

Domestic Violence and Gun Control: Determining the Proper Interpretation of “Physical Force” in the Implementation of the Lautenberg Amendment

Abigail Browning*

INTRODUCTION

In the last half of the nineteenth century, public awareness of domestic violence rose as organizations, such as social purity leagues and temperance groups, campaigned for battered women’s rights in the United States and Europe.¹ The first juvenile and family courts in the United States were created in the early twentieth century, and with their creation came a clearer focus on domestic violence against women.² Yet by the 1970s, the problems of domestic violence victims were viewed as family and personal problems of “individual or social pathology.”³

Class action lawsuits brought against police departments in the 1970s for failing to adequately protect battered women caused a shift in the criminal justice system’s response to domestic violence.⁴ These

* J.D. (2010), Washington University School of Law; B.A. (2007), Pomona College. I would like to thank the Editorial Board of the *Washington University Journal of Law & Policy* for their support and numerous contributions to this work.

1. R. EMERSON DOBASH & RUSSELL P. DOBASH, WOMEN, VIOLENCE AND SOCIAL CHANGE 156–57 (1992). During this period, and into the early twentieth century, laws to punish men who beat their wives were proposed in many state legislatures and in the British Parliament, but they rarely passed. *Id.* at 157. Punishment was even rarer, as the attention devoted to domestic violence in this early era focused more on maintaining public order and preventing crime than on protecting women. *Id.*

2. *Id.* at 159. Many cities in the United States focused on integrating psychology, social welfare, and notions of justice, and by 1920 there were juvenile, family, or domestic relations courts in over ten major cities. *Id.* at 158–59.

3. *Id.* at 160. “The CJS [Criminal Justice System] was not considered the appropriate institution for dealing with violence against women within the home; it was now defined as a family and personal problem best dealt with through social and psychological solutions.” *Id.*

4. *Id.* at 165–66. These class actions “raised public awareness of the problem, publicized

early lawsuits led to major institutional changes and legislative reform beginning in the late 1970s.⁵ Since then, domestic violence research has grown to include methods like gathering firsthand accounts from victims of domestic violence and their family members.⁶ Many accounts demonstrate how quickly violent words in a domestic relationship can develop into threats of violence involving guns or actual physical violence.⁷

institutional forms of injustice, led to changes in State laws and set a precedent for police response all over the country.” *Id.* at 166.

5. *Id.* at 166–67. The movement for reform “witnessed the creation of research and demonstration projects in law enforcement and police training in several states Innovative criminal justice programmes and new law enforcement legislation were often the result of local and national pressure by activists.” *Id.* at 167.

6. See DOBASH & DOBASH, *supra* note 1, at 2–14 (examining the development of public awareness about domestic violence and recounting several firsthand accounts from research studies).

7. See, e.g., Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 66–68 (1991). Mahoney recounts a firsthand account from a victim, pregnant with her second child, whose verbally abusive husband yelled at her for hours each day. *Id.* at 66. One day, the woman worked up the courage to tell her husband that she could not stand his screaming any longer and that, if he did not stop the abuse, she would leave him. *Id.* The woman described his reaction:

Suddenly he lost his temper He stormed upstairs, and I heard him pushing around in the closet. I thought, “That’s funny. It sounds like he’s getting the gun.” And I didn’t sit down or move—I stood in the middle of the living room floor and waited. He came down the stairs shouting and I saw that he really did have the shotgun. I knew it was fully loaded. I remember making the conscious decision that this was different than waiting through other outbursts, and that any argument would be deadly.

Id. (alteration in original). Often victims of domestic violence first report assaults by violent partners or husbands within days, or even hours, of threats or violence using firearms, but reporting does not guarantee a victim’s safety. See *id.* at 72–74 (describing instances where domestic violence victims were murdered even after seeking protection). For example, Mahoney points to the case of *Godfrey v. Georgia*. *Id.* at 72–73. In *Godfrey*, the domestic relationship involved an abusive husband and wife. *Godfrey v. Georgia*, 446 U.S. 420, 424 (1980). The husband’s history of violent behavior caused the couple to separate in the past. *Id.* at 424 & n.3. One day, in the middle of a heated argument, Godfrey “threatened his wife with a knife and damaged some of her clothing.” *Id.* at 424. The same day, she went to a Justice of the Peace to get a warrant for her husband’s arrest. *Id.* Mrs. Godfrey moved out and went to live with her mother. *Id.* at 424–25. After Mr. Godfrey failed to convince his wife to return home, he got his shotgun and went to his mother-in-law’s home. *Id.* “He pointed the shotgun at his wife through the window and pulled the trigger. The charge from the gun struck his wife in the forehead and killed her instantly.” *Id.* at 425. Godfrey then “proceeded into the trailer, striking and injuring his daughter with the barrel of the gun. He then fired the gun at his mother-in-law, striking her in the head and killing her instantly.” *Id.*

Beginning in the late 1970s, legislative efforts to prevent domestic violence addressed the most violent crimes that often lead to death, particularly those crimes committed with firearms.⁸ A major effort to prevent such fatal results is the Lautenberg Amendment, which makes it unlawful for an individual “‘convicted of a misdemeanor crime of domestic violence’ to ship, transport, possess, or receive firearms or ammunition in or affecting commerce.”⁹ The Lautenberg Amendment, passed in 1996, amends the Gun Control Act of 1968 (“GCA”), which defines the term “misdemeanor crime of domestic violence” to include “the use or attempted use of physical force. . . .”¹⁰

This Note provides an overview of the legislative history of the Lautenberg Amendment and discusses the prior and subsequent legislative, sociological, and community efforts to combat and prevent domestic violence. In particular, this Note examines and critiques the circuit split over the interpretation of the GCA’s “physical force” requirement.¹¹ Finally, this Note proposes allowing for more latitude in judicial interpretation of the Lautenberg Amendment and the associated laws that combat domestic violence.

I. ACADEMIC, SOCIETAL, AND GOVERNMENTAL RESPONSES TO DOMESTIC VIOLENCE

A. *VAWA and Contemporary Domestic Violence Studies*

Although it is not a new phenomenon, addressing domestic violence only became a focus of legislative action relatively recently. Beginning in the late 1970s, researchers took a more critical look at domestic violence and identified indicators, precursors, and

8. See DOBASH & DOBASH, *supra* note 1, at 128–42.

9. 18 U.S.C. § 922(G)(9) (2006); T.J. HALSTEAD, CONG. RESEARCH SERV., LIBRARY OF CONG., CRS ORDER CODE RL31143, FIREARMS PROHIBITIONS AND DOMESTIC VIOLENCE CONVICTIONS: THE LAUTENBERG AMENDMENT 5 (2001).

10. 18 U.S.C. § 921(a)(33)(A)(ii) (2006); HALSTEAD, *supra* note 9, at 2.

11. The Seventh, Ninth, and Tenth Circuits hold that “physical force,” as used in section 921(a)(33)(A)(ii) requires more than “mere touching.” See *infra* note 38 and accompanying text. The First, Eighth, and Eleventh Circuits accept a much lower standard to satisfy the “physical force” requirement. *Id.*

incidence.¹² Many studies take a critical look at non-violent behaviors that often occur alongside violent behaviors and examine the contemporaneous incidence of non-violent and violent behaviors in domestic relationships.¹³ Generally, studies like the Violent Men Study indicate that men tend to underreport the incidence of domestic violence in their relationships, skewing the statistics, particularly statistics that rely on self-reporting.¹⁴

Despite concerns over the accuracy of statistics, many of the statutes enacted by Congress to combat domestic violence rely on statistical studies to guide legislation. One such step toward combating domestic violence at the federal level is the Violence Against Women Act (“VAWA”).¹⁵ Enacted as part of the Violent Crime Control and Law Enforcement Act of 1994,¹⁶ VAWA makes it a federal crime for an individual to travel in interstate commerce with the intent to harm or intimidate a domestic partner and who, in the course of doing so, commits a crime of violence against that partner.¹⁷ Subtitle B of VAWA, entitled “Safe Homes for Women,”

12. See Rebecca Emerson Dobash & Russel P. Dobash, *Violent Men and Violent Contexts*, in *RETHINKING VIOLENCE AGAINST WOMEN* 144–55 (R. Emerson Dobash & Russell P. Dobash eds., 1998). Projects like the Violent Men Study and Violence Against Wives emerged in relatively recent years. See *id.* at 144. The Violence Against Wives study was conducted in 1979 and the Violent Men Study in 1996. *Id.* Evidence from these studies and other domestic violence research reveals “four general themes: men’s possessiveness and jealousy, disagreements and expectations concerning domestic work and resources, men’s sense of the right to punish ‘their’ women for perceived wrongdoing, and the importance to men of maintaining or exercising their power and authority.” *Id.*

13. See, e.g., *id.* at 160–61. Indicators of imminent violent behavior include swearing, shouting, calling names, pretending to hit, and putting down a person with whom the offender is in a domestic relationship. *Id.* at 161.

14. See *id.* at 160. Research “show[s] more concordance in men’s and women’s reports of men’s use of various forms of controlling and intimidating behaviors than for violence and injuries,” but there is a significant difference between “men’s and women’s reports of men’s attempts to use children in arguments, men’s attempts to control and restrict the woman’s life and movements, putting her down, deliberately keeping her short of money and threatening to hurt the pets.” *Id.*

15. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified in scattered sections of 8 U.S.C., 16 U.S.C., 18 U.S.C., 28 U.S.C., 42 U.S.C.).

16. See *id.*

17. 18 U.S.C. § 2261(a)(1) (2006). The full text of the section states that:

A person who travels in interstate or foreign commerce or enters or leaves Indian country or within the special maritime and territorial jurisdiction of the United States with the intent to kill, injure, harass, or intimidate a spouse, intimate partner, or dating partner, and who, in the course of or as a result of such travel, commits or attempts to

provides a list of safeguards and preventative measures to protect and educate past, present, and potential female victims of violence.¹⁸

Congress amended the statute in October 2000, eliminating the requirement of “either a completed commission of a crime of violence or bodily injury.”¹⁹ VAWA also prescribes a set of penalties for violations depending on the “extent of the bodily injury to the victim and whether a weapon [i]s used.”²⁰ VAWA is only one of several statutes written to combat domestic violence and provide redress and protection to past, present, and potential victims.²¹

commit a crime of violence against that spouse, intimate partner, or dating partner, shall be punished as provided in subsection (b).

§ 2261(a)(1). Subsection (b) sets out penalties ranging from not more than five years to imprisonment for life, depending on the severity of the crime. *See* 18 U.S.C. § 2261(b).

Shortly after the enactment of VAWA, the Department of Justice obtained its first conviction under VAWA’s interstate domestic violence enforcement provision. *MARGARET C. JASPER, THE LAW OF VIOLENCE AGAINST WOMEN* 18 (1998). The case, tried in the Southern District of West Virginia, involved a man who “beat his wife . . . until she collapsed.” *Id.* After placing her in his car trunk and driving for five days, the man finally took his wife to the hospital where she was diagnosed with irreversible brain damage. *Id.* Prosecutors obtained a conviction against the man “who was sentenced to life in prison.” *Id.* at 19.

18. *See id.* at 2–3. Among other things, Subtitle B provides for a National Domestic Violence Hotline; gives monetary grants to state, tribal, and local governments to treat domestic violence as a serious criminal offense; and helps to subsidize the operating costs of battered women’s shelters. *Id.* The subtitle also provides for funding for educating young people about domestic violence, provides grants for research regarding domestic violence, and provides money to nonprofit organizations that establish “prevention/intervention domestic violence projects in local communities.” *Id.* at 3.

19. James M. Peters, *Federal Domestic Violence Laws—2001*, 44 *ADVOCACY* 15, 15 (2001).

20. *Id.* at 17.

21. *See id.* at 18–19. For example, the Full Faith and Credit to Orders of Protection, 18 U.S.C. § 2265, requires that “a qualifying civil or criminal domestic protection order issued by a court in one state or Indian tribe shall be accorded full faith and credit by the courts of other states or tribes.” *Id.* at 18. The Amendment to ATF Form 4473 provides that a firearm purchaser must complete a form “certifying that he or she is not subject to a valid protection order and has not been convicted of a qualifying misdemeanor crime of domestic violence.” *Id.* Another relevant statute, the Right of Victim to Speak at Bail Hearings, 18 U.S.C. § 2263, provides that “victims of VAWA crimes have the right, if they want, to be heard at bail hearings regarding the danger posed by defendants,” and the Other Victims’ Rights provision, 42 U.S.C. § 10606(b), gives victims of federal crimes, including domestic violence victims the following rights:

- The right to be treated with fairness and with respect for the victim’s dignity and privacy.
- The right to be reasonably protected from the accused offender.
- The right to be notified of court proceedings.

To aid implementation of VAWA and related programs, as well as to “assist states in reorganizing law enforcement’s response to violent crimes against women,” Congress allocated funds to the S.T.O.P. Violence Against Women Grant Program.²² Another obstacle to implementation is police officers’ reluctance to become involved in domestic violence disputes.²³ To this end, many jurisdictions instituted mandatory arrest policies.²⁴ The Department of Justice also began a program in 1996 to help governments across the country “treat domestic violence as a serious criminal offense.”²⁵ VAWA also established funding for community education and policing.²⁶

-
- The right to be present at all public court proceedings related to the offense,
 - The right to confer with attorney for the Government in the case.
 - The right to restitution.
 - The right to information about the conviction, sentencing, imprisonment, and release of the offender.

Id.

22. See JASPER, *supra* note 17, at 5–6. Within five years of instituting VAWA, “a total of \$800 million in federal funds was authorized under” the S.T.O.P. Violence Against Women Grant Program. *Id.* at 5. States must meet certain requirements before they can receive federal funding under the program. See *id.* at 6. As a result of these requirements, “several states have passed laws or changed their administrative procedures to fund all forensic medical examinations for victims of sexual assault, thereby ensuring that criminal investigations in sexual assault cases are funded like all other criminal investigations—by the state and not by the victim.” *Id.*

23. *Id.* at 20–21. Jasper points out that police reluctance to become involved in domestic violence disputes is due to the fact that “calls for police assistance are among the most complex, emotionally charged and potentially dangerous calls to which police respond.” *Id.*

24. *Id.* Mandatory arrest policies “require[] police to arrest . . . offender[s] whenever the police officer determines that a crime has been committed and probable cause for arrest exists.” *Id.* at 21. Jasper states her belief that these policies send a message of zero tolerance toward crimes of domestic violence in the community. *Id.*

25. *Id.* Under DOJ’s Grants to Encourage Arrest Policies program, “[l]aw enforcement officers are being trained to identify patterns of abuse, and to provide the immediate support and protection a domestic violence victim requires, including shelter and counseling, medical care, and legal assistance.” *Id.*

26. *Id.* at 22. One such program is the Community Oriented Policing Services (“COPS”) Office, which was established to add 100,000 police officers across the country to promote community policing. *Id.* Funding is granted to police departments that collaborate with nonprofits and non-governmental groups to combat domestic violence. *Id.* The program seeks to educate individuals who know a domestic violence victim or offender and/or those who witness acts of domestic violence. *Id.* An example of a successful outcome from education provided under the program is the case of a woman in Virginia who went to the hospital with a black eye and asked that the nurse not call the police for fear of further abuse from her husband. *Id.* at 22–23. The nurse, against the victim’s wishes, called the police to report the suspected

Although problems with implementation still exist, many governmental, nonprofit, and private entities are involved in ongoing efforts to make the programs against domestic violence stronger and more effective.²⁷

B. The Lautenberg Amendment

The GCA is a well-known example of a legislative effort to combat domestic violence. It established strict regulations of “the manufacture, sale, transfer, and possession of firearms and ammunition.”²⁸ “Section 922(g) of the GCA delineates nine classes of individuals who are prohibited from shipping, transporting, possessing or receiving firearms or ammunition in interstate commerce.”²⁹ Congress added the ninth category of individuals in September 1996 as part of the Omnibus Consolidated Appropriations Act of 1997.³⁰ This addition, known as the “Lautenberg Amendment,” “makes it unlawful for ‘any person . . . who has been convicted of a misdemeanor crime of domestic violence’ to ship, transport, possess, or receive firearms or ammunition in or affecting commerce.”³¹ Senator Frank Lautenberg, who proposed the amendment, was troubled that federal gun laws prohibited only convicted felons from possessing firearms despite the fact that many

domestic violence and, afterward, the woman attributed her freedom from the violent relationship to the nurse’s concern and action. *Id.* at 23.

27. *See id.* For example, one major problem with implementation of the programs to aid domestic violence victims, including women and children, is helping those victims who live in rural areas. *See id.* at 21–22. Two concerns include a fear of slow police response to calls reporting domestic violence and fear that women will not report abuse because they worry about suffering a loss of reputation in a small, rural community. *Id.* at 21. VAWA addressed these problems by establishing funding programs specifically to help victims in rural areas. *Id.* The goal of grants set out under this program is to: “(i) create training programs for those most likely to be in contact with domestic violence victims, such as law enforcement, shelter workers, health care providers, and clergy; (ii) increase public awareness and implement community education campaigns; and (iii) expand direct services for rural and Native American victims and their children.” *Id.* at 21–22.

28. HALSTEAD, *supra* note 9, at 1.

29. *Id.*

30. *Id.* at 2.

31. *Id.* (alteration in original); *see also* 18 U.S.C. § 922(g)(9) (2006) (making it unlawful for any person “who has been convicted in any court of a misdemeanor crime of violence,” to ship, transport, possess or receive ammunition or firearms in interstate commerce).

abusers and batterers were only convicted of misdemeanors.³² The Senator stated that the amendment “closes this dangerous loophole and keeps guns away from violent individuals who threaten their own families.”³³

In order for an individual to qualify as having been convicted of a misdemeanor crime of domestic violence under section 922(g)(9), the underlying conviction must include an offense with an element that requires “the use or attempted use of physical force.”³⁴ The statute broadly defines the types of domestic relationships between a victim and an offender that must exist for there to be a crime of “domestic” violence;³⁵ yet, according to both the Eighth Circuit and the Bureau of Alcohol, Tobacco, and Firearms (“ATF”), “a predicate offense is not required to contain an explicit element referring to domestic violence.”³⁶ The ATF defines the term “misdemeanor crime of domestic violence” as “misdemeanors that involve the use or attempted use of physical force (e.g., simple assault, assault, and battery) if the offense is committed by one of the defined parties. This is true whether or not the State statute or local ordinance

32. 142 CONG. REC. 19,415 (1996).

33. *Id.* The legislative history of the Lautenberg Amendment emphasizes the often minimal punishment received by domestic violence offenders. *See, e.g., id.* To demonstrate this, Senator Lautenberg used the hypothetical of a man who “beat his wife brutally and was prosecuted, but like most wife beaters, he pleaded down to a misdemeanor and got away with a slap on the wrist.” 142 CONG. REC. 26,674 (1996). Lautenberg’s hope was to keep such a man from owning a gun and thereby prevent escalation in violent situations. *See id.* at 26,674–75.

34. 18 U.S.C. § 921(a)(33)(A)(ii) (2006).

35. *Id.* The full text of § 921(a)(33)(A) states:

[T]he term “misdemeanor crime of domestic violence” means an offense that—(i) is a misdemeanor under Federal, State or Tribal law; and (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

§ 921(33)(A).

36. HALSTEAD, *supra* note 9, at 3; *see also* United States v. Smith, 171 F.3d 617, 620 (8th Cir. 1999) (holding that “while § 921(a)(33) requires proof of a domestic relationship, it requires the predicate misdemeanor to have only one element: the use or attempted use of physical force (or its alternative, the threatened use of a deadly weapon)”).

specifically defines the offense as a domestic violence misdemeanor.”³⁷

C. Circuit Split

There is a split among the circuits concerning the meaning of “physical force” under section 922(g) in the context of state misdemeanor domestic violence statutes.³⁸ The Seventh, Ninth, and Tenth Circuits hold that the term “physical force,” as used in section 921(a)(33)(A)(ii) requires more than “mere touching.”³⁹ The First, Eighth, and Eleventh Circuits require a much lower standard to satisfy the “physical force” requirement of the statute.⁴⁰

The Tenth Circuit examined the phrase “physical force” in *United States v. Hays*.⁴¹ “Steven Daniel Hays was indicted under § 922(g)(9) . . . for possession of a firearm after having been convicted of a misdemeanor crime of domestic violence.”⁴² The Wyoming statute at issue stated that a person could be convicted of “battery if he *unlawfully touches another in a rude, insolent or angry manner* or intentionally, knowingly or recklessly causes bodily injury to another.”⁴³ The Tenth Circuit, in determining the congressional intent behind the term “physical force,” stated that “[b]ecause neither § 922(g)(9) nor § 921(a)(33)(A) defines the term ‘physical force,’

37. HALSTEAD, *supra* note 9, at 3.

38. The following cases lie on the side of the circuit split that agrees that “physical force” must entail more than “mere contact”: *United States v. Hays*, 526 F.3d 674 (10th Cir. 2008); *United States v. Belless*, 338 F.3d 1063 (9th Cir. 2003); *Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003). The other circuits contend that a much lower standard applies to the “physical force” requirement of § 921(a)(33)(A)(ii). *See* *United States v. Griffith*, 455 F.3d 1339 (11th Cir. 2006); *United States v. Nason*, 269 F.3d 10 (1st Cir. 2001); *United States v. Smith*, 171 F.3d 617 (8th Cir. 1999).

39. *See, e.g., Hays*, 526 F.3d at 678. The *Hays* court required more than “mere touching” and defined the term “force” as referring to “destructive or violence force.” *Id.*

40. *See, e.g., Nason*, 269 F.3d at 16–17 (stating the Congress clearly intended that section 922(g)(9) “encompass misdemeanor crimes involving *all* types of physical force, regardless of whether they could reasonably be expected to cause bodily injury”).

41. *See Hays*, 526 F.3d at 676–81.

42. *Id.* at 675.

43. *Id.* (citing WYO. STAT. ANN. § 6-2-501(b) (2009)). Mr. Hays argued that “mere touching . . . [was] not the type of ‘physical force’ contemplated by the federal statute [§ 921(a)(33)(A)], and that his predicate conviction . . . was therefore inadequate to support the charge in the indictment.” *Id.*

‘. . . [the court] look[s] to the “ordinary . . .” meanings of the words used.’”⁴⁴ The Tenth Circuit pointed to the Supreme Court’s decision in *Leocal v. Ashcroft*,⁴⁵ which defined a “crime of violence,” as well as decisions from other circuits, to conclude that “physical force” requires more than mere rude or insolent contact.⁴⁶ The court determined that the Wyoming statute defining battery as touching in a “rude,” “insolent,” or “angry” manner did not satisfy § 921(a)(33)(A) because it “embraces conduct that does not include ‘use or attempted use of physical force.’”⁴⁷

To bolster its argument, the Tenth Circuit in *Hays* examined the legislative history of the Lautenberg Amendment.⁴⁸ Senator Lautenberg stated that those who would be targeted by the amendment would be “people who show they cannot control themselves and are prone to fits of violent rage, directed, unbelievably enough, against their own loved ones.”⁴⁹ The court focused on statistics regarding death resulting from domestic violence

44. *Id.* at 677. The court first looked to the Black’s Law Dictionary definition of “force” and “physical force.” *Id.* The dictionary “defines ‘force’ as ‘[p]ower, violence, or pressure directed against a person or thing,’ and ‘physical force’ as ‘[f]orce consisting in a physical act, esp. a violent act directed against a robbery victim.’” *Id.* (citing BLACK’S LAW DICTIONARY 673 (8th ed. 2004)).

45. 543 U.S. 1 (2004).

46. *Id.* The *Leocal* decision focused on the definition of a “‘crime of violence’ within the meaning of 18 U.S.C. § 16.” *Id.* (citing *Leocal*, 543 U.S. at 4). The court noted:

Section 16 defines “crime of violence” to mean: (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Id. (citing 18 U.S.C. § 16 (2006)).

47. *Id.* at 679 (citing *United States v. Belless*, 338 F.3d 1063, 1067 (9th Cir. 2003)). To illustrate its point, the Court explained:

For example, in the midst of an argument a wife might angrily point her finger at her husband and he, in response, might swat it away with his hand. This touch might very well be considered “rude” or “insolent” in the context of a vehement verbal argument, but it does not entail “use of physical force” in anything other than an exceedingly technical and scientific way.

Id.

48. *Id.* at 680. The Tenth Circuit looked at Senator Lautenberg’s speech on the Senate Floor to determine why Congress added section 922(g)(9) to the statute. *Id.*

49. *Id.* (quoting 142 CONG. REC. 19,415 (1996)). The Senator also stated that “2,000 American children are killed each year from abuse inflicted by a parent or caretaker.” *Id.*

as well as Lautenberg's use of strong language like "violent rage" to determine that Congress intended to keep guns out of the hands of violent domestic abusers rather than those who only inflicted *de minimis* touches.⁵⁰

The Tenth Circuit's decision in *Hays* was in line with the Seventh Circuit's decision in *Flores v. Ashcroft*.⁵¹ In *Flores*, the defendant pleaded guilty to a misdemeanor crime of domestic violence for "attack[ing] and beat[ing] his wife even though prior violence had led to an order barring . . . any contact with her."⁵² The Indiana battery statute to which Flores pleaded guilty stated that battery included "any touching in a rude, insolent, or angry manner."⁵³ Like the court in *Hays*, the Seventh Circuit addressed section 16's definition of the term "crime of violence."⁵⁴ The court determined that, although rudeness "has nothing to do with force, . . . both touching and injury have a logical relation to the 'use of physical force' under § 16(a)."⁵⁵

In determining that the Indiana statute did not satisfy the definition of "physical force" under section 921(a)(33)(A), the *Flores* court stated that under that statute, "[a]ny contact counts as a 'touch,' including slight or indirect touches."⁵⁶ The court found that it was

50. *Id.* The Tenth Circuit stated that the comments that Senator Lautenberg made on the Senate floor

make clear that Congress broadened the scope of § 922(g) to encompass misdemeanor crimes of domestic violence not out of a hope to keep guns out of the hands of individuals who may have inflicted *de minimis* touches on their spouses or children, but to keep guns out of the hands of domestic abusers who previously fell outside the bounds of the statute because they were convicted of misdemeanors rather than felonies due to "outdated thinking" or plea bargains.

Id.

51. 350 F.3d 666 (7th Cir. 2003).

52. *Id.* at 670. Because bodily injury resulted from Flores's attack on his wife, he received a one-year sentence. *Id.* The court stated that "Flores did not tickle his wife with a feather during a domestic quarrel, causing her to stumble and bruise her arm. That would not have led to a prosecution, let alone to a year's imprisonment." *Id.*

53. *Id.* at 669. "Indiana law provides: '(a) A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor. However the offense is: (1) a Class A misdemeanor if: (A) it results in bodily injury to any other person.'" *Id.*

54. *Id.*

55. *Id.*

56. *Id.* The court stated that Indiana's judiciary previously determined that "any physical hurt satisfies section 35-42-2-1(a)(1)(A). So if the paper airplane inflicts a paper cut, the snowball causes a yelp of pain, or a squeeze of the arm causes a bruise, the aggressor has

important to maintain the boundaries between violent and non-violent offenses and thus insisted that “force” should imply violence.⁵⁷ The court held that although “Flores’s *acts* were on the ‘force’ side of the legal line, the elements of his *offense* were on the ‘contact’ side.”⁵⁸ The court reached this holding by following the instructions of section 16(a), which state that “the elements rather than the real activities are dispositive in misdemeanor cases. . . .”⁵⁹

In *United States v. Belless*, the Ninth Circuit aligned itself with the Seventh and Tenth Circuits and held that “physical force” under title 18 section 921(a)(33)(A)(ii) required the violent use of physical force against another, and “mere touching” would not be sufficient to satisfy the definition.⁶⁰ “Robert Belless was convicted of illegally possessing a firearm, in violation of 18 U.S.C. § 922(g)(9).”⁶¹ The

committed a Class A misdemeanor It is hard to describe any of this as ‘violence.’” *Id.* at 670.

57. *Id.* at 672. The court stated:

To avoid collapsing the distinction between violent and non-violent offenses, we must treat the word “force” as having a meaning in the legal community that differs from its meaning in the physics community. The way to do this is to insist that the force be violent in nature—the sort that is intended to cause bodily injury, or at a minimum likely to do so.

Id. The courts found that a failure to draw this distinction would lead to the result of “physical force against” and “physical contact with” meaning the same thing—a clearly unreasonable result. *Id.* The court offered examples of actions on either side of the line: “an offensive touching is on the ‘contact’ side” and “a punch is on the ‘force’ side.” *Id.*

58. *Id.*

59. *Id.* In the concurring opinion, Judge Evans argued that the majority’s strict adherence to section 16(a)’s instructions to follow the elements, rather than the “real conduct,” of the act is misplaced. *Id.* at 673 (Evans, J., concurring). Judge Evans stated:

If it is permissible to look at Flores’ “real conduct” to determine if the person he beat was his wife rather than some stranger, why does it not make perfectly good sense to allow [a] . . . judge to look at what he really did in other respects as well, rather than restrict the judge to a cramped glance at the “elements” of a cold statute? The more information upon which the judge acts, the better. A common-sense review here should lead one to conclude that Flores committed a “crime of domestic violence.”

Id.

60. *United States v. Belless*, 338 F.3d 1063, 1068–69 (9th Cir. 2003).

61. *Id.* at 1064. Belless argued that his conviction was invalid because his “prior misdemeanor conviction [w]as not within . . . [18 U.S.C. § 922(g)(9)]’s definition of a crime of domestic violence, as set out in 18 U.S.C. § 921(a)(33)(A)” *Id.* at 1064–65.

underlying misdemeanor conviction arose from an assault and battery he committed against his wife.⁶²

The Wyoming statute at issue in *Belless* prohibits “unlawfully touch[ing] another in a rude, insolent or angry manner or intentionally, knowingly or recklessly caus[ing] bodily injury to another.”⁶³ The Ninth Circuit found that “[a]ny touching constitutes ‘physical force’ in the sense of Newtonian mechanics.” In the criminal context, however, “the physical force to which the federal statute refers is not *de minimis*.”⁶⁴ The court contrasted the federal statute with the “Wyoming statute [which] criminalizes conduct that is minimally forcible. . . .”⁶⁵

62. *Id.* at 1065. Belless was accused of “grabbing . . . [his wife’s] chest/neck area and pushing her against her car in an angry manner.” *Id.* Following his conviction, “Belless was sentenced to serve ninety days, all suspended except for the time” he spent in jail awaiting his final sentence. *Id.* He was required to pay a fine of \$270 and given six months probation. *Id.*

63. *Id.* at 1067. Belless argued that because the Wyoming statute did not include, as an element, that the offender and victim share a domestic relationship specified in 18 U.S.C. section 921(a)(33)(A)(ii), he was not guilty of an underlying crime as required in the federal statute. *Id.* at 1065–66. The Ninth Circuit rejected this argument by stating that the “federal statute does not require that the misdemeanor statute charge a domestic relationship as an element. It requires only that the misdemeanor have been committed against a person who was in one of the specified domestic relationships.” *Id.* at 1066.

64. *Id.* at 1067–68. The court invokes the “traditional doctrine of *noscitur a sociis*, that ‘the meaning of doubtful words may be determined by reference to associated words and phrases.’” *Id.* at 1068. The court states that “[i]n the federal definition the associated phrase [with ‘physical force’] is ‘threatened use of a deadly weapon,’” and such threat can only mean a “gravely serious threat to apply physical force.” *Id.*

65. *Id.* The court pointed to the example of Vice President Richard Nixon, in 1959, jabbing his finger into Soviet Premier Nikita Khrushchev’s chest and yelling in his face after the Soviet Premier made offensive comments regarding American consumerism. *Id.* The court stated that if such an ungentlemanly act had been committed in Wyoming, the Vice President might have been charged with the same act as Belless. *Id.* The court stated:

The ungentlemanly act of hollering in anyone’s face, much less a chief of state’s, may be characterized as “insolent,” and pointing a finger at someone, much less touching him with the finger, may fairly be characterized as “rude,” and both men, though perhaps exaggerating their affect for the crowd, looked “angry.”

Id. The court found that the Wyoming statute, while it may provide for acts that would lead to violence, also includes merely “impolite” acts, so it cannot qualify under the federal statute. *Id.* In its explanation, the Ninth Circuit failed to address the serious issue at hand regarding domestic violence such as the violence which occurred between Belless and his wife. *See id.* There is no indication that finger jabbing and yelling between two heads of state is in any way analogous to a man grabbing his wife’s chest and neck and pushing her against a car in an angry manner, which is exactly what happened in the case at hand. *See id.*

In *United States v. Griffith*,⁶⁶ the Eleventh Circuit determined that the phrase “physical force” does not necessitate the direct violence required by the Seventh, Ninth, and Tenth Circuits.⁶⁷ In *Griffith*, Jerry Lee Griffith was convicted of a misdemeanor crime of domestic violence after he hit his wife and dragged her across the floor.⁶⁸ Two years later, Griffith “was found in possession of a firearm. That led to a conditional guilty plea to one count of violating § 922(g)(9).”⁶⁹ The Georgia statute under which Griffith was convicted provided that an individual was guilty of “simple battery when he or she . . . intentionally makes physical contact of an insulting or provoking nature with the person of another.”⁷⁰

In analyzing the meaning of the Georgia statute, the court stated that an individual could not satisfy the physical contact requirement without exerting some level of physical force.⁷¹ The court held that “a person cannot make physical contact . . . of an insulting or provoking nature . . . without physical force,” and noted that Congress’s explicit requirement of the use of violent physical force in other portions of the statute demonstrated that Congress knew how to require more than “simple physical force.”⁷²

66. 455 F.3d 1339 (11th Cir. 2006).

67. *Griffith*, 455 F.3d at 1344–46.

68. *Id.* at 1340. The state court records stated that the “first count was for making ‘contact of an insulting and provoking nature to Delores Griffith, his wife, by hitting her,’” and that the “second count was for ‘intentionally mak[ing] contact of an insulting and provoking nature to Delores Griffith, his wife, by dragging her across the floor.’” *Id.* (alteration in original).

69. *Id.*

The condition of the plea being that Griffith could appeal the district court’s denial of his motion to dismiss the indictment. The sole ground of that motion to dismiss was Griffith’s contention that his prior Georgia misdemeanor conviction was not a valid predicate offense to sustain his current conviction under 18 U.S.C. § 922(g)(9).

Id.

70. *Id.* at 1341 (citing GA. CODE. ANN. § 16-5-23(a)(1) (2007)).

71. *Id.* at 1342. In *Griffith*, the Eleventh Circuit also looked to the plain meaning of the words of the statute and the dictionary definition of what it found to be the key words of section 921(a)(33)(A)(ii): “physical force.” *Id.* It found that the plain meaning of “physical force” is “power, violence, or pressure directed against a person” “consisting in a physical act.” *Id.* (citing BLACK’S LAW DICTIONARY 673 (8th ed. 2004); *United States v. Nason*, 269 F.3d 10, 16 (1st Cir. 2001)).

72. *Id.* at 1342–43. The Eleventh Circuit specifically looked to section 922(g)(8)(C)(ii), what they called a “close neighbor” of section 921. *Id.* Section 922(g)(8)(C)(ii) is “part of provision restricting firearm possession by anyone subject to a court order that prohibits the ‘use, attempted use, or threatened use of physical force . . . that would reasonably be expected

In reaching its holding that “simple physical contact” is enough to satisfy section 921(a)(33)(A), the Eleventh Circuit explicitly rejected the reasoning in *Flores* and *Belless*.⁷³ It stated that its decision, unlike the holdings in the Seventh and Ninth Circuits, did not defy common sense, because it refused to “read into a statutory definition a word that was not there—inserting ‘violent’ before the words ‘physical force.’”⁷⁴

In *United States v. Smith*, the Eighth Circuit held that the defendant’s prior simple misdemeanor assault conviction satisfied the “physical force” requirement of section 922(g)(9).⁷⁵ In *Smith*, William Maurice Smith pleaded guilty to two firearm charges after committing a crime of domestic violence during which he shot and wounded Lauralee Lorensen, the mother of his child, during an argument.⁷⁶ The Iowa misdemeanor assault statute under which Smith had previously pleaded guilty stated that “a generic assault may include, as an element, placing another in fear of imminent physical contact.”⁷⁷

to cause bodily injury.” *Id.* (citing 18 U.S.C. § 922(g)(8)(C)(ii)). The *Griffith* court relied on the rule of statutory interpretation directing that where Congress has put language in one section of a statute and omitted that language in another section of the same Act, “it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Id.* at 1342.

73. *Id.* at 1345. The court noted the concurring opinion in *Flores*, which stated that the majority’s decision was correct on the law, but did not comport with common sense. *Id.* See also *Flores*, 350 F.3d at 672–73. The *Flores* concurrence also stated that individuals are not arrested for “expending a Newton of force against victims.” *Griffith*, 455 F.3d at 1345 (citing *Flores*, 350 F.3d at 672).

74. *Id.* In arguing against the Seventh and Ninth Circuit’s reading of “physical force” as “violent physical force,” the Eleventh Circuit used the well-established law from *Duncan v. Walker* to show that, while the reading of a restrictive word into the statute may “guard against an absurd result that it admits has little or no basis in the real world,” the court actually reached a result that was illogical and absurd in itself. *Id.*

75. *United States v. Smith*, 171 F.3d 617, 621 (8th Cir. 1999).

76. *Id.* at 619. Smith was twenty years old at the time he bought a gun with a driver’s license that falsely listed his age as twenty-one. *Id.* He was convicted of one count of making false representations in connection with the purchase of a firearm and one count of possessing a firearm after having been convicted of a misdemeanor crime of domestic violence. *Id.* The court sentenced him to a fifty-one month prison sentence, followed by a three-year term of supervised release. *Id.*

77. *Id.* at 620. The state statute

defin[ed] “assault” as occurring when a person does any of the following: (1) Any act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another. . . . (2) Any act which is

The record in *Smith* indicates that Smith grabbed the mother of his child by the throat and pushed her down.⁷⁸ The Eighth Circuit stated that this sufficed to show a violation of the Iowa Code “for committing an act intended to cause pain, injury or offensive or insulting physical contact, rather than . . . for placing one in fear of such contact,” and thus Smith pleaded guilty to a predicate offense that contained an element of physical force sufficient to satisfy section 921(a)(33)(A)(ii).⁷⁹

II. ANALYSIS AND PROPOSAL

The historical context and more recent statistical and sociological studies concerning domestic violence provide a background for the circuit split regarding the level of force required to satisfy the “physical force” requirement in section 921(a)(33)(A)(ii). Society’s view of victims of domestic violence has shifted from blaming the victim to addressing the perpetrator’s behavior and shaping the law to prevent harm to the victim. Of particular mention are the studies noting the prevalence of domestic violence and how a battered woman can be reluctant to leave an abusive relationship.⁸⁰ Although

intended to place another in fear of immediate physical contact which will be painful, injurious, insulting or offensive

Id.

78. *Id.* at 621. The court acknowledged that Smith argued that the applicable Iowa statute “contains, as an element, physical contact that is merely insulting or offensive. *Id.* at 621 n.2. However, the court did not accept Smith’s argument, because it determined that “such physical contact, by necessity, requires physical force to complete.” *Id.*

79. *Id.* at 621. In this case, Smith also argued that the predicate misdemeanor must have, as an element, “a domestic relationship between the perpetrator and the victim, and argues that [Smith’s] predicate offense of simple assault does not contain this element.” *Id.* at 620. The court held that, while section 921(a)(33) does require “proof of a domestic relationship, it requires the predicate misdemeanor only to have one element: the use or attempted use of physical force (or its alternative, the threatened use of a deadly weapon, a situation not here presented).” *Id.* The court bolstered its argument both by looking to the plain language of the statute and to the legislative history. *See id.* The court cites Senator Lautenberg: “[C]onvictions for domestic violence-related crimes often are for crimes, such as assault, that are not explicitly identified as related to domestic violence.” *Id.* (citing 142 CONG. REC. S11,872-01, *S11,878 (1996) (statement of Sen. Lautenberg)). The court determined that this statement, as well as other parts of the legislative history, shows that “Congress evinced its intent that the predicate offense need not contain a domestic relationship as an element.” *Id.*

80. *See MAHONEY, supra* note 7, at 10, 65–68. In her article, Professor Mahoney points out that physical violence may appear or increase when a woman chooses to separate herself

some circuits have chosen to require more than “mere touching” or words to fulfill the “physical force” requirement, commentators have noted that women who are involved in an abusive relationship that falls short of such a definition are often trapped in a dangerous relationship.⁸¹ Their attempts to leave their abusive partners precipitate violence.⁸²

As the issues involved in abusive relationships become clearer, including the power and control dynamics between the victim and the abuser, interpreting and defining the law becomes more complicated. In the studies conducted by Dobash and Dobash, results indicate that men and women’s reports of physical violence and controlling behavior can differ significantly.⁸³ These differences show that defining violence involves subjectivity, and that while violence may be used to control behavior, it is not always necessary.⁸⁴

Despite these complexities, the history of the law relating to violence against women indicates an ongoing effort to address the challenges involved in recognizing and preventing further abuse.⁸⁵ Enforcement and treatment programs, like those instituted by the Department of Justice, indicate a growing effort to recognize crimes

from her violent spouse or lover. *Id.* at 65–68.

81. *See, e.g., id.*

82. *Id.* Professor Mahoney’s discussion implies that the female victim should not be blamed for failing to leave an abusive relationship. *Id.* Mahoney states that, as courts and lawmakers become more conscious of the power structure involved in abusive relationships, and as they become more aware of the dangers involved in separation, it will be possible to make “women’s experience comprehensible in law.” *Id.* at 71.

83. *See Dobash & Dobash, supra* note 12, at 155–62. Dobash and Dobash found that women infrequently characterized controlling behavior as “insignificant” and more often characterized such behavior as “serious” or “very serious.” *Id.* at 161. The authors suggest that such characterizations often stem from a victim’s knowledge and experience with violent actions that often follow controlling behavior. *Id.* These results indicate that women frequently correctly perceive controlling behavior as closely connected with physical violence.

84. *Id.* at 161. Dobash and Dobash found that “certain ‘looks’ and moods, pointing in an aggressive manner, swearing, calling names, and criticizing can be used by men to control women and display signs of potential danger.” *Id.* at 160. The authors also point out that these controlling behaviors, when coupled with the fact that the aggressor is often larger and physically stronger than the victim, are even more coercive and threatening to the victim. *Id.* at 160–61.

85. These efforts include the Violence Against Women Act, the Lautenberg Amendment, and related studies and programs aimed at enforcement, education, and prevention. *See* discussion *supra* Part I.

of domestic violence as serious criminal offenses.⁸⁶ Law enforcement's growing awareness that immediate and more serious measures are required to aid domestic violence victims perhaps indicates that courts should take greater action in order to prevent further violence, particularly in the case of known abusers.

Viewed in the context of these studies, the definition of "physical force" and the accompanying complexities grow extremely important. Senator Lautenberg's statements regarding the Lautenberg Amendment provide a useful place to begin unpacking the meaning of "physical force" and understanding how this definition plays a role in preventing domestic violence.⁸⁷ The Senator explicitly stated that the amendment was intended to "keep guns away from violent individuals who threaten their own families."⁸⁸ From this statement, it appears implicit that the Senator intended for action to be taken against those who pose a *threat*, and not just those who already had taken some egregiously violent act.⁸⁹

In beginning to explore and define "physical force" in the context of sections 922(g)(9) and 921(a)(33)(A), the Tenth Circuit took the straightforward approach of examining the plain meaning of the words "physical force" in *Hays*.⁹⁰ The Tenth Circuit also looked to the legislative history and statistical studies related to domestic violence.⁹¹ In focusing on Senator Lautenberg's statement that the

86. See JASPER, *supra* note 17, at 20–21. The programs recognize the need for immediate assistance and support on the part of law enforcement for victims of domestic violence. *Id.*

87. See *supra* text accompanying notes 32 and 33. The Senator spoke directly to preventing those who pose a threat to their own families from owning guns. *Id.*

88. See *supra* text accompanying note 33. While not conclusive of what the definition of "physical force" does or should mean, looking to the statements of the Senator who proposed the bill certainly provides a firm foundation from which to interpret the provision's meaning.

89. As demonstrated in the many studies regarding domestic violence, threats of violence are often the precursors to acts of violence. See, e.g., DOBASH & DOBASH, *supra* note 12, at 160–61. Often this is seen in the context of separation assault, where the abuser threatens his spouse with violence if she attempts to leave him. See MAHONEY, *supra* note 7, at 71–79. As Professor Mahoney states: "Separation assault provides a link between past violence and current legal disputes by illuminating the custody action as *part of* an ongoing attempt, through physical violence and legal manipulation, to force the woman to make concessions or return to the violent partner." *Id.* at 78. Thus, although a batterer may not have committed a serious act of physical violence in the past, this does not preclude future violent action. Moreover, past threats can foreshadow future violent abuse.

90. See *supra* note 44 and accompanying text.

91. See *supra* notes 48 and 49 and accompanying text. As noted in *Rethinking Violence*

amendment was intended to target those who could not control themselves and were “prone to fits of violent rage,” the court determined that the amendment meant to exclude those incidents where any touching or gesturing did not, or could not have, resulted in injury.⁹²

Although the Tenth Circuit determined that a husband swatting away a wife’s pointing finger did not constitute a situation in which physical force was used, the example used may have been too convenient.⁹³ In light of the numerous studies regarding the use of force and violence in domestic relationships, it seems that the court would need to take a more complete inventory of the relationship in order to understand the action’s significance.⁹⁴ While a swat may not seem violent in one isolated incident, it may represent much more in the context of a violent or potentially violent relationship.

The Seventh Circuit, in *Flores* aligned itself with the Tenth Circuit when it determined that touching in a “rude, insolent, or angry manner” did not satisfy the definition of “physical force.”⁹⁵ The court emphasized the importance of maintaining boundaries between violent and non-violent offenses.⁹⁶ By focusing too strictly on the

against Women, statistical studies of domestic violence pose a variety of challenges to the researcher. See Dobash & Dobash, *supra* note 12, at 23–31. Yet, despite the possible inaccuracies of these studies, they may be useful to courts as one of many factors influencing a court’s decision. For example, statistics could be helpful in defining the context and probability of future violence. In surveying the legislative history, the court focused on words such as “wife beaters,” “child abusers,” and “those who commit family violence.” *United States v. Hays*, 526 F.3d 674, 679 (10th Cir. 2008). The last is the most difficult to interpret, as family violence does not appear exclusively to mean physical violence. Nevertheless, in terms of supporting a public policy that prevents any spousal or child abuse (including neglect, a non-violent activity), it would be prudent to err on the side of over-inclusiveness.

92. See *id.* In *Hays*, the court gave the example of a wife who might “angrily point her finger at her husband and he, in response, might swat it away with his hand.” *Id.* The court determined that, although this might be rude, it did not amount to “physical force.” *Id.*

93. See *id.* The court spoke directly to a “rude” or “insolent” action that would not amount to any physical harm or injury and stated that it certainly was not the type of action Congress intended to cover in section 922(g)(9). *Id.*

94. Dobash and Dobash list some points of argument and contextual issues that lead to violence in the domestic setting: “the woman’s domestic work, the man’s jealousy, money, the man’s use of alcohol, and assorted issues relating to children, other family members, and friends.” Dobash & Dobash, *supra* note 12, at 145.

95. *Flores v. Ashcroft*, 350 F.3d 666, 670 (7th Cir. 2003); see *supra* text accompanying notes 52–56.

96. See *supra* text accompanying note 57. The court drew a line between “contact” and “force,” with the former failing to satisfy the definition of “physical force” and the latter

“elements,” rather than looking at the full context, including the defendant’s conduct and the past and current condition of the relationship between the defendant and his victim, the court may have missed the intent of the statute: to prevent domestic violence.⁹⁷ The court needed to take a broader view of what constitutes a violent act and take into account more than the strict “elements” of the act.

Belless offers a compelling example of domestic abuse identified as non-violent.⁹⁸ The court aligned with the Tenth and Seventh Circuits and determined that the defendant’s act of taking his wife and “grabbing her chest/neck area and pushing her against her car in an angry manner” did not satisfy the “physical force” requirement of section 922(g)(9).⁹⁹ *Belless* avoided both a conviction under section 922(g)(9) and a minimal jail sentence; his only punishment was a \$270 fine.¹⁰⁰ Again, one might ask whether the Ninth Circuit failed to properly take *Belless*’s acts in the context of a perhaps broader pattern of angry or violent behavior and failed to fulfill the intent of the Lautenberg Amendment, which was to prevent continued and more serious violence on the part of those with a predisposition for violent behavior.¹⁰¹

Representing the other side of the circuit split, the Eleventh Circuit determined that *violent* physical force was not required to fulfill the “physical force” requirement of section 922(g)(9). The Eleventh Circuit, in *Griffith*, followed a settled rule of statutory interpretation to determine that if Congress had intended to require “violent physical force,” it would have so specified.¹⁰² The court reasoned that because the word “violent” does not precede the word “physical force” in the statute, and because Congress knew how to

successfully doing so. *See Flores*, 350 F.3d at 672.

97. *See supra* text accompanying note 59. Judge Evans’s concurring opinion supported this view that a judge ought to be given more latitude in choosing what to consider in defining an act of violence. *See Flores*, 350 F.3d at 672–73 (Evans, J., concurring). The judge felt that if this were allowed, the *Flores* defendant (and potentially many others) would be found guilty of a “crime of domestic violence.” *Id.*

98. *See United States v. Belless*, 338 F.3d 1063, 1068 (9th Cir. 2003).

99. *Id.* at 1065.

100. *Id.*

101. *See supra* notes 32 and 33 and accompanying text.

102. *See discussion supra* note 72 and accompanying text.

state otherwise, the provision should not be read to require violent physical force.¹⁰³

In the context of the current circuit split regarding statutory interpretation, it would be helpful to either get a clearer articulation of the rule from Congress or resolve the issue judicially by considering Congress's policy goals. As Judge Evans suggested in *Flores*, it would be better policy to allow a judge more freedom to consider the context of each violent or potentially violent act rather than requiring a judge to adhere strictly to elements of a statute.¹⁰⁴ Although critics of this view may suggest that adhering to a statute's elements is the standard and widely accepted method of statutory interpretation, it is important to take into account the policy goals of the Lautenberg Amendment and the unique history and sociological underpinnings of domestic violence law.

Courts play a vital role in recognizing and preventing future domestic abuse.¹⁰⁵ Although a court may not consider an act of domestic violence so violent that it causes serious injury, in light of the policy concerns and history of domestic violence going unreported and unpunished, the judiciary ought to pay special attention to the abuser and the implicit threats caused by the abuser's actions.¹⁰⁶ In addressing each specific case, the court should also take into account the implications of allowing an abusive individual to possess a firearm, regardless of whether the individual has yet caused serious harm to a victim.¹⁰⁷ Moreover, courts should familiarize

103. See discussion *supra* note 72.

104. See *Flores v. Ashcroft*, 350 F.3d 666, 672 (Evans, J., concurring).

105. Several studies outlined in this Note indicate that an unacceptably high proportion of women experience domestic violence, and that these are not isolated occurrences. See, e.g., DOBASH & DOBASH, *supra* note 1, at 37–40. This makes intervention all the more vital. The very fact that there is an act of domestic violence, regardless of whether it results in severe physical injury, should serve as an early warning sign to law enforcement and courts that a lack of interference may result in further, perhaps escalated, acts of violence.

106. This conclusion should have become more apparent once studies revealed that the odds are already stacked against victims, in that they resist even reporting an act of violence for fear of serious, even deadly, retaliation. See MAHONEY, *supra* note 7. Martha Mahoney highlights this fear in her descriptions of “separation assault” and abused women’s traumas and experiences leaving an abusive relationship where the abuser often attempts violent retaliation for her leaving. See *id.* at 71–79; see also DOBASH & DOBASH, *supra* note 12, at 160 (stating that there is a disparity in men’s and women’s reporting of the “frequent use (more than five times) of “violent or controlling behaviors”).

107. When considering the risk of continued harm to victims, courts should take into

themselves with the growing body of literature and studies into the behavior of domestic violence offenders, the differences between non-violent and violent domestic relationships, and the power dynamics in abusive relationships. This knowledge will contribute to law enforcement and courts' understanding of the context and nature of domestic violence.¹⁰⁸

To assist courts, law enforcement should fully investigate each alleged instance of abuse, utilize academic studies of domestic violence, and perhaps even take severe precautionary measures. Studies indicate that abusive relationships often involve a complex set of behaviors that include controlling behavior and alcohol abuse, as well as sexual demands and coercion.¹⁰⁹ Law enforcement can use these increasingly in-depth studies of the dynamics of abusive relationships to aid their assessments of potentially abusive domestic situations. For example, officers called to the scene of an act of domestic violence, even when it is not a violent act, could be required

account two different elements. First, a court should consider the effect of putting a firearm into the hands of an individual with a known history of domestic abuse. Even if the abuser has only made threats or menacing gestures, courts should consider that possession of a firearm gives the abuser even more power over the victim. Also, courts should consider the extremely detrimental mental and emotional effects that even a threat with a gun may have on a victim. Even if the individual never fired the gun, a victim who lives with an abuser who possesses a lethal weapon likely lives in a state of constant fear. Dobash & Dobash point out that threats, such as “feigning to strike, and pointing in a threatening manner can all be frightening” and take an emotional toll, particularly when the abuser is stronger and has shown himself capable of violence. Dobash & Dobash, *supra* note 12, at 160–61. When an abuser has a gun, he has put himself in a position where he is stronger and more powerful than his victim simply by virtue of the fact that he possesses a deadly weapon.

108. Researchers such as Holly Johnson, the director of the Violence Against Women Survey, have conducted surveys regarding the experiences of women in abusive relationships. DOBASH & DOBASH, *supra* note 1, at 10–11. The results of Johnson’s study, “were intended to help understand how violent marriages differ from nonviolent ones.” *Id.* at 11. Additionally, Johnson’s study attempted to more accurately predict violence in relationships, in part through a focus on “which personal and interpersonal characteristics of offenders and marital relationships predict violence” and “which risk factors predict more serious, potentially life-threatening assaults.” *Id.* As our understanding of the frequency and effects of domestic violence, as well as the predictive importance of specific relational characteristics, continues to develop, it can greatly assist courts determine which misdemeanor crimes of domestic violence constitute serious enough offenses to determine that a criminal may not possess a firearm.

109. See Dobash & Dobash, *supra* note 12, at 156. These are only a few of the behaviors on which Dobash & Dobash focus in studying indicators that lead to domestic violence or reveal indications of preexisting domestic violence. See generally Dobash & Dobash, *supra* note 12.

to conduct a more thorough investigation into the circumstances and to closely monitor the household for a certain period of time.

Additionally, even if a violent act is not committed, law enforcement could require a mandatory separation period during which the victim would be removed from the abuser and receive access to counseling. Although some may view this as paternalistic or an invasion of liberty or privacy, it may be necessary and in the best interest of the victim in light of the statistical and anecdotal evidence indicating that victims of domestic abuse often are extremely anxious to take action against their abusers for fear of further, more violent retaliation.¹¹⁰

CONCLUSION

Through social scientific research, the causes and precursors to violent behavior are becoming more evident and identifiable. This can provide courts and law enforcement with a stronger foundation from which to identify abusive and potentially dangerous situations and carry out the spirit of the Lautenberg Amendment, which is to identify dangerous individuals and prevent them from possessing firearms.¹¹¹ Furthermore, the work being done to investigate and clarify the complexities surrounding domestic violence will allow courts to make more educated decisions regarding how to apply laws like the Lautenberg Amendment.

In approaching the issue, the judiciary should keep in mind that the legislative history of the amendment emphasizes the problem of minimal punishment for domestic abuse offenders.¹¹² Implicit in this congressional concern is the idea that to effectively combat domestic violence, the law must provide a strong disincentive for potentially violent offenders. In order to do so, it is important that the courts properly interpret the definition of “physical force” and do not read the statute so strictly that they omit many dangerous offenders.

110. *See, e.g.*, MAHONEY, *supra* note 7.

111. *See supra* text accompanying notes 32 and 33. The amendment was proposed and enacted to provide stricter regulation of those prone to violence and who threaten family members. *See United States v. Hays*, 526 F.3d 674, 680 (10th Cir. 2008).

112. *See supra* note 33. The Congressional Record reveals that the legislature took issue with the fact that many egregious offenders received only “a slap on the wrist.” *Id.*

Although individual rights are a foundational American concept, individuals who pose a danger to their families must be denied any right to bear arms in order to protect the rights of potential victims.

Finally, the fact that many law enforcement officers are now trained to identify abuse and to provide support is a significant step toward helping to end an abusive relationship before it results in grave physical harm or even death.¹¹³ A synthesis of continuing scholarship, vigilance on the part of law enforcement, and efforts by the judiciary to consider the context of each case will all aid the prevention and deterrence of domestic violence.

113. *See supra* note 25. Support provided by the officers includes “shelter and counseling, medical care, and legal assistance.” *Id.* While these steps will not solve the problem of domestic violence, they are certainly a significant step in the right direction.