand if the victim's condition worsened as a result of the interstate abduction, but only if the trial court instructed the jury on this theory.[243] Had the prosecution proceeded in state court, it would not have had to overcome these obstacles.

B. Proving Intent

While it can be difficult for the prosecution to prove criminal intent in many types of criminal cases,[244] it is particularly hard in criminal prosecutions under VAWA because defendants are likely to raise several defenses relating to intent. The alleged offender might argue that he was involved in a consensual relationship with the victim until they separated and that the victim now has decided to exact revenge through prosecution.[245] Or the defendant might admit that he committed a nonconsensual act of violence within a state, but that at the time he crossed the state line, he did not possess the intent to harass or to injure the victim.[246] This crime would be a purely local matter, not subject to federal jurisdiction, as long as the perpetrator did not violate a valid order of protection from another state. These potential arguments indulge the temptation to treat domestic violence as something different than ordinary violent crime and, by extension, to treat VAWA as something other than an ordinary crime-control statute. In

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240 *See* Clymer, *supra* note 25, at 714.

241 *See id.* at 715-17.

242 *See* United States v. Page, 136 F.3d 481, 485 (6th Cir.), *reh'g en banc granted and opinion vacated*, 143 F.3d 1049 (6th Cir. 1998).

243 *See id.* at 485-86.

244 *See, e.g.*, Sandstrom v. Montana, 442 U.S. 510, 521-22 (1979) (holding that the prosecution must prove every element of an offense beyond a reasonable doubt, and not merely assert that a reasonable person would intend the natural consequences of his or her act); People v. Conley, 543 N.E.2d 138, 142-44 (Ill. App. Ct. 1989) (illustrating the difficulty of proving the intent of the assailant to cause permanent disability). *See generally* JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 105-28 (1994) (discussing problems in proving the mental-state element of crimes); Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401 (1993) (discussing reasons why some criminal offenses remove the element of intent and why this removal can be unfair to defendants).

245 *See* Roberts & Mason, *supra* note 4, at 16.

246 *See id.* at 16-17 (discussing defenses and methods of overcoming them).

fact, however, VAWA embodies the assertion that the criminal justice system *should* treat domestic violence like any other serious offense.[247]

Some defendants might argue that the term "interstate commerce" is vague or is ambiguous, and consequently the principle of lenity[248] should invalidate their prosecution under VAWA because they were unaware that the statute could apply to them. Therefore, they lacked the requisite intent to violate the statute. A defendant successfully made this argument in *Page*. There, the court overturned on the principle of lenity a conviction under § 2261(a)(2) of VAWA because the defendant may not have understood that the statute could prohibit him from causing harm to a victim prior to interstate travel, even though it plainly forbids causing harm as a result of an interstate abduction.[249]

Other defendants similarly might argue that the type of conduct that VAWA prohibits is vague.[250] The Supreme Court rejected a similar vagueness challenge to the National Stolen Property Act[251] in *McElroy v. United States*.[252] The Court held that "interstate commerce begins well before state lines are crossed"[253] and that the government could charge the defendant under the federal statute because the Court has given interstate commerce a broad meaning since the early

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247 *See infra* note 319.

248 *See, e.g.*, Moskal v. United States, 498 U.S. 103, 107-08 (1990) (holding that according to the lenity doctrine, when "a reasonable doubt persists about a statute's intended scope even *after*" traditional statutory interpretation, the court should employ the interpretation that provides for the most lenient treatment of the defendant); Keeler v. Superior Court, 470 P.2d 617, 624 (Cal. 1970) (asserting that criminal statutes should be interpreted "as favorably to the defendant as its language and the circumstances of its application may reasonably permit"). *See generally* DRESSLER, *supra* note 244, at 75-80 (explaining the basic application of the lenity doctrine); John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 198-99 (1985) (arguing that the doctrine of lenity is applied only seldom by the modern courts).

249 *See* United States v. Page, 136 F.3d 481, 483-85 (6th Cir.) (applying the rule of lenity by interpreting 18 U.S.C. § 2261(a) (1994) more narrowly than the prosecution had asserted, holding that it does not allow the "'single episode'" theory), *reh'g en banc granted and vacated*, 143 F.3d 1049 (6th Cir. 1998).

250 *See, e.g.*, Wainwright v. Stone, 414 U.S. 21, 22 (1973) (stating that statutes are not read for definiteness in a vacuum, but in context of common law meaning); Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340 (1952) (stating that criminal statutes must be definite enough to give notice of what conduct is prohibited); Connally v. General Constr. Co., 269 U.S. 385, 391-93 (1926) (asserting that criminal statutes must be definite enough to allow a reasonable person of ordinary intelligence to realize that his or her conduct would violate that statute); *In re* Banks, 244 S.E.2d 386, 390 (N.C. 1978) (holding that "ambiguous language that is sufficient to inform a person of ordinary intelligence, with reasonable precision, of those acts the statute intends to prohibit, so that he may know what acts he should avoid in order that he may not bring himself within its provisions" provides sufficient notice).

251 18 U.S.C. § 2314 (1994).

252 455 U.S. 642 (1982).

253 *Id.* at 653.

part of this century.[254] Prosecutors could handle these jurisdictional, lenity, and vagueness arguments during trial, but they would profit by preparing for them in advance.

The criminal provisions of VAWA include some elements that are objective—crossing a state line, committing assault and battery on a victim—and others that are subjective—crossing a state line with intent to harm, acting with intent to harass. These subjective elements, combined with juror uncertainty or even bias with regard to prosecution for domestic violence,[255] can make VAWA prosecutions difficult. Prosecutors must pay attention to these concerns during the investigation, trial preparation, and jury selection. In their article, an Assistant United States Attorney and a Senior FBI Agent who have worked on domestic violence cases under VAWA suggest that it is important for both investigators and prosecutors to collect evidence of the pattern of abuse to help prove criminal intent.[256] They note that defendants' diaries of their activities or victims' notes describing harassing telephone calls or contact can help establish this intent.[257] This evidence also will make defense arguments that the perpetrator lacked criminal intent when he crossed the state line less credible.[258] Finally, it may be critical to prepare the victim to be a witness at trial because her testimony regarding the patterns of past abuse may be essential to proving the case.[259]

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254 *See id.* at 658 (noting that "Congress intended to use the term 'interstate commerce' [in the broad way the] Court had been using it in Commerce Clause cases before 1919").

255 *Cf.* Roberts & Mason, *supra* note 4, at 19-20 (noting how important it is for prosecutors conducting jury selection "to expose persons who would be quick to blame women, and who would be unable or unwilling to understand the cycle of abuse that can make it so difficult for a woman to break free of an abusive relationship").

256 *See id.* at 16-17.

257 *See id.*

258 *See id.* Roberts and Mason also observe that in cases in which the victim has changed her name to elude the defendant, the defendant may request disclosure of that new name to conduct discovery and confront the witness. *See id.* at 18. They suggest use of in camera hearings before the court to demonstrate the danger to the victim of such a disclosure. *See id.* They note that there is ample case law allowing for the withholding of the name of a witness when that witness's safety is in danger. *See id.* n.26 (citing United States v. Doe, 655 F.2d 920, 922 n.1 (9th Cir. 1980); United States v. Cavallaro, 553 F.2d 300, 304 (2d Cir. 1977)).

259 The central importance of victim testimony in some cases may make conviction difficult if the victim does not wish to testify or leaves the area prior to trial without leaving a forwarding address. In my experience, victims often become unavailable as witnesses because they depart the area to make a fresh start, fear reprisals from the perpetrator and refuse to cooperate with law enforcement, or distrust police officers and prosecutors. For instance, in a Northern District of New York case that I investigated in my prior tenure as a police officer, I found the estranged boyfriend of a victim of domestic violence holding her at gunpoint and threatening to kill her. After the situation was resolved safely, she refused to testify against him. The local district attorney was able to secure a conviction based on witness testimony and a recording made over the victim's telephone during the two hours of negotiations with the perpetrator. Nonetheless, the additional evidence required even

C. The Validity of Orders of Protection

Under VAWA, an order of protection from one state will receive full faith and credit in the others, which will enforce it "as if it were the order of the enforcing State."[260] This concept means that courts will treat an order of protection that Florida issues and New York enforces as if a New York court had issued it, even though Florida and New York may have different substantive policies relating to the issuance and provisions of orders of protection.[261] A federal judge unfamiliar with both states' laws might find it difficult to decide whether the order of protection is valid in its issuing state.[262] Yet federal judges face this type of problem whenever they confront choice-of-law issues. Courts may turn to conflict-of-law precedents for guidance, as the Second Circuit did in *United States v. Casciano*.[263]

1. *A Question of Law or of Fact?*

Casciano is the first case that involves a prosecution for the interstate violation of an order of protection under § 2262 (a)(1)(A)(i) to reach the Second Circuit.[264] As a threshold matter, the Second Circuit had to decide whether the trial judge or the jury should determine whether Massachusetts, the issuing state, had issued a valid order of protection.[265] Although the defendant argued that the order's validity was a question of fact that the jury should decide,[266] the Second Circuit reasoned by analogy and by reference to public policy concerns that the judge should decide this matter.[267]

The court undertook this analysis because there was no precedent on point—VAWA was still a relatively new act.[268] The court drew

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in such an "open and shut" case underlines the potential difficulty of prosecuting VAWA cases with uncooperative or unavailable victims.

260 18 U.S.C. § 2265(a) (1994); *see* Klein, *supra* note 28, at 255-57.

261 *See* Klein, *supra* note 28, at 257-63 (examining different state laws regarding orders of protection); *id.* at 256 n.13 (noting that state policies regarding the issuance of orders of protection may vary on matters such as "the parties' eligibility for protection, offenses that give rise to protection, and the duration and scope of protection").

262 *See, e.g.*, United States v. Von Foelkel, No. Crim.A.96-CR-283(RSP), 1997 WL 67795, at *2-3 (N.D.N.Y. Feb. 10, 1997) (holding as a matter of law that a Florida order of protection was valid in Florida during the time of the defendant's acts in New York, allowing prosecution under 18 U.S.C. § 2262(a)(1)(A) (1994 & Supp. II 1996) regardless of whether the order of protection otherwise would be entitled to full faith and credit in New York), *aff'd*, 136 F.3d 339 (2d Cir. 1998); United States v. Casciano, 927 F. Supp. 54, 58-59 (N.D.N.Y. 1996) (finding that an order of protection was properly served on the defendant under Massachusetts state law, allowing prosecution under § 2262(a)(1)), *aff'd*, 124 F.3d 106 (2d Cir.), *cert. denied*, 118 S. Ct. 639 (1997).

263 124 F.3d 106 (2d Cir.), *cert. denied*, 118 S. Ct. 639 (1997).

264 *See id.* at 107.

265 *See id.* at 110-11.

266 *See id.*

267 *See id.* at 111.

268 *See id.* The Second Circuit did note, however, that Judge Pooler in the Northern District of New York had decided this question was a matter of law to be decided by the

an analogy to criminal contempt proceedings in which the judge decides whether the initial contempt order is valid.[269] In addition, the court found it "unlikely that in prosecutions under § 2262(a)(1) Congress intended federal juries to explore the intricacies of 50 state statutes relating to service of process."[270] An order of protection must satisfy due process requirements and must comply with the notice requirements of the issuing state to be valid.[271] The court held that these questions were for the trial court and not for the jury to decide.[272]

This holding is of enormous practical importance to prosecutors bringing cases under VAWA for the interstate violation of a protection order. A prosecutor will not have to instruct the jury on the principles of notice and due process or on the applicable law of the issuing state. This benefit should lead to greater efficiency because trial judges understand the general principles involved.[273] Lay juries, however, may become confused by these topics,[274] and courts would have to devote a significant portion of the trial to educating jurors on the law. The holding also prevents appeals on the ground that the court gave improper jury instructions regarding this issue.[275]

2. *Due Process Requirements*

There is some question about what notice and due process requirements actually apply to § 2262.[276] Other sections of VAWA spell out the requirements. For instance, the full faith and credit provision in § 2265 specifies the following prerequisites to using orders of protection in relation to VAWA: the issuing court must have had jurisdiction; the defendant must have had reasonable notice and an opportunity to be heard; the court must have issued the order of protection to prevent either violence or harassment against the victim or

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judge in *United States v. Von Foelkel*, No. Crim.A.96-CR-283(RSP), 1997 WL 67795, at *2 (N.D.N.Y. Feb. 10, 1997). Judge Pooler now sits on the Second Circuit.

269 *See Casciano*, 124 F.3d at 111.

270 *Id.*

271 *See id.* at 112.

272 *See id.* at 111.

273 The Second Circuit's decision quite reasonably assumes that district court judges have gained experience in researching and in applying the laws of different states as part of their duties.

274 These complex subjects account for a significant portion of law school instruction in civil procedure and constitutional law. To experience the complexity of these issues, see, for example, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Griffin v. Griffin, 327 U.S. 220 (1946); Pennoyer v. Neff, 95 U.S. 714 (1877).

275 The defendant in *Casciano* claimed that the judge had given improper instructions for determining the validity of an order when the trial court turned this matter over to the jury. *See Casciano*, 124 F.3d at 114. The Second Circuit held that this challenge must fail because the matter could be decided as a matter of law without the involvement of the jury. *See id.*

276 *See* Roberts & Mason, *supra* note 4, at 17.

to provide her physical separation from the defendant; and the victim must have requested the order of protection.[277] While *Casciano* applies these criteria to a prosecution under § 2262, this section actually is silent on these matters.[278] The omission of both notice and due process criteria may reflect a drafting error, and it makes sense for the court to require each of these elements[279] because they seem central to establishing the criminal intent of the defendant[280] and to protecting his due process rights.

Therefore, in some cases defendants will argue that they did not receive actual notice of the order.[281] The Second Circuit held in *Casciano* that a defendant's conviction was proper, even if he only had constructive notice of the order of protection, when the service complied with state law, when the police made repeated efforts to serve the defendant, and when police left a copy at the defendant's last routinely used address.[282] *Casciano* raises another wrinkle regarding notice, however. Under the law of Massachusetts, the court should mail a copy of the order of protection to the defendant as well as leave a copy at his last address.[283] The police never did all of these things with respect to Casciano.[284] Massachusetts law provides, however, that imperfect service still may comply with due process if the defendant has actual notice of the order and is not prejudiced when the court fails to mail the order to him.[285] The Second Circuit was satisfied that Casciano had actual notice of the order of protection and was not prejudiced, even though the court never officially served him with the order.[286] The court reached these conclusions because the victim had told the defendant that she would seek the order and because the terms of the order were identical to an earlier order that the court validly had served on him.[287] There was no prejudice because the second order contained no new terms. The defendant had the opportunity to dispute all of the terms in the second order by disputing the first order, which he chose not to challenge.[288] Evidence that the defendant intentionally had avoided service of the second order at his

277 *See* 18 U.S.C. § 2265 (1994); Roberts & Mason, *supra* note 4, at 17.

278 *See* 18 U.S.C. § 2262 (1994 & Supp. II 1996); Roberts & Mason, *supra* note 4, at 17.

279 One exception is the requirement that the victim request the order. Whether the victim requested the order or not makes no difference in determining the offender's intent, nor does it affect his due process rights.

280 *See supra* Part II.B.

281 This was one argument made in *Casciano*. *See* United States v. Casciano, 124 F.3d 106, 112-14 (2d Cir.), *cert. denied*, 118 S. Ct. 639 (1997).

282 *See id.*

283 *See id.* at 112.

284 *See id.*

285 *See id.* at 113.

286 *See id.*

287 *See id.*

288 *See id.*

apartment furthered the court's holding that the notice had been sufficient.[289]

Casciano teaches two lessons with regard to due process and the service of protection orders. First, the trial judge's inquiry into the applicable law of the state that issued the order of protection is crucial. Second, each case will have its own unique set of both facts and issues regarding service of process that prosecutors must investigate before bringing a case under § 2262. By making state orders of protection federally enforceable throughout the United States, VAWA provides an impetus for interstate coordination of information related to these orders. The creation of the computer-based Order of Protection Registries in many states[290] should assist investigators and prosecutors in verifying the validity of out-of-state orders.

D. Law Enforcement Responds to VAWA with National Computerized Databases

Law enforcement officers and the public they serve have benefitted greatly from advances in information technology over the past decades. State and federal databases keep numerous records, including records of stolen property and wanted and missing persons, that are accessible to officers on the street.[291] This technology provides police officers on patrol with nationwide information that they rapidly can access at any time and often while the suspects are still present. These advances have assisted police in the investigation of domestic violence as well. The police officer at the scene may be unaware that an order of protection exists. For a variety of reasons, the victim may never mention its existence because she may be either unable or unwilling to inform the police officer of this fact or may not realize that an out-of-state order is relevant to the current incident.[292] It is vitally important that the police officer be able to find out at the scene, while all the parties are present, whether an order of protection exists. It is especially important if the police otherwise would release the suspect

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289 *See id.*

290 *See, e.g., New York State Order of Protection Registry*, NYSPIN NEWSL. (New York St. Police, Albany, N.Y.) July-Sept. 1995, at 1 (noting that since October 2, 1995, all valid orders of protection in New York State shall be entered in a central computer system so that officers investigating domestic disputes may quickly ascertain if any apply).

291 *See* FBI, Dep't of Justice, *National Crime Information Center: 30 Years on the Beat*, INVESTIGATOR, Dec. 1996-Jan. 1997, *available at* <http://www.fbi.gov/2000/ncicinv.htm> (describing the system and how it works, as well as NCIC's Missing Persons File, Unidentified Persons File, Interstate Identification Index, U.S. Secret Service Protective File, Foreign Fugitive File, and Violent Gang/Terrorist File).

292 In my experience as a police officer investigating domestic disputes, many victims did not mention that an order of protection had been issued to them for the following reasons: they did not want the perpetrator to know they bad turned him in; they had hopes of reconciliation that an arrest might prevent; they did not realize that the order of protection was still in effect; or they did not understand the scope of the protection that the order offered.

at the scene, making him potentially difficult to locate for prosecution should this information become available later.

For example, starting October 2, 1995, the New York State Police began keeping computerized records on the New York Statewide Police Information Network ("NYSPIN") of all valid orders of protection issued within the state.[293] All state and local police officers within New York can access this system. But what if a police officer in another state needs to know whether a valid order exists in New York? A sign of VAWA's influence is that the FBI recently added to its National Crime Information Center ("NCIC")[294] a Protection Order File, allowing police across state lines to share this information.[295] This information sharing is essential to the practical enforcement of § 2265 because it will allow police officers at the scene of a domestic incident to ascertain, without consulting the victim, whether an order of protection covers the parties involved. The victim may be either unaware that an out-of-state order is valid or unable for a variety of reasons to assist the investigating officers. Allowing police officers to establish without victim assistance whether an out-of-state order of protection is in effect is consistent with the rationale behind mandatory arrest laws. As a New York State Police training bulletin notes, the goal is to "take the burden of the decision to arrest from victims who may be ill prepared due to social, economic, psychological, safety, and/or other pressures or constraints."[296] This information now will be available at the scene, allowing local law enforcement to act promptly to detect and begin prosecuting a federal offense when a valid order of protection is on file in another state. VAWA, combined with initiatives such as the creation of these databases, will allow local and state police officers to work with federal law enforcement to protect victims of domestic violence.

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293 *See New York State Order of Protection Registry, supra* note 290, at 1. The New York State Police graciously forwarded several relevant training newsletters to the author, and they maintain an informative webpage on the Internet at <http://www.troopers.state.ny.us>. They may be contacted via this webpage.

294 *See NCIC Protection Order File, supra* note 6, at 2. The FBI maintains the federal NCIC database, which gathers information that state and federal police agencies provide. NCIC processes about two million data transactions a day, involving access to numerous files, which contain approximately ten million records. The system also allows access to an additional 24 million criminal history records kept by state agencies.

295 *See id.* This newsletter observes: "Title 18, U.S.C., Section 2265, provides that any protection order that is consistent with this Act *should be given full faith and credit* by the court of *another* state and enforced as if it were the order of the enforcing state." *Id.* It then notes the conditions under which a protection order would be valid for this purpose and also describes relevant federal firearm offenses related to domestic violence. *See id.*

296 *Order of Protection Registry—Mandatory Arrests, supra* note 1, at 4.

E. Gender-Neutral Interpretations of VAWA After *Oncale v. Sundowner Offshore Services, Inc.*

The title of the Violence Against Women Act and many of the congressional findings underlying its enactment indicate that it targets male offenders and female victims.[297] The actual language of VAWA, however, much like that in Title VII of the Civil Rights Act of 1964,[298] is gender neutral on its face.[299] This comparison raises the question of whether VAWA should apply only when women are the victims of domestic violence at the hands of men, or whether the Act should apply without regard to gender. Does it apply in cases of same-sex battering? Although courts have not yet indicated these limitations on VAWA's applicability, it is illustrative to examine how courts have interpreted gender-neutral language in employment law and in the Civil Rights Act of 1964.

Until recently, the courts of appeals were widely split on the application of Title VII to same-sex sexual harassment.[300] This split led the Supreme Court to grant certiorari in *Oncale v. Sundowner Offshore Services, Inc.*,[301] a Fifth Circuit same-sex sexual harassment case. The court of appeals held that Title VII does not give a cause of action when the harasser and the victim are the same sex.[302] The Supreme Court reversed with a unanimous decision.[303]

Given the large number of Title VII claims of same-sex sexual harassment,[304] it seems likely that victims of both sexes will attempt to use VAWA against offenders of both sexes.[305] The Court's brief opin-

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297 *See supra* note 9.

298 42 U.S.C. § 2000e-2 (1994).

299 *Compare id.* § 2000e-2(a)(1) (prohibiting the failure or refusal to hire or the discharging of "any individual"), *with* 18 U.S.C. § 2261(a)(1) (making it a crime for "[a] person" to travel across state lines with the intent to injure or harass "that person's spouse or intimate partner").

300 *Compare* Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118 (5th Cir. 1996) (refusing to allow same-sex claims), *rev'd*, 118 S. Ct. 998 (1998); *and* Garcia v. Elf Atochem N. Am., 28 F.3d 446 (5th Cir. 1994) (same), *with* Quick v. Donaldson Co., 90 F.3d 1372 (8th Cir.) (holding that same-sex harassment based on gender makes a Title VII claim), *reh'g en banc denied*, (8th Cir. Sept. 23, 1996), *and* McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191 (4th Cir.) (ruling that Title VII claims between those of the same sex are not allowed if both the harasser and victim are heterosexual), *cert. denied*, 117 S. Ct. 72 (1996).

301 83 F.3d 118 (5th Cir. 1996), *rev'd*, 118 S. Ct. 998 (1998).

302 *See id.* at 120 (relying on *Garcia*, 28 F.3d at 446, as binding precedent).

303 *See* Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1003 (1998).

304 A search in Westlaw's "ALLFEDS" database conducted on September 10, 1998 revealed at least 66 cases of this type on file. Furthermore, the Supreme Court's grant of certiorari in *Oncale* demonstrates the importance of the question as well as the wide variety of circuit court responses.

305 *See, e.g.*, Heather Lauren Hughes, Note, *Same-Sex Marriage and Simulacra: Exploring Conceptions of Equality*, 33 HARV. C.R.-C.L. L. REV. 237, 246 (1998) (referring to fears Senator John Kerry voiced in Congress that same-sex marriage would expand VAWA to cover homosexual battery, indicating that the Senator believes VAWA does not currently provide this coverage).

ion in *Oncale* does little to define same-sex sexual harassment. If the Court eventually adopts the Eighth Circuit's expansive reading of Title VII,[306] same-sex VAWA claims may receive an additional boost, as will VAWA's civil remedies provision. For example, in *Seaton v. Seaton*[307] the plaintiff sought damages under 42 U.S.C. § 13981 of between forty and eighty-seven million dollars.[308] From a practical standpoint, the availability of large damage awards will draw claimants from virtually any situation and give them a powerful incentive to sue under VAWA, even if their circumstances are not those that the Act's title or legislative history envision.

The language of VAWA itself is gender neutral, and no compelling reason exists to treat one victim of domestic violence differently from another on the basis of gender.[309] VAWA is meant to protect victims of domestic violence[310] and to overcome stereotypes regarding domestic violence.[311] From a policy perspective, it makes sense to provide VAWA's protection to both women and men, even if doing so further opens the floodgates to more litigation in the federal courts.

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306 *See* Quick v. Donaldson Co., 90 F.3d 1372, 1377-79 (8th Cir.) (allowing Title VII claim for same-sex harassment and analyzing it as any other sexual harassment claim), *reh'g en banc denied*, (8th Cir. Sept. 23, 1996).

307 971 F. Supp. 1188 (E.D. Tenn. 1997).

308 *See Judge Upholds VAWA*, NAT'L L.J., July 21, 1997, at A8.

309 For a discussion of domestic violence against men, see *supra* notes 11-12. If VAWA applies to male but not to female perpetrators, the statute would be discriminatory on its face, triggering equal protection analysis without the need to show bias on the part of prosecutors. *Cf.* Wayte v. United States, 470 U.S. 598, 608 n.10 (1985) ("A showing of discriminatory intent is not necessary when the equal protection claim is based on an overtly discriminatory classification. No such claim is presented here, for petitioner cannot argue that the passive policy discriminated on its face." (citing Strauder v. West Virginia, 100 U.S. 303 (1880) (citation omitted))). The question remains whether VAWA's language would support prosecution in same-sex domestic violence cases. In its definition section, VAWA defines a "spouse or intimate partner" with respect to its criminal provisions as:

> (A) a spouse, a former spouse, a person who shares a child in common with the abuser, and a person who cohabits or has cohabited with the abuser as a spouse; and
>
> (B) any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the State in which the injury occurred or where the victim resides.

18 U.S.C. § 2266 (1994). Thus, whether VAWA's criminal provisions would apply to same-sex cases depends on how the applicable state law defines marriage and domestic violence. However, VAWA would support a prosecution in a same-sex case given the appropriate underlying state law. Additionally, § 2265's full faith and credit provision would allow the enforcement of protection orders for any parties who are able to obtain them in state court.

310 *See supra* note 24.

311 *See supra* note 12 (describing the stereotype that only women are victims of domestic abuse).

F. The Deluge and Possible Responses

1. *Can the System Handle VAWA?*

Undoubtedly, many federal judges are concerned about the effect of VAWA on their dockets and may feel that state and family court judges have greater expertise in the field of domestic violence.[312] Notably, no one has made a proposal to send VAWA cases to a separate set of courts, such as those in use for bankruptcy. Yet one could imagine a system in which Congress responds to federal judges' concerns by combining elements of the state family courts and the federal bankruptcy courts to create a new federal domestic violence court system.[313] In this system, non-Article III judges, perhaps with life tenure, would preside over trial level "domestic violence courts," similar to the bankruptcy courts. Appeals could be heard either by the district courts or by a specially created "domestic violence appellate panel," such as those many federal circuits use to hear bankruptcy court appeals.[314] Like state family court judges, domestic violence court judges would receive special training on domestic violence issues and would develop expertise in this area of law and sensitivity to its special issues.

The fundamental problem with establishing a separate court system is that it isolates crimes of domestic violence from "normal" crimes, effectively sending the message to both perpetrator and victim that domestic violence somehow differs from federal crimes like kidnapping,[315] conspiracy to commit arson,[316] or murder.[317] Federal district courts already hear cases involving all of these crimes.[318] A separate court system offers administrative convenience, but it is difficult to treat domestic violence uniquely without sending the message

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312 *See Judge Upholds VAWA*, *supra* note 308 (following his decision to uphold the civil remedy provision of VAWA, "the judge expressed 'deep concern that the act will effectively allow domestic relations litigation to permeate the federal courts'" and said that these "matters are better handled in state courts").

313 As to whether such a system would be constitutional, see Magistrate Judge Div., Admin. Office of the U.S. Courts, *A Constitutional Analysis of Magistrate Judge Authority*, 150 F.R.D. 247 (1993) (discussing what sorts of issues non-Article III judges can and should be allowed to handle). *See generally Magistrates No Longer Just Caddies*, NAT'L L.J., Mar. 9, 1998, at A10 (discussing the enhanced roles of magistrate judges in many circuits, including those of civil trial judge with consent of the parties).

314 Bankruptcy court decisions may be appealed to a district court under 28 U.S.C. § 158(a)(3) (1994). The courts of appeals are authorized to establish special appellate panels that can replace district court review with the parties' consent. *See id.* § 158(c)(1).

315 *See* 18 U.S.C. § 1201 (1994 & Supp. II 1996).

316 *See id.* § 844(i) (Supp. II 1996).

317 *See id.* § 1111 (1994).

318 *See generally* Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL'Y 247 (1997) (arguing that federalism and public sentiment support an increased federal role in the criminal arena).

that it is in some way different from normal crimes.[319] After all, even in state systems, victims of domestic assaults can seek justice in criminal court instead of family court.[320] Perhaps allowing victims to choose whether to proceed in a specialized domestic violence court or in a district court would eliminate any stigma associated with the specialized court. Yet the principles of statutory interpretation and of intent and the practice of applying the law to the facts are the same under VAWA as the other criminal statutes that the federal courts handle, suggesting that unique domestic violence courts are unnecessary.

A more modest and perhaps more appropriate suggestion would be to increase the training for trial judges on the specific aspects of domestic violence that do differ from other crimes, such as the patterns of abuse in domestic violence and the extreme reluctance of victims to cooperate in many prosecutions.[321] This solution would not lighten the dockets of the district courts, unlike the establishment of separate federal domestic violence courts, but it would treat domestic violence like any other federal crime, delivering a clear message to perpetrators and victims that society will not tolerate these actions.

2. *Problems of Supplemental Jurisdiction*

The civil rights remedies section of VAWA gives plaintiffs a powerful incentive to take their civil domestic violence claims to federal court. Predictably, one district court already has found the exercise of supplemental jurisdiction[322] for state law claims inappropriate,[323] even though it allowed a claim to proceed under VAWA's civil rights remedies provision.[324] In *Seaton v. Seaton*, a plaintiff suing under VAWA in the Eastern District of Tennessee attempted to bring pendent state law claims into federal court.[325] These claims included assault and battery, intentional infliction of emotional distress, false imprisonment, breach of fiduciary duty, fraud and conversion, and

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319 Treating domestic violence as any other crimes will help increase the effectiveness of legal remedies. *See* Fedders, *supra* note 6, at 288-89 ("[T]reating violence against women as a crime would help to stop it."); Yvette J. Mabbun, Comment, *Title III of the Violence Against Women Act: The Answer to Domestic Violence or a Constitutional Time-Bomb?*, 29 ST. MARY'S L.J. 207, 215-22 (1997). Congress reported that VAWA was a response "to the underlying attitude that this violence is somehow less serious than other crime." S. REP. No. 103-138, at 38 (1993).

320 *See supra* note 1.

321 *See* Roberts & Mason, *supra* note 4, at 20-21. For possible funding sources for this training, see *supra* note 27. For discussions of the dynamics involved in domestic abuse, especially with regard to violence against women, see Gayla Margolin et al., *Wife Battering*, *in* HANDBOOK OF FAMILY VIOLENCE, *supra* note 11, at 89; Andrea J. Sedlak, *Prevention of Wife Abuse*, *in* HANDBOOK OF FAMILY VIOLENCE, *supra* note 11, at 319.

322 *See generally* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS §§ 9, 19 (5th ed. 1994) (describing the operation and limits of supplemental jurisdiction).

323 *See* Seaton v. Seaton, 971 F. Supp. 1188 (E.D. Tenn. 1997).

324 *See* 42 U.S.C. § 13981 (1994).

325 *See* 28 U.S.C. § 1367.

misrepresentation.[326] Although the expiration of the relevant statute of limitations would have barred most of these claims,[327] the court clearly stated that it would not consider those claims even if they had been timely, reasoning that "this court will not allow the Act to become a gateway for domestic relations issues to slip into this federal court."[328] The court held that because a divorce proceeding was in progress in state court, that court could better handle the domestic violence issues.[329] Because federal judges enjoy tremendous discretion in allowing supplemental jurisdiction,[330] it seems likely that many courts will decline jurisdiction to lessen the burden of VAWA on their dockets.

At least one district court has come to the opposite conclusion, however, accepting supplemental jurisdiction under VAWA. In *Doe v. Hartz*,[331] the court refused to dismiss the state pendent claims. Despite defense arguments that the state claims should be dismissed under 28 U.S.C. § 1367(c)(1) as a "novel or complex issue of State law,"[332] the court held that it properly could exercise supplemental jurisdiction even if this were true. The court decided that because "the plaintiff's claims plainly arise from a common nucleus of operative fact," it would hear them for the sake of judicial economy.[333] The court opted to hear the state claims because "the federal claim is clearly substantial, and clearly is really the plaintiff's main mission, not merely an incident or adjunct of the state claim."[334]

Two district courts have reached opposite conclusions, basing their opinions on subjective determinations of the plaintiff's purpose in bringing the VAWA claim. The result is frustration: depending on the presiding judge's views regarding VAWA and the role of the federal system, the federal courts either will take numerous matters normally heard in local criminal and family courts or will use their discretion to lessen their caseloads.[335] Either way, the federal courts are sure to feel the impact of VAWA. VAWA's promise of thorough

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326 *See Seaton*, 971 F. Supp. at 1189.

327 *See id.* at 1195-96. At least one district court has limited the number of claims that one can bring under VAWA by holding that actions arising before the statute's effective date could not be brought under VAWA in the absence of congressional authorization to the contrary. *See* Doe v. Abbott Labs., 892 F. Supp. 811 (E.D. La. 1995).

328 *Seaton*, 971 F. Supp. at 1196.

329 *See id.*

330 *See* 28 U.S.C. § 1367(c) (1994) (listing reasons why district courts can decline to assume supplemental jurisdiction).

331 970 F. Supp. 1375 (N.D. Iowa 1997).

332 28 U.S.C. § 1367(c)(1).

333 *Doe*, 970 F. Supp. at 1425.

334 *Id.* at 1426.

335 For a discussion of whether claims are removable from state to federal court when a VAWA claim is involved, see *Newton v. Coca-Cola Bottling Company Consolidated*, 958 F. Supp. 248 (W.D.N.C. 1997).

compensation to victims[336] is likely to bring many victims from the state system to the federal courts, as was intended. One likely consequence of this promise is an increase in attempts by plaintiffs to seek supplemental jurisdiction, which at least will require the court to spend additional time considering the issue. Yet consistency is unlikely as long as Congress gives wide discretion to the district judges under § 1367. As VAWA becomes more accepted, district court judges may be willing to entertain more related claims under supplemental jurisdiction, and the courts of appeals may encourage them to do so.

CONCLUSION

Domestic violence is a problem of national proportion.[337] Statistics on its frequency are shocking, and its impact on the nation's welfare and economy is immeasurable.[338] What is the effect on women who must live in fear, who must move frequently to protect their safety, uprooting their family and economic ties? What is the effect on children raised in an environment without security, in which violence becomes a fact of life?[339] How can children subjected to this violent environment succeed in school or in work and establish their own peaceful family relationships? They certainly start life at a tremendous disadvantage.[340] The amount of resources the nation must spend on police services, social services, medical services,[341] and incarceration as a result of domestic violence surely is staggering.[342] The problem is how to break this cycle of violence.

VAWA alters the balance between state and federal law enforcement and places more burdens on the federal courts. Nevertheless, VAWA is an appropriate congressional response to a national problem. It sends a message to the nation, including law enforcement of-

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336 VAWA's civil rights provision seeks to vindicate the rights of the victim of domestic violence and to punish the perpetrator by making him liable for "compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate." 42 U.S.C. § 13981(c).

337 *See supra* notes 9-23 and accompanying text.

338 *See supra* notes 9-23 and accompanying text; *cf.* Richard J. Gelles & Murray A. Straus, *The Medical and Psychological Costs of Family Violence, in* PHYSICAL VIOLENCE IN AMERICAN FAMILIES, *supra* note 19, at 425 (describing the higher medical costs and serious harm to the psychological well-being of victims that domestic violence causes nationwide); Roberts & Mason, *supra* note 4, at 2-3 (giving the example that during voir dire of potential jurors in a VAWA prosecution, "over one-third of the jury pool disclosed, in often tearful and wrenching terms, that they had been exposed to domestic violence").

339 Congress found that "children in homes with family violence are 15 times more likely to be abused or neglected than children in peaceful homes." S. REP. No. 103-138, at 41 (1993).

340 *See id.*

341 Approximately one million women seek medical attention every year for injuries caused by domestic violence from a male partner. *See id.*

342 Congressional "estimates suggest that we spend $5 to $10 billion a year on health care, criminal justice, and other social costs of domestic violence." *Id.*

ficers and prosecutors, that Congress considers domestic violence a serious national epidemic.[343] VAWA's provisions tell victims that the nation takes their plight seriously, allow them some control over detention hearings,[344] and provide them with civil remedies that acknowledge and partly compensate them for the harm they have suffered.[345] Finally, when victims reach the point at which they feel they can try to make a new start away from the offender, VAWA protects them by prohibiting the offender from crossing state lines to continue the abuse. The Act assures the victim that despite the unfamiliar surroundings of new state courts and new law enforcement officers, the authorities will enforce existing orders of protection.[346]

Although some challenge the wisdom of further federal involvement in the criminal law,[347] VAWA follows the precedent that numerous other valid federal statutes, which prohibit conduct such as kidnapping,[348] drug dealing,[349] the transportation of stolen goods,[350] and the possession of machine guns, have established.[351] VAWA is supported by numerous findings on record. Despite some initial setbacks, VAWA will survive *Lopez* challenges because of its jurisdictional elements. The federalism debate, while of interest, ignores the current federal role in law enforcement nationwide.[352]

Problems undoubtedly will arise with the implementation of VAWA. DOJ guidelines that direct U.S. Attorney Offices how to screen cases for federal prosecution will help avoid equal protection problems and charges of prosecutorial misconduct, while improving the image of federal law enforcement as a fair system.[353] It also seems likely that many domestic violence cases will find their way into federal court, requiring more training for judges unfamiliar with these cases. The problem of domestic violence, however, is too important and costly to the nation not to make these investments.[354] The courts also can take a narrow view of what state claims they will hear in conjunction with federal domestic violence charges to limit VAWA's impact on the courts' dockets. Federal judges may have difficulty ascertaining

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343 *See supra* note 9 and accompanying text.

344 *See* 18 U.S.C. § 2263 (1994).

345 *See* 42 U.S.C. § 13981.

346 *See* Klein, *supra* note 28, at 255-57; *supra* notes 44-48 and accompanying text.

347 *See supra* Part I.C.1.

348 *See* 18 U.S.C. § 1201 (1994 & Supp. II 1996).

349 *See* 21 U.S.C. § 841(a) (1994).

350 *See* 18 U.S.C. § 2315.

351 *See id.* § 922(o).

352 For examples of the variety of federal criminal statutes upheld against *Lopez* challenges, see *supra* note 98.

353 *See* Clymer, *supra* note 25, at 675-717.

354 "Gender-based crimes and the fear of gender-based crimes restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy." S. REP. No. 103-138, at 54 (1993).

and applying the applicable state law regarding orders of protection issued in one state and violated in another, but they currently must construe issues of state law in many diversity actions.[355] Moreover, this additional burden of deciding conflicts of laws questions seems to be an unavoidable, if imperfect, result of any adequate federal response to domestic violence. The Violence Against Women Act is a well-conceived and generally well-drafted response to a serious national problem. If properly applied, VAWA provides the federal government a proper role in policing domestic violence.

355 *See* WRIGHT, *supra* note 322, § 58.

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