


7-20-2018

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Rachel B. Polan

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### Recommended Citation

Rachel B. Polan, *The Context of Violence: The Lautenberg Amendment & Interpretive Issues in the Gun Control Act*, 83 Brook. L. Rev. (2018).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol83/iss4/6>

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# The Context of Violence

## THE LAUTENBERG AMENDMENT & INTERPRETIVE ISSUES IN THE GUN CONTROL ACT

### INTRODUCTION

On October 18, 2009, Stephen Voisine used his Remington Model 7400 to shoot and kill a bald eagle.<sup>1</sup> His crime, punishable as a federal offense,<sup>2</sup> was not his first brush with the law. Years prior, a Maine district court convicted Voisine of assaulting his girlfriend, a crime classified as a “misdemeanor crime of domestic violence.”<sup>3</sup> Under 18 U.S.C. § 922(g)(9), a federal law more commonly known as the “Lautenberg Amendment,”<sup>4</sup> Voisine’s assault conviction barred him from the current and future possession of a firearm.<sup>5</sup> When Voisine was later federally indicted for killing a national symbol,<sup>6</sup> he was also

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<sup>1</sup> Information, *United States v. Voisine*, 2011 WL 1458666 (D. Me. Apr. 14, 2011), (No. 1:11-CR-00017-JAW) (hereinafter *Voisine Information*); Rachel Louise Snyder, *The Court Slams the Door on Domestic Abusers Owning Guns*, NEW YORKER, June 30, 2016, <http://www.newyorker.com/news/news-desk/the-court-slams-the-door-on-domestic-abusers-owning-guns> [<https://perma.cc/P7JL-UBZM>].

<sup>2</sup> 16 U.S.C. § 668(a) (2012) (imposing criminal penalties of a fine of “not more than \$5,000,” or up to one year of imprisonment for “knowingly, or with wanton disregard” taking or possessing “any bald eagle commonly known as the American Eagle”).

<sup>3</sup> *Voisine v. United States*, 136 S. Ct. 2272, 2272–76 (2016) *Voisine* was convicted under Section 207 of the Maine Criminal Code for “intentionally, knowingly or recklessly causes bodily injury or offensive physical contact to another person.” ME. REV. STAT. ANN. tit. 17-A, § 207(1)(A) (2004). A brief note on language: in several of the sources cited, a misdemeanor conviction of domestic violence is alternatively referred to by its acronym as an “MCDV” offense.

<sup>4</sup> See Melanie C. Schneider, *The Imprecise Draftsmanship of the Lautenberg Amendment and the Resulting Problems for the Judiciary*, 17 COLUM. J. GENDER & L 505, 505 (2008) (“In 1996, Congress passed the Domestic Violence Offender Gun Ban (‘Lautenberg Amendment’), a controversial Amendment to the Gun Control Act.” (citing 18 U.S.C. § 922(g)(9))).

<sup>5</sup> 18 U.S.C. § 922(g)(9); *Voisine Information*, *supra* note 1; Snyder, *supra* note 1.

<sup>6</sup> U. S. FISH & WILDLIFE SERV., BALD EAGLE: HALIAEETUS LEUCOCEPHALUS 1 (2007), <https://www.fws.gov/migratorybirds/pdf/management/bald-eagle-fact-sheet.pdf> [<https://perma.cc/YYQ3-NJ65>] (The bald eagle was first adopted “as the national symbol in 1782.”).

charged with illegal possession of a firearm under the Lautenberg Amendment.<sup>7</sup>

Prior to the passage of the Lautenberg Amendment, the Gun Control Act of 1968 allowed defendants charged with a misdemeanor conviction of domestic violence to legally purchase firearms, whereas defendants charged with a felony conviction were barred.<sup>8</sup> This loophole was particularly dangerous because of the frequency with which domestic violence defendants pleaded down to misdemeanor convictions—and the deadly connection between domestic abuse and firearms.<sup>9</sup> Sponsored by Senator Lautenberg of New Jersey,<sup>10</sup> the amendment serves two primary functions: first, it prohibits the “possession of firearms by persons convicted of a misdemeanor crime of domestic violence,” and second, it bans the “sale or disposition of any firearm” to such persons.<sup>11</sup>

The outcome of a defendant’s Lautenberg Amendment charge turns on whether a court, looking at the predicate crime, finds a defendant’s conviction to be a “misdemeanor crime of domestic violence.”<sup>12</sup> Courts have used a variety of approaches<sup>13</sup> to determine whether the underlying misdemeanor conduct falls within the scope of the Lautenberg Amendment.<sup>14</sup> In particular, courts look to the Lautenberg Amendment’s force clause, which specifies that a misdemeanor crime of domestic violence must have “as an element [] the use or attempted use of physical force.”<sup>15</sup>

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<sup>7</sup> *Voisine Information*, *supra* note 1; Conditional Plea, *United States v. Voisine*, 2011 WL 1458666 (D. Me. Apr. 14, 2011), (No. 1:11-CR-00017-JAW).

<sup>8</sup> See Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 658(b)(2), 110 Stat. 3009, 3372 (1996) (codified as amended at 18 U.S.C. § 922(g)(9) (2012)); 142 CONG. REC. S10377–78 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg); See *e.g.*, 18 U.S.C. § 922 (1968) (enacting the Unlawful Acts section of the Gun Control Act prohibited convicted felons from possession of a firearm but did not prohibit misdemeanants).

<sup>9</sup> *Id.*; see also Tom Lininger, *An Ethical Duty to Charge Batterers Appropriately*, 22 DUKE J. GENDER L. POL’Y 173, 191–93 (2015) (noting the common practice of undercharging or accepting plea agreements for defendants accused of committing crimes of domestic violence).

<sup>10</sup> S. 1632, 104th Cong. (1996).

<sup>11</sup> T.J. HALSTEAD, CRS REPORT FOR CONGRESS: FIREARMS PROHIBITIONS AND DOMESTIC VIOLENCE CONVICTIONS: THE LAUTENBERG AMENDMENT (2001), <http://mchenry.house.gov/uploadedfiles/second%20amend%20-%20firearms%20prohibitions%20and%20domestic%20violence%20convictions%20the%20lautenberg%20amendment.pdf> [<https://perma.cc/QKU3-2DWN>].

<sup>12</sup> See *Voisine*, 136 S. Ct. at 2278 (“Reckless assaults, no less than the knowing or intentional ones we addressed in *Castleman*, satisfy that definition. Further, Congress enacted § 922(g)(9) in order to prohibit domestic abusers convicted under run-of-the-mill misdemeanor assault and battery laws from possessing guns.”).

<sup>13</sup> See *infra* Section II.B.

<sup>14</sup> *Voisine*, 136 S. Ct. at 2276–77.

<sup>15</sup> 18 U.S.C. § 921(a)(33)(ii).

Voisine's subsequent unsuccessful challenge to the court's application of the Lautenberg Amendment's force clause, and the classification of his crime as one that triggers it, was the subject of the Supreme Court's *Voisine v. United States* decision.<sup>16</sup> In *Voisine*, the Court looked to whether Voisine's assault conviction, which included a reckless mens rea, qualified as a "use of force."<sup>17</sup> Previously, in *United States v. Castleman*, the Court had ruled that an assault conviction—although not committed with force traditionally deemed "violent"—with an intentional or knowledgeable mens rea, triggered the amendment's force clause.<sup>18</sup> In a 6–2 decision, the *Voisine* Court went a step further than *Castleman* and upheld Voisine's conviction, widening the scope of the Lautenberg Amendment's applicability to underlying misdemeanor crimes of domestic violence committed with a reckless mind.<sup>19</sup>

The government is now asking circuit and district courts to construe *Voisine*'s holding beyond the realm of domestic violence law and to another section of the Gun Control Act.<sup>20</sup> The Armed Career Criminal Act (ACCA), a sentencing enhancement within the Gun Control Act, penalizes a defendant who has three prior violent felony convictions further by enhancing his sentence to a minimum of fifteen years imprisonment.<sup>21</sup> In the aftermath of *Voisine*, district and circuit courts have repeatedly had to address whether the expanded required mens rea of crimes that trigger the Lautenberg Amendment qualify under the ACCA enhancement.<sup>22</sup> Some courts have decided to cabin *Voisine*'s

<sup>16</sup> *Voisine*, 136 S. Ct. at 2276.

<sup>17</sup> *Id.* at 2278–79.

<sup>18</sup> Lininger, *supra* note 9 at 177 (arguing that *United States v. Castleman* substantially widens the applicability of the Lautenberg Amendment, but does not substantially support or change its level of enforcement); *see also* *United States v. Castleman*, 134 S. Ct. 1405, 1411–12 (2014).

<sup>19</sup> Rory Little, *Opinion analysis: Federal "use of force" encompasses reckless domestic violence misdemeanor offenses*, SCOTUSBLOG (June 27, 2016, 9:08 PM), <http://www.scotusblog.com/2016/06/opinion-analysis-federal-use-of-force-encompasses-reckless-domestic-violence-misdemeanor-offenses/> [<https://perma.cc/C6H5-H8YL>] (reporting on the *Castleman* decision); *Voisine*, 136 S. Ct. at 2281; Elisabeth Ponsot, *Under US law, convicted domestic abusers cannot buy guns*, QUARTZ (Oct. 4, 2017), <https://qz.com/1094713/las-vegas-shooting-what-is-the-lautenberg-amendment/> [<https://perma.cc/356B-UDMQ>].

<sup>20</sup> *Compare* *Bennett v. United States*, No. 1:16-CV-251-GZS, 2016 WL 3676145, at \*3 (D. Me. July 6, 2016) (order granting motion for relief, *with* *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016); *See also* *United States v. Wehunt*, 230 F. Supp. 3d 838, 845–46 (E.D. Tenn. 2017) (evaluating the government's argument that courts should "extend[] *Voisine*'s interpretation of the term 'use' to the ACCA and/or the career offender enhancement."); *See infra* Part III.

<sup>21</sup> 18 U.S.C. § 924(e)(1).

<sup>22</sup> *See* 18 U.S.C. § 924(a); *See Fogg*, 836 F.3d. at 956 ("Reckless conduct thus constitutes a 'use' of force under the ACCA because the force clauses in 18 U.S.C. § 921(a)(33)(A)(ii) and the ACCA both define qualifying predicate offenses as those

holding to the domestic violence realm, while others have engaged in interpretive spillover and applied it to the ACCA.<sup>23</sup> Given the seriousness of an ACCA enhancement and the important and burgeoning circuit split, the time has come for novel legislation or Supreme Court clarification.

By analyzing the tensions underlying current Supreme Court domestic violence jurisprudence, this note proposes that the inconsistent mens rea requirements of the predicate crimes contemplated by the Lautenberg Amendment and the ACCA be kept separate. Part I looks to rationales and theories underpinning the modern jurisprudence of domestic violence issues, and the importance of congressional action in this area of the law. Part II examines the Lautenberg Amendment and its interpretation through the Supreme Court decisions in *United States v. Hayes*, *Castleman*, and *Voisine*.<sup>24</sup> This Part further highlights the shift of Justice Sotomayor from the author of the unanimous 2014 *Castleman* decision to that of a dissenter in the 2016 *Voisine* decision.<sup>25</sup> Part III then focuses on whether the Court's interpretation of the force clause of the Lautenberg Amendment should be extended to the force clause in the ACCA. In order to avoid interpretation beyond congressional intent, Part IV argues that an addition to the Lautenberg Amendment's definitional section would strengthen its statutory application and clarify the law, while denying the same interpretation to other sections of the Gun Control Act. The history and context of domestic violence allows for a more liberal reading of statutes, but does not set forth universal principles to extend to other sentencing regimes.

## I. DOMESTIC VIOLENCE AS A LEGAL ISSUE

A review of domestic violence concepts illuminates the principles and application of the Lautenberg Amendment, as well as how the Supreme Court arrived at its interpretive decisions.<sup>26</sup> A substantial body of theory and law underpin the

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involving the 'use . . . of physical force' against another."); *United States v. Taylor*, 272 F. Supp. 3d 127, 146 (D.D.C. 2017) ("The Court notes that in reaching this conclusion, it reaches a contrary holding to some other courts addressing this issue.").

<sup>23</sup> *Id.*

<sup>24</sup> *United States v. Voisine*, 136 S. Ct. 2272 (2016); *Castleman*, 134 S. Ct. 1405; *United States v. Hayes*, 555 U.S. 415 (2009).

<sup>25</sup> *Voisine*, 136 S. Ct. at 2282 (Thomas, J., dissenting); *Castleman*, 134 S. Ct. at 1408; Little, *supra* note 19 (reviewing the *Voisine v. United States* decision).

<sup>26</sup> See Emily J. Sack, *United States v. Castleman: The Meaning of Domestic Violence*, 20 ROGER WILLIAMS U. L. REV. 128, 129 (2015) (arguing that the Court's decision in *Castleman* imports language of domestic violence advocates and could have effects beyond the dispossession statute).

Supreme Court decisions that make up its domestic violence jurisprudence.<sup>27</sup> First, the evolution of spousal abuse from traditionally acceptable to criminally liable behavior evidences the changing cultural recognition of harmful behavior that overwhelmingly affects women, children, and the disenfranchised.<sup>28</sup> Furthermore, this now criminally liable behavior becomes more dangerous once firearms are involved and necessitates regulation.<sup>29</sup> Lastly, in addition to state laws that create criminal liability for domestic violence, Congress has created important federal laws, including the Lautenberg Amendment, to address these issues.

### A. *Overview of the Criminalization of Family Violence*

Although violence has always been used as a means of coercion and control, in the context of a domestic relationship, the specter of violence takes on a different dimension.<sup>30</sup> Historically, courts turned a blind eye to the subversion of women and family members, even allowing for violence committed in the home to be “immun[e]” from assault and battery charges.<sup>31</sup>

Traditionally, Anglo-American common law allowed a husband, as “master of his household” to physically discipline his wife, provided “he did not inflict permanent injury upon her.”<sup>32</sup> Although ideas about domestic physical abuse began to change with the temperance movement of the 1920s, the contemporary women’s movement of the 1970s was able to

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<sup>27</sup> See Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2118 (1996) (providing an exhaustive review of the history of domestic violence from unacknowledged problem to criminally liable behavior).

<sup>28</sup> See *id.* at 2120–21.

<sup>29</sup> See Brief of Everytown for Gun Safety as *Amici Curiae* in Support of Respondent at 2, *Voisine*, 136 S. Ct. 2272 (2016). (No. 14-10154) (citing Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1089–97 (July 2003) (discussing the harrowing statistics of when guns are present in situations of domestic violence) [hereinafter Everytown Brief].

<sup>30</sup> Mary Fan, *Disarming the Dangerous: Preventing Extraordinary and Ordinary Violence*, 90 IND. L.J. 151, 156 (2014–2015) (“While the current regulatory focus is on preventing violence from the armed deranged stranger hunting in schools, businesses, and on the street, nearly half of all incidents of firearms-related homicide take place in the home. The majority of firearms homicides with known victim-perpetrator circumstances are perpetrated by people the victim knew. Even when it comes to the seemingly most extreme form of extraordinary violence—the homicidal-suicidal—the clearest warning signs entail incidents of ordinary violence. This Article presents data revealing that a substantial proportion of high-risk actors who go on to commit homicide-suicides have a history of assaults and domestic disturbances but have never been in court. In contrast, a much smaller proportion of homicidal-suicidal shooters could have been caught by focusing on mental-health red flags.”).

<sup>31</sup> Siegel, *supra* note 27, at 2118.

<sup>32</sup> *Id.*

effectively challenge these ideologies and bring about the modern understanding that physical discipline of a spouse is, in fact, abusive violence.<sup>33</sup> Victims of domestic abuse can now seek out battered women's shelters, participate in specialized arrest procedures, and have gained federal recognition through the Violence Against Women Act, a federal statute that penalizes gender-based crime.<sup>34</sup>

In its landmark *Planned Parenthood v. Casey* decision, the Supreme Court "recognized the pervasiveness and severity of intimate violence for the first time."<sup>35</sup> In turn, Justice O'Connor upheld and overruled several Pennsylvania restrictions on abortion.<sup>36</sup> In a surprisingly passionate section, the Court overturned the spousal notification provision of the law.<sup>37</sup> This provision banned doctors from "perform[ing] an abortion on a married woman without receiving a signed statement from the woman that she ha[d] notified her spouse that she [was] about to undergo an abortion."<sup>38</sup> The Court found that this provision would place an undue burden on women and would mean that those "who faced intimate violence, and who could not tell their partner that they were pregnant without fear of harm, would be unable to freely exercise their reproductive choice."<sup>39</sup> This aspect of the *Casey* decision, grounded in research, statistics,<sup>40</sup> and empathy, provided jurisprudential recognition from the country's highest court that when in tension with criminally violent conduct, women's voices would not be suppressed.

The Court's language could be seen as an early indication of a more informed understanding of domestic violence, and directly leading to the Court's evaluation of the Lautenberg Amendment.<sup>41</sup> Notably, the Supreme Court's later

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<sup>33</sup> See *id.* at 2170–71.

<sup>34</sup> See *id.* Violence Against Women Act of 1994, Pub. L. No. 102-322, 108 Stat. 1796; see Siegel, *supra* note 27, at 2171–72; Jane K. Stoeber, *Mirandizing Family Justice*, 39 HARV. J.L. & GENDER 189, 198–99 (2016) (examining the modern state of the domestic violence social welfare system).

<sup>35</sup> *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 887–88 (1992); ELIZABETH SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 3 (2000) (discussing the history of domestic violence jurisprudence through the lens of critical legal theory).

<sup>36</sup> *Casey*, 505 U.S. at 897–98.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> SCHNEIDER, *supra* note 35, at 3.

<sup>40</sup> *Casey*, 505 U.S. at 891–92 ("Where the husband is the father, the primary reason women do not notify their husbands is that the husband and wife are experiencing marital difficulties, often accompanied by incidents of violence." (citation omitted)).

<sup>41</sup> See *infra* Section II.B (discussing the Court's interpretation of the Lautenberg Amendment to include the language regarding violence supported by domestic violence advocacy groups); See also Megan L. Bumb, *Domestic Violence Law*,

adoption in *Castleman* that “[d]omestic violence’ is not merely a type of ‘violence’; it is a term of art encompassing acts that one might not characterize as ‘violent’ in a nondomestic context,” has its basis in *Casey’s* language of coercion and freedom.<sup>42</sup>

### B. *The Importance of Dispossession*

Against this framework of punishing abusers’ intents and actions, policy makers have sought out ways to further limit harm to intimate partners and those likely to be the subject of abuse.<sup>43</sup> Access to guns in a household with a history of domestic abuse raises the stakes for victims of the abuse. Studies confirm that the presence of a firearm in a home with a background of domestic violence is the “single most accurate predictor” of homicide.<sup>44</sup> Women disproportionately bear the brunt of this burden, and in 2013, “53% of female victims of intimate partner homicide were killed with firearms.”<sup>45</sup> A history of domestic abuse coupled with firearm access is an almost incendiary combination, where “[a] firearm in the home *quintuples* the risk that an individual with a history of domestic violence will subsequently murder an intimate partner.”<sup>46</sup>

Additionally, an individual with a history of domestic abuse can be largely tied to not only violence in the home, but also outside of it.<sup>47</sup> In an analysis of mass shootings, more than

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*Abusers’ Intent, and Social Media: How Transaction-Bound Statutes Are the True Threats to Prosecuting Perpetrators of Gender-Based Violence*, 82 BROOK. L. REV. 917, 932–35 (2017) (discussing how the societal “changing awareness” of domestic violence issues affects congressional legislation and Supreme Court jurisprudence); *See also* *United States v. Castleman*, 134 S. Ct. 1405, 1409 (2014).

<sup>42</sup> Sack, *supra* note 26, at 141–42 (emphasis in original) (quoting *Castleman*, 134 S. Ct., at 1411–12); Sandra Tibbetts Murphy, *Supreme Court Says Federal Gun Ban Includes “Reckless” Domestic Assault*, NAT’L DOMESTIC VIOLENCE & FIREARMS RESOURCE CTR. (July 1, 2016), <http://www.preventdvgunviolence.org/news/voisine-vs-united-states.html> [<https://perma.cc/MR7Z-2W5D>].

<sup>43</sup> Joan Meier, *Voisine v. United States: The Supreme Court Just Says No—Again—to Domestic Abusers Seeking to Possess Firearms*, GEO. WASH. L. REV.: ON THE DOCKET (June 30, 2016), <https://www.gwlr.org/voisine-v-united-states-the-supreme-court-just-says-no-again-to-domestic-abusers-seeking-to-possess-firearms/> [<https://perma.cc/G7CT-9JTR>].

<sup>44</sup> Lininger, *supra* note 9, at 177.

<sup>45</sup> Brief *Amici Curiae* of Major Cities Chiefs and The Int’l Brotherhood of Police Officers Supporting Respondent at 7, *Voisine v. United States*, 136 S. Ct. 2272 (2016), (No. 14-10154) (citing data from the Federal Bureau of Investigation).

<sup>46</sup> Everytown Brief, *supra* note 29, at 2 (citing Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1089–97 (2003)).

<sup>47</sup> *See* MAYORS AGAINST ILLEGAL GUNS, ANALYSIS OF RECENT MASS SHOOTINGS 4 (2013), <http://libcloud.s3.amazonaws.com/9/56/4/1242/1/analysis-of-recent-mass-shootings.pdf> [<https://perma.cc/MD7F-9QLQ>] (“There was a noteworthy connection between mass shooting incidents and domestic or family violence. In at least 53 of the [93] cases [studied] (57%), the shooter killed a current or former spouse



half of the incidents included victims who were former spouses, intimate partners, or family members of the perpetrator.<sup>48</sup> Of that number, at least 32 percent of the shooters had a history of domestic violence.<sup>49</sup> Whereas politicians and public figures often focus on the “mental health” of the gunman after a mass shooting,<sup>50</sup> given these statistics, one scholar finds that the focus should instead be on gun reduction for those convicted of domestic violence.<sup>51</sup>

Even in shootings that do not involve intimate partners or family members, a history of domestic violence is often an indicator for future violence.<sup>52</sup> Our understanding that domestic violence should be treated as “ordinary” violence and should not implicate future “extraordinary violence” is thus unfounded.<sup>53</sup> In the United States, where 36 percent of households have guns,<sup>54</sup> gun violence disproportionately affects women and families, and a history of abuse can even be linked to mass shootings,<sup>55</sup> American legislatures have an imperative duty to regulate and prevent gun access to domestic abusers.

### C. *Congressional Action: The Lautenberg Amendment*

A host of federal remedies and doctrines exist to target violence against women and domestic violence as a legally redressable ill. Remedies range from bankruptcy laws to

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or intimate partner or other family member, and in at least 17 incidents the shooter had a prior domestic violence charge.”).

<sup>48</sup> *Id.* at 2, 4. To note, a mass shooting is defined by the Federal Bureau of Investigation as “any incident where at least four people were murdered with a gun.” *Id.*

<sup>49</sup> *Id.* at 4. This number has surely changed since the Mayor’s Report was published in 2013, although sadly the numbers may have only worsened. During the time it took to write and publish this note, many more horrific mass shootings occurred—all undertaken by shooters with a criminal or public history of domestic violence. To catalogue these atrocities would require a separate research paper and I will not attempt to do so here. See Max de Haldevang, *Stephen Paddock shared a trait with other mass killers: He abused women*, QUARTZ (OCT. 4, 2017), <https://qz.com/1094160/las-vegas-shooter-stephen-paddock-abused-women-just-like-other-mass-killers-in-the-us/> [https://perma.cc/539Y-GU9M].

<sup>50</sup> The Editorial Board, *Don’t Blame Mental Illness for Gun Violence*, N.Y. TIMES: OPINION PAGES, Dec. 16, 2015, at A34, <http://nyti.ms/1P6EHro> [https://perma.cc/GWZ7-XZGG].

<sup>51</sup> Fan, *supra* note 30, at 165–69 (evaluating data from the Center for Disease Control’s National Violent Death Reporting System and finding that “[p]rior studies have found that intimate-partner conflict and domestic-violence history are major risk factors for homicide-suicides.”).

<sup>52</sup> See *id.*

<sup>53</sup> *Id.* at 166.

<sup>54</sup> See Christopher Ingraham, *Gun ownership in the US is at a 40-year low, but gun purchases are at an all-time high*, WORLD ECON. F. (July 7, 2016), <https://www.weforum.org/agenda/2016/07/gun-ownership-in-the-us-is-at-a-40-year-low-but-gun-purchases-are-at-an-all-time-high> [https://perma.cc/5GYX-TTVR].

<sup>55</sup> See MAYORS AGAINST ILLEGAL GUNS, *supra* note 47.

potential exceptions to the threat doctrine under the First Amendment, to the overarching reforms within the Violence Against Women Act.<sup>56</sup> The Lautenberg Amendment is born from this background.

On the heels of the widely supported Violence Against Women Act,<sup>57</sup> Congress passed the Domestic Violence Offender Gun Ban, also known as the Lautenberg Amendment.<sup>58</sup> An amendment to the Gun Control Act of 1968, the Lautenberg Amendment is a federal ban on gun possession by anyone convicted of a misdemeanor crime of domestic violence.<sup>59</sup> The amendment was intended to “close [a] dangerous loophole” where many state criminal laws classified domestic violence as a misdemeanor and not a felony.<sup>60</sup> Significantly, a felony conviction would automatically bar a person from firearm possession, however, a misdemeanor conviction would not.<sup>61</sup> In practice this meant that when a defendant accused of felony domestic violence instead pleaded guilty to a lesser misdemeanor charge in order to expedite the legal process, the now-convicted person was not barred from firearm possession.<sup>62</sup> As a result, those with misdemeanor convictions of domestic violence could purchase firearms unencumbered. Given the strong correlation between domestic violence murders and firearms,<sup>63</sup> Senator Lautenberg called on his fellow senators to “establish a policy of zero tolerance when it comes to guns and domestic violence,” in order to signal that family violence was taken “as seriously as other forms of brutal behavior.”<sup>64</sup> The

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<sup>56</sup> See 11 U.S.C. § 362(b)(2)(A)(v) (2012) (The automatic stay, which bars creditors from seeking money or a host of other remedies from the debtor, does not allow for a petition to operate as a stay against “the commencement or continuation of a civil action or proceeding . . . regarding domestic violence”); *Elonis v. United States*, 135 S. Ct. 2001, 2023–24 (2015); see Bumb, *supra* note 41, at 946–47; see generally *Factsheet: The Violence Against Women Act*, OBAMAWHITEHOUSE.ARCHIVES.GOV, [https://obamawhitehouse.archives.gov/sites/default/files/docs/vawa\\_factsheet.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/vawa_factsheet.pdf) [<https://perma.cc/TF3L-JBQ9>] (The federal government approved sweeping measures that helped prosecutors and communities maintain domestic violence dockets, and assisted with victim services, by increasing federal funding for rape kit testing and access to services.).

<sup>57</sup> *Id.*

<sup>58</sup> Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 658(b)(2), 110 Stat. 3009, 3372 (1996) (codified as amended at 18 U.S.C. § 922(g)(9) (2012)).

<sup>59</sup> *Id.*

<sup>60</sup> 142 CONG. REC. S10377-78 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg).

<sup>61</sup> See generally 18 U.S.C. § 922(g)(1) (2012) (criminalizes possession of a firearm by a convicted felon, or a person “who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year.”)

<sup>62</sup> 142 CONG. REC. S10, 377–78 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg). To note, the practice of pleading to a lesser crime in exchange for a lighter sentence is more commonly known as plea bargaining. *Id.*

<sup>63</sup> Everytown Brief, *supra* note 29, at 2.

<sup>64</sup> 142 CONG. REC. S10, 377–78.

amendment was eventually passed by a Senate vote of 97–2,<sup>65</sup> signaling strong congressional support for Senator Lautenberg’s sentiments.

## II. THE LAUTENBERG AMENDMENT JURISPRUDENCE

The Lautenberg Amendment is constructed of both a punitive section banning the possession or sale of firearms by a person convicted of a misdemeanor conviction of domestic violence,<sup>66</sup> and a definitional section outlining the required element (the force clause) and relationship (the relationship requirement) of an underlying conviction.<sup>67</sup> The definitional section broadly construes the requirements for the predicate misdemeanor conviction, and since misdemeanors vary by state, statutory interpretation plays a large role in deciding what type of conduct the federal government can punish.<sup>68</sup> By looking at the statutory text, concepts of domestic violence jurisprudence, and congressional history, the Supreme Court has interpreted the Lautenberg Amendment on three significant occasions.<sup>69</sup>

### A. *Context and Practice: The Relationship Requirement*

The relationship requirement of the Lautenberg Amendment,<sup>70</sup> which describes what types of intimate partner

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<sup>65</sup> See Tom Lininger, *A Better Way to Disarm Batterers*, 54 HASTINGS L.J. 525, 553 (2003).

<sup>66</sup> 18 U.S.C. § 922(g)(9) (2012) (“It shall be unlawful for any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”).

<sup>67</sup> 18 U.S.C. § 921(a)(33)(A) (defining an applicable offense as “a misdemeanor under Federal, State, or Tribal law” that includes “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.”).

<sup>68</sup> See, e.g., *United States v. Hayes*, 555 U.S. 415, 426–27 (2009) (“Construing § 922(g)(9) to exclude the domestic abuser convicted under a generic use-of-force statute would frustrate Congress’ manifest purpose.”).

<sup>69</sup> See *Voisine v. United States*, 136 S. Ct. 2272, 2279–80 (2016); *Hayes*, 555 U.S. at 415, 421; *United States v. Castleman*, 134 S. Ct. 1405, 1410 (2014); See also Melissa Jeltsen, *Supreme Court Affirms That Even ‘Reckless’ Domestic Abusers Should Lose Gun Rights*, HUFFINGTON POST (June 27, 2016), [http://www.huffingtonpost.com/entry/supreme-court-domestic-violence-gun-rights\\_us\\_5771293fe4b0dbb1bbbb0e63](http://www.huffingtonpost.com/entry/supreme-court-domestic-violence-gun-rights_us_5771293fe4b0dbb1bbbb0e63) [<https://perma.cc/969R-2JMD>].

<sup>70</sup> See 18 U.S.C. § 921(a)(33)(A)(ii) (A misdemeanor conviction of domestic violence includes an element of force 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

and family relationships can give rise to a misdemeanor conviction of domestic violence, was the subject of the Justice Ginsburg’s opinion in *United States vs. Hayes*.<sup>71</sup> In *Hayes*, the Court found that the predicate offense did not need to have as “a discrete element” a domestic relationship requirement in order to qualify as a domestic violence misdemeanor.<sup>72</sup> Justice Ginsburg looked to the structure and syntax of the Lautenberg Amendment to come to this conclusion.<sup>73</sup> Finding that the government was required to establish the fact of a domestic relationship beyond a reasonable doubt in order to successfully prosecute under the Lautenberg Amendment, Justice Ginsburg rejected the argument that the government should rely solely on the relationship element in the predicate offense.<sup>74</sup>

Additional practical motivations supported the *Hayes* opinion.<sup>75</sup> Many domestic violence misdemeanors are charged as general assault and not specifically as a domestic violence assault.<sup>76</sup> At the time of the enactment, domestic violence-specific statutes were rare, and most states continued to prosecute under general assault and battery laws.<sup>77</sup> Requiring a relationship element, and not just a fact, in the underlying conviction would render the amendment a “dead letter” in some two-thirds of the States from the very moment of its enactment.<sup>78</sup> By requiring the government to engage in limited fact-finding in order to prove a domestic relationship beyond a reasonable doubt, the Supreme Court upheld the challenge to the Lautenberg Amendment in *Hayes* and set the precedent that a contextual statutory interpretation governed.<sup>79</sup>

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spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.”).

<sup>71</sup> *Hayes*, 555 U.S. at 415.

<sup>72</sup> *Id.* at 421–22.

<sup>73</sup> *Id.* at 421–23. Notably, Justice Ginsburg did not apply the categorical approach—a method of statutory interpretation that looks only to the elements, and not the facts, of a prior offense to see if it triggers the current federal charge. *See also* Rebecca Sharpless, *Finally, A True Elements Test: Mathis v. United States and the Categorical Approach*, 82 BROOK. L. REV. 1275, 1279–83 (2017) (a clear-eyed explanation of how the Court uses the “categorical approach” to remain blind to the facts below or the “modified categorical approach” to “ascertain whether a criminal conviction qualifies as a predicate offense for a federal consequence”). In dissent, Chief Justice Roberts criticized this approach, arguing that the Court should use the categorical approach and look to the statutory elements, just as they had done in previous cases interpreting the ACCA. *Hayes*, 55 U.S. at 436 (Roberts, C.J. dissenting).

<sup>74</sup> *Hayes*, 55 U.S. at 426.

<sup>75</sup> *See id.* at 427–28 (“Practical considerations strongly support our reading of § 921(a)(33)(A)’s language.”).

<sup>76</sup> *Id.*

<sup>77</sup> *See id.* at 427–28.

<sup>78</sup> *Id.*

<sup>79</sup> Legislators continue to seek an expansion of the relationship requirement to include the evolving cultural understanding of families. Identical bills have been

B. *Interpretation and Congressional Intent: The Force Clause*

In two later cases, the Supreme Court interpreted Lautenberg Amendment's force clause, alternatively known as the elements cause, which requires that the applicable predicate offense must include as "an element, the use or attempted use of physical force."<sup>80</sup> First, in *United States v. Castleman*, Justice Sotomayor,<sup>81</sup> writing for a unanimous court, interpreted the underlying misdemeanor conviction element of the Lautenberg Amendment to include convictions predicated on "intentionally or knowingly caus[ing] bodily injury to" a domestic partner as fulfilling the force clause's requirement.<sup>82</sup> Castleman argued that his misdemeanor conviction did not involve "violent force," and thus should not be eligible as a predicate conviction.<sup>83</sup> The Supreme Court, however, found that in the context of domestic violence, the common-law definition of force captured the type of conduct in Castleman's predicate conviction, making him eligible for a Lautenberg Amendment charge.<sup>84</sup>

Two years later, in *Voisine v. United States*, Justice Kagan, writing for a 6–2 majority, again upheld the validity of a broad reading of the Lautenberg Amendment's force clause.<sup>85</sup> The defendant argued that his predicate misdemeanor conviction, which allowed for a conviction based on a "recklessly" caused bodily injury, did not suffice as a predicate for his Lautenberg Amendment charge.<sup>86</sup> Once more using the *Castleman* method of evaluating congressional intent and

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introduced in the House and the Senate that would widen the relationship requirement to include current and former dating partners, who may be unmarried and not living together, or stalking misdemeanants. See Zero Tolerance for Domestic Abusers Act, H.R.3130, 114th Cong. (2015), <https://www.congress.gov/114/bills/hr3130/BILLS-114hr3130ih.pdf> [<https://perma.cc/K2JJ-XYQJ>]; Protecting Domestic Violence and Stalking Victims Act of 2015, S. 1520, 114th Cong. (2015), <https://www.congress.gov/114/bills/s1520/BILLS-114s1520is.pdf> [<https://perma.cc/7BE8-MF3H>].

<sup>80</sup> See generally 18 U.S.C. § 921(a)(33)(A)(ii) (2012); *Voisine v. United States*, 136 S. Ct. 2272 (2016); *United States v. Castleman*, 134 S. Ct. 1405 (2014).

<sup>81</sup> Notably, Justice Sotomayor is the only justice currently on the Court to have been a trial court judge and have significant experience with the criminal justice system as a Manhattan Assistant District Attorney. Rachel E. Barkow, *Justice Sotomayor and Criminal Justice in the Real World*, 123 YALE L.J. F. 409, 409–10 (2014).

<sup>82</sup> *Castleman*, 134 S. Ct. at 1414–15 (quoting Tenn. Code. Ann. § 39–13–111b (Supp. 2002)).

<sup>83</sup> *Id.* at 1409 ("Castleman moved to dismiss the § 922(g)(9) charges, arguing that his Tennessee conviction did not qualify as a 'misdemeanor crime of domestic violence' because it did not 'ha[ve], as an element, the use . . . of physical force,' § 921(a)(33)(A)(ii).").

<sup>84</sup> *Id.*

<sup>85</sup> See *Voisine*, 136 S. Ct. at 2272, 2276.

<sup>86</sup> *Id.* at 2277.

statutory interpretation, the Supreme Court upheld *Voisine's* conviction.<sup>87</sup> Since the force clause does not specify the mental state required of a predicate misdemeanor conviction, each decision has necessarily addressed how federal law can address differences between state criminal codes.<sup>88</sup> Thus, as these holdings have led to a circuit split among lower courts,<sup>89</sup> the solution must be decided with a broad brush.

### 1. Statutory Interpretation: Determining the Meaning of “Use of Force”

In order to further evaluate the interpretation of the Lautenberg Amendment's force clause, the Supreme Court had to determine what exactly constituted a “use” of force.<sup>90</sup> In *Castleman*, a man previously convicted under Tennessee battery law of “intentionally . . . caus[ing] bodily injury to’ the mother of his child,” argued that this conviction was for a nonviolent misdemeanor.<sup>91</sup> When he was later found “selling firearms on the black market,” *Castleman* was indicted under the Lautenberg Amendment's possession ban.<sup>92</sup> He argued that under a common law reading of the Tennessee assault statute, his predicate misdemeanor did not contain an element of “violent force,” and thus did not trigger the Lautenberg Amendment charge.<sup>93</sup> His previous conviction, he argued, was an act of “offensive touching,” and “not an act of violence within the meaning” of the law.<sup>94</sup>

Significantly, *Castleman's* reasoning relied heavily on a previous firearm dispossession case unrelated to domestic violence, *United States v. Johnson (Johnson I)*. Rejecting principles of common law in favor of a contextual reading, the *Johnson I* Court ruled that the “physical force” element meant

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<sup>87</sup> *Id.* at 2280–81. Yet, the two courts differed in an important sense: the *Castleman* court used the modified categorical approach, whereas the *Voisine* Court did not. *Castleman*, 134 S. Ct. at 1414 (“We may accordingly apply the modified categorical approach . . .”); *Voisine*, 126 S. Ct. at 2278 (“Statutory text and background alike lead us to conclude . . .”). In the ACCA context, however, courts are required to apply either the categorical approach or the modified categorical approach, depending on whether or not the statute is divisible, when looking at predicate crimes. *United States v. Taylor*, 272 F. Supp. 3d 127, 137 (D.D.C. 2017); see also *infra* Part IV.

<sup>88</sup> See *Voisine*, 136 S. Ct. at 2280–81; *Castleman*, 134 S. Ct. at 1412–13.

<sup>89</sup> Compare *Bennett v. United States*, No. 1:16-CV-251-GZS, 2016 WL 3676145, at \*3 (D. Me. July 6, 2016) (order granting motion for relief), with *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016).

<sup>90</sup> See *Voisine*, 136 S. Ct. at 2278.

<sup>91</sup> *Castleman*, 134 S. Ct. at 1409.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Lininger*, *supra* note 9, at 186.

violent force, and that a simple offensive touch, such as a slap, would not suffice as a predicate battery charge in the context of the ACCA.<sup>95</sup> Finding *Johnson I*'s reasoning persuasive, the *Castleman* Court still reached the opposite conclusion—that the common law meaning of the “use of force” was applicable because the difference in context between domestic violence and the ACCA.<sup>96</sup> Finding that although “‘violence’ standing alone ‘connotes a substantial degree of force,’” as in *Johnson I*, Justice Sotomayor found that the same is “not true of domestic violence.”<sup>97</sup> Domestic violence, the Court noted, can be “a squeeze of an arm,” or an “accumulation of such acts over time [that] can subject one intimate partner to the other’s control.”<sup>98</sup> The Court, by using this language, is making a sweeping acknowledgement and adoption of the language of domestic violence advocates.<sup>99</sup> Justice Scalia’s concurrence, reading often like a dissent, signaled dissatisfaction that the Court was now adopting a broad rule recognizing that domestic violence is different than other types of violence, and encompasses too broad an array of conduct.<sup>100</sup> Yet, the *Castleman* holding serves as an important step forward for domestic violence advocates and was widely celebrated as a decision that “sav[ed] women’s lives.”<sup>101</sup>

The Supreme Court extended its *Castleman* reading of the “use of force” in the case of *Voisine v. United States*.<sup>102</sup> Unlike the *Castleman* defendant, who was indicted under an assault statute that included only “intentional” or “knowing” actions, *Voisine*’s state conviction occurred under an assault statute that also included “reckless” actions, a mental state deemed significantly less culpable.<sup>103</sup> The Court sought to resolve whether a reckless use of force in an assault statute was sufficient to fulfill the requisite misdemeanor crime

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<sup>95</sup> *Johnson v. United States*, 559 U.S. 133, 139–40 (2010) (*Johnson I*).

<sup>96</sup> See *Castleman*, 134 S. Ct. at 1411–12 (“*Johnson I* resolves this case in the Government’s favor—not, as the Sixth Circuit held, in *Castleman*’s.”).

<sup>97</sup> *Id.* at 1411.

<sup>98</sup> *Id.* at 1412.

<sup>99</sup> *Id.*

<sup>100</sup> Wesley M. Oliver, *Domestic Violence, Gun Possession, and the Importance of Context*, 90 IND. L.J. SUPP. 36, 37–38 (2015) (arguing that the *Castleman* decision is best read not as a strict statutory interpretation, but as a public welfare decision); see *Castleman*, 134 S. Ct. at 1418 (Scalia, J., concurring).

<sup>101</sup> Lininger, *supra* note 9 at 187 (“The White House issued a press release expressing confidence in the efficacy of the *Castleman* ruling: ‘[t]his week the Supreme Court decided a case that will save women’s lives.’”).

<sup>102</sup> *Voisine v. United States*, 136 S. Ct. 2272, 2278 (2016).

<sup>103</sup> *Id.* Additionally, even if *Voisine*’s predicate domestic assault crime was not undertaken with a reckless mental state, in *Mathis v. United States*, the Court found that where a state law includes several mental states, the law is “assumed to encompass all of them.” Little, *supra* note 19.

necessary to trigger the Lautenberg Amendment's possession ban.<sup>104</sup> Instead of looking to the common law definition of the "use of force," which did not include "recklessness . . . in the [] standard lexicon,"<sup>105</sup> Justice Kagan's opinion almost directly adopts the language of the Model Penal Code's definition of recklessness.<sup>106</sup> Regardless of the *Voisine* Court's use of the common law, context, or Model Penal Code, the same principles of its *Castleman* decision underlie its conclusion: the specific context of domestic violence requires a broad interpretation of the Lautenberg Amendment.<sup>107</sup>

The Court's opinion in *Voisine* accords with its "nuanced understanding of domestic violence."<sup>108</sup> To illustrate, the difference between the "use of force" in a traditional context compared to a domestic one, the Court pointed to the idea of a "soapy hand[ed]" husband who throws a plate with the intent to scare, but not injure, his wife.<sup>109</sup> The action of throwing the plate is a "'use' of force," but it is a reckless action that could rise to an assault if the plate shatters and subsequently injures the wife.<sup>110</sup> Thus, by looking at the context of domestic violence to be one of both emotional and physical coercion, the "use" of force takes on a different meaning to include reckless conduct.<sup>111</sup>

Yet, Justice Sotomayor notably joined Justice Thomas' dissent with regard to the statutory interpretation issue.<sup>112</sup> This portion of his dissent focused on the overbroad statutory reading as contrary to Supreme Court precedent that has never understood the "use of physical force" to be any actions beyond intentional or knowledgeable.<sup>113</sup> Justice Sotomayor's change, from majority writer to dissenter, has been the subject of much curiosity among academics, and could be based in her extensive

<sup>104</sup> *Voisine*, 136 S. Ct. at 2276–78; see also Amy Howe, *Court grants review in firearm-possession case*, SCOTUSBLOG (Oct. 30, 2015, 4:19 PM), <http://www.scotusblog.com/2015/10/court-grants-review-in-firearm-possession-case/> [<https://perma.cc/G5NF-PB63>] (noting that *Voisine*'s case was joined with an appeal by William Armstrong, similarly convicted in Maine).

<sup>105</sup> *Voisine*, 136 S. Ct. at 2281.

<sup>106</sup> See *id.* at 2278; see also MODEL PENAL CODE § 2.02(2) (AM. LAW INST. 1985). The American Legal Institute, a collection of scholars and practitioners, began developing the Model Penal Code in the 1960s in order to urge states to adopt more uniform criminal laws. The Model Penal Code sets out a scale of culpable mental states, or *mens rea*, making "purposeful" or "intentional" crimes the most culpable. Wayne R. LeFave, *Criminal Law: Hornbook Series*, West Academic Publishing, § 5.1(c) (6th Ed. 2017).

<sup>107</sup> *Voisine*, 136 S. Ct. at 2278–79; see also Little, *supra* note 19.

<sup>108</sup> Sack, *supra* note 26, at 129–31.

<sup>109</sup> *Voisine*, 136 S. Ct. at 2279.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 2282–90 (Thomas, J. dissenting).

<sup>113</sup> *Id.* at 2287.



knowledge and firsthand experience within the realm of criminal law.<sup>114</sup> It is far from clear whether Justice Sotomayor dissented because of concern of overbreadth of application or because she wanted the majority to consistently apply the common law reading used in *Castleman*. As a justice with significant experience on both the district and circuit courts,<sup>115</sup> it is possible she had an awareness of the mens rea interpretive spillover likely to result in the ACCA. What is clear is that the *Voisine* holding has led to a problem of application—discussed in Part III below.

## 2. Congressional Intent

Next, both the *Castleman* and *Voisine* courts looked to congressional history and intent, to find if “Congress meant to incorporate that misdemeanor-specific meaning of ‘force’ in defining a ‘misdemeanor crime of domestic violence.’”<sup>116</sup> Citing *Hayes*, the *Castleman* Court again reiterated that excluding reckless conduct would render the Lautenberg Amendment inoperative.<sup>117</sup> In a world where domestic abusers are routinely prosecuted under laws that penalize intentional offensive touching, Congress enacted the law with the clear intent to prohibit all domestic violence offenders from owning a firearm—not just some of them.<sup>118</sup> Additionally, evident congressional intent to capture a wide amount of conduct and differences within state criminal laws also guide the *Voisine* decision.<sup>119</sup> Where many state laws include “recklessness” within their assault statutes, to find this mens rea inapplicable would be to make the Lautenberg Amendment “broadly inoperative” in thirty-five jurisdictions.<sup>120</sup> Instead, the Court chose to expand the scope of the amendment, providing clarity and reviving a statute meant to protect victims of domestic violence.<sup>121</sup>

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<sup>114</sup> See Barkow, *supra* note 81, at 409–10.

<sup>115</sup> See *id.*

<sup>116</sup> *United States v. Castleman*, 134 S. Ct. 1405, 1411 (2014); see also *Voisine*, 136 S. Ct. at 2280–81.

<sup>117</sup> *Castleman*, 134 S. Ct. at 1413.

<sup>118</sup> See *id.*

<sup>119</sup> See *Voisine*, 136 S. Ct. at 2279–80.

<sup>120</sup> *Id.* at 2278–80; see e.g., *United States v. Bailey*, 9 Pet. 238, 256, 9 L.Ed. 113 (1835) (Story, J.) (“Congress must be presumed to have legislated under this known state of the laws.”).

<sup>121</sup> See *Voisine*, 136 S. Ct. at 2280.

### III. THE LAUTENBERG AMENDMENT'S FORCE CLAUSE IN OTHER CONTEXTS

The Court's opinions interpreting the "use of force" has been largely based on context,<sup>122</sup> leading lower courts to wrestle with difficult questions of when the predicate statute at issue in the case is not related to domestic violence. One such example is the Armed Career Criminal Act (ACCA). The ACCA also requires the use of predicate convictions and contains a similarly worded force clause—requiring the earlier crime to have as an element the "use or attempted use of physical force."<sup>123</sup> Yet, the ACCA is borne out of a different purpose and effectuates a very different outcome than the Lautenberg Amendment.<sup>124</sup> Across the country, prosecutors are arguing that *Voisine's* holding that reckless conduct falls within the definition of a "use of force" dictates that a range of conduct previously thought unregulated by the ACCA now falls within its purview.<sup>125</sup> Although in a footnote the *Voisine* Court expressly demurred on the application of its holding to the ACCA's force clause, the Court stated that there may be a "divergent reading[]." <sup>126</sup> Yet, the Court's unclear approach to the question of reckless convictions under the ACCA and the escalating circuit split make one thing clear: the Supreme Court is likely to see this question again.

#### A. *The ACCA Sentence Enhancement*

Another section of the Gun Control Act, the ACCA subjects a defendant charged with being a felon in possession of a firearm to an enhanced sentence if he has at least three prior convictions.<sup>127</sup> These three prior convictions would have to fall under one of two categories: either a drug offense or a violent

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<sup>122</sup> See generally *id.* at 2281–82.

<sup>123</sup> Compare 18 U.S.C. § 924(e)(2)(B)(ii), with 18 U.S.C. § 921(a)(33)(A)(ii).

<sup>124</sup> 18 U.S.C. § 924(e)(2)(B)(ii).

<sup>125</sup> See *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016); *United States v. Middleton*, 883 F.3d 485, 499–500 (4th Cir. 2018) (Floyd J., concurring).

<sup>126</sup> *Voisine*, 136 S. Ct. at 2280 n.4; see also *Middleton*, 883 F.3d at 498 (Floyd J., concurring). To note, the Court in *Leocal v. Ashcroft* ruled that an underlying felony conviction, if proffered to constitute a "crime of violence" in a deportation proceeding, could not be conducted with merely "negligent or even inadvertent" conduct. *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). The *Voisine* Court called upon Justice Rehnquist's discussion of the word "use" in *Leocal* to support its assertion in footnote four that different statutes may require divergent readings.

<sup>127</sup> 18 U.S.C. § 922(g)(1) criminalizes possession of a firearm by a convicted felon, whose sentence is then enhanced if the felon is found to be a "career criminal" under the ACCA. 18 U.S.C. § 924(e) (2012). See *Johnson v. United States*, 559 U.S. 133, 136 (2010) (*Johnson I*); see also *Johnson v. United States*, 135 S. Ct. 2551, 2555 (2015) (*Johnson II*).

felony.<sup>128</sup> A violent felony must then fall under one of two categories: it either must be encompassed in a list of enumerated crimes (the enumerated clause),<sup>129</sup> or be a felony that “has as an element the use, attempted use, or threatened use of physical force against the person of another,” (the force clause).<sup>130</sup> The ACCA provides for a minimum sentence of fifteen years imprisonment, whereas a violation of the Lautenberg Amendment provides for a maximum of ten years imprisonment.<sup>131</sup>

In 2010, the Supreme Court ruled in *Johnson I* that an underlying felony conviction, if proffered to enhance someone’s sentence under the ACCA, must contain an element of “violent force.”<sup>132</sup> Looking to both the context and purpose of the force clause, Justice Scalia’s majority opinion concludes that mere physical force—for example, a slap on the wrist—would not suffice for the sentence enhancement.<sup>133</sup> Instead, the violence must be “a substantial degree of force.”<sup>134</sup> Scalia’s evaluation of the context surrounding the “use of force,” leads to his conclusion that since the ACCA sought to punish violent felonies, the force element of the underlying conviction must also contain a degree of violent force.<sup>135</sup>

The Court also concluded in *Johnson I* that the ACCA’s purpose in targeting felonies did not necessarily apply to other sections of the Gun Control Act that targeted misdemeanor crimes.<sup>136</sup> Specifically, in referencing the Lautenberg Amendment, Justice Scalia noted that “the context of defining

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<sup>128</sup> See 18 U.S.C. § 922(g)(1).

<sup>129</sup> 18 U.S.C. § 924(e)(2)(B)(i)–(ii) (The enumerated felonies subject to the ACCA enhancement are “burglary, arson, or extortion, [as well as any crime that] involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.”).

<sup>130</sup> 18 U.S.C. § 924(e)(2)(B)(i). The ACCA used to involve a third category called the “residual clause” which read that a violent felony could be anything “otherwise involve[ing] conduct that presents a serious potential risk of physical injury to another.” The residual clause was overruled as vague in *Johnson II*. *Johnson II*, 135 S. Ct. at 2555–57.

<sup>131</sup> See 18 U.S.C. § 924(e) (2012). See generally Harvard Law Review Association, *Armed Career Criminal Act-Residual Clause*-*Johnson v. United States*, 129 HARV. L. REV. 301 (2015) (discussing the *Johnson II* opinion that invalidated the residual clause section of the ACCA, not at issue in this paper); cf. 18 U.S.C. § 924(a)(2) (“Whoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.”).

<sup>132</sup> See *Johnson I*, 559 U.S. at 140–41.

<sup>133</sup> Oliver, *supra* note 100, at 37 (“In *Johnson I* [I], [the term ‘physical force’] was used to define violent felony; in *Castleman*, it was used to define an act of domestic violence.”).

<sup>134</sup> *Id.*

<sup>135</sup> *Johnson I*, 559 U.S. at 140–41.

<sup>136</sup> See *id.* at 143–44 (“We have interpreted the phrase ‘physical force’ only in the context of a statutory definition of ‘violent felony.’ We do not decide that the phrase has the same meaning in the context of defining a *misdemeanor* crime of domestic violence. The issue is not before us, so we do not decide it.” (emphasis in original)).

a *misdemeanor* crime of domestic violence” was not before the Court—a premise that, as written, might lead to a very different conclusion.<sup>137</sup> By looking to the divergent purposes of the statute, the Court cast aside the government’s contention that interpreting “physical force” to only mean “violent force” would additionally weaken the Lautenberg Amendment to only include misdemeanor crimes of domestic violence that have an element of exclusively “violent force.”<sup>138</sup> Since the context of domestic violence is wholly separate from the context of career criminal, the Court stressed that its interpretation did not extend to the domestic violence context, as that issue was not before the Court.<sup>139</sup>

### B. *Current Circuit Split: Similar Clause, Different Context*

Given the “confusing backdrop of recent precedents,”<sup>140</sup> it is no wonder that lower courts across the country are unevenly applying *Voisine* to ACCA cases. From this backdrop, a divergence has emerged: circuits that are willing to extend *Voisine*’s reckless mens rea standard to predicate violent felonies for the ACCA, and those that are not.<sup>141</sup>

A court reviewing a predicate felony under the ACCA must apply the categorical or modified categorical approach, whereas the same precedent does not necessarily bind a court looking at a Lautenberg Amendment case.<sup>142</sup> To avoid relitigating the prior conviction, the categorical approach requires a court, seeking to review potentially qualifying convictions, to look exclusively to the elements of the underlying crime, and none of the facts.<sup>143</sup> This difference of review—looking exclusively at the elements versus looking at the underlying facts and context—affects the depth of a court’s analysis of the underlying conduct.

Courts are now using the categorical approach in one of two ways: to find either that the ACCA context is wholly

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<sup>137</sup> *Id.* (emphasis in original).

<sup>138</sup> *See id.*

<sup>139</sup> *See id.*

<sup>140</sup> *Bennett v. United States*, No. 1:16-CV-251-GZS, 2016 WL 3676145, at \*4 (D. Me. July 6, 2016).

<sup>141</sup> Although I have sought to conduct a thorough look at the recent and ever-increasing number of federal court decisions discussing *Voisine* in the context of the ACCA sentencing enhancement, I do not contend that this note is a complete list of cases addressing this issue.

<sup>142</sup> *United States v. Taylor*, 272 F. Supp. 3d 127, 137 (D.D.C. 2017); see also the discussion at *supra* note 74 for the Court’s rejection of the categorical approach in the Lautenberg Amendment jurisprudence in *United States v. Hayes*.

<sup>143</sup> *See Sharpless*, *supra* note 73, at 1279.

different from the Lautenberg Amendment context and thus a reckless mens rea in the original conviction is inapplicable or alternatively that in light of *Voisine*, reckless convictions can qualify as a “use of force” and are now eligible for the ACCA enhancement. This note argues that courts within the former category appropriately cabin the *Voisine* decision to the domestic violence context whereas courts within the latter category are misapplying *Voisine* to qualify felony convictions that are violent in nature, but still contain a reckless mens rea. This misapplication, although sensible given the seriousness of the crimes at issue, could easily lead to the “comical misfit”<sup>144</sup> of disproportionate punishment not befitting the crime and must be congressionally addressed.

### 1. District Courts in the First, Sixth, and D.C. Circuits Circumscribe *Voisine*, and the Fourth Circuit Seems Poised to Follow Suit

Looking critically at the context and purpose of the statutory language, several district courts have found that a reckless conviction does not satisfy the “use of force” element required of a violent felony under the ACCA. In *Bennett v. United States*, a district court in the First Circuit rejected the government’s assertion that *Voisine* applied outside of the context of domestic violence.<sup>145</sup> In *Bennett*, the petitioner challenged his ACCA conviction, arguing that three of his prior convictions did not qualify as violent felonies.<sup>146</sup> Because his convictions for aggravated assault were considered “reckless” crimes, Bennett argued they were not “violent” for the purposes of the sentence enhancement.<sup>147</sup> Siding with the defendant, Judge Singal found that to label a defendant an “Armed Career Criminal,” for a reckless action would be a “comical misfit,” for the purposes of the law.<sup>148</sup> The district court in *Bennett* became one of the first examples of a court rejecting the government’s argument that *Voisine*’s reckless mens rea misdemeanor standard should extend to the elements of a violent felony for the purpose of the ACCA.<sup>149</sup>

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<sup>144</sup> *Johnson v. United States*, 559 U.S. 133, 145 (2010) (Johnson I).

<sup>145</sup> *Bennett*, 2016 WL 3676145, at \*3–4.

<sup>146</sup> *Id.* at \*1.

<sup>147</sup> *See id.* at \*2.

<sup>148</sup> *Id.* \*3–4 (quoting *Johnson I*).

<sup>149</sup> The First Circuit later upheld, but under rule of lenity grounds, the district court’s decision in *Bennett v. United States*, 868 F.3d 1 (1st Cir. 2017). Bennett died before the decision was issued, however, and the opinion was withdrawn and vacated. *See Bennett v. United States*, 870 F.3d 34 (1st Cir. 2017). The First Circuit later

Several district courts within other circuits followed suit. In 2017, courts within the Sixth and D.C. Circuits also disagreed with government arguments that crimes with reckless mens rea qualify for the violent felony enhancement in accordance with *Voisine*. In *United States v. Taylor*, Judge Kollar-Kotelly of the D.C. district court noted that whether a violent felony can be “reckless” for the purposes of the ACCA was an “open issue in th[e] jurisdiction.”<sup>150</sup> After a thorough evaluation of precedent, the court found that “divergent readings” of the required mens rea within the force clauses of both statutes—the ACCA and the Lautenberg Amendment—were warranted.<sup>151</sup> Since a defendant’s sentencing enhancement under the ACCA is based on prior felony convictions, Congress likely did not intend for the same level of culpability as that required of a misdemeanor conviction of domestic violence.<sup>152</sup> A mere “linguistic similarity” was not enough, per Judge Kollar-Kotelly, to expand the categories of mens rea culpability for a substantially different purpose.<sup>153</sup> Her *Taylor* decision notes the novelty of this inquiry, and expressly cites to *Bennett* to note the agreement among sister courts.<sup>154</sup>

Following the same analytical lines, a court within the Sixth Circuit has come to the same result. In *United States v. Wehunt*, Judge Mattice of the Eastern District of Tennessee was similarly unconvinced that *Voisine* overruled previous Sixth Circuit case law.<sup>155</sup> Again citing the district court in *Bennett*, the *Wehunt* court refused to extend *Voisine*’s more expansive reading of a “crime of violence” to a context outside of domestic violence.<sup>156</sup> As judges around the country are faced with a lack of

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upheld their *Bennett* reasoning to the same question at issue in *United States v. Windley*, 864 F.3d 36 (1st Cir. 2017).

<sup>150</sup> See *United States v. Taylor*, 272 F. Supp. 3d 127, 144 (D.D.C. 2017).

<sup>151</sup> See *id.* at 145–46.

<sup>152</sup> *Id.* at 146.

<sup>153</sup> *Id.* at 145–46.

<sup>154</sup> See *id.* at 145. The *Taylor* court also cites to the earlier D.C. district court case *United States v. Brown*, 249 F. Supp. 3d 287, 298 (D.D.C. 2017). In *Brown*, Judge Sullivan ruled on a felony that included a negligent mental state, in addition to a reckless one—but included a thoughtful discussion of the *Voisine* holding. *Id.* In looking at *Voisine*’s applicability to the ACCA context, Judge Sullivan comes to this ultimate conclusion: “Among the various well-reasoned justifications [] courts have already articulated for not understanding *Voisine* to mean that recklessness is a sufficient mens rea in the context of ACCA’s elements clause, the Court finds particularly persuasive the fact that the ‘Supreme Court had previously defined terms that are used identically in the ACCA and the Misdemeanor Domestic Violence Act to have different meanings.’” *Id.* (citations omitted).

<sup>155</sup> See *United States v. Wehunt*, 230 F. Supp. 3d 838, 846–47 (E.D. Tenn. 2017).

<sup>156</sup> *Id.* at 847–48 (“Finally, the Court is persuaded by the *Bennett* court’s finding that extending *Voisine* to the case at bar would lead to a ‘comical misfit,’ in which ‘three past convictions for injuries that result from reckless plate throwing (the

Supreme Court guidance and a developing circuit split, many are unwilling to extend the mens rea holding from *Voisine*.

Lastly, in *United States v. Middleton*, the Fourth Circuit, while not ruling precisely on this issue, signaled that it is poised to join the debate. In *Middleton*, Judge Gregory determined that a prior conviction for involuntary manslaughter did not qualify as a violent felony for the purposes of the ACCA, over the government's argument that using *Castleman* would allow a different reading.<sup>157</sup> The court noted the divergent Supreme Court readings of the force clause in the Lautenberg Amendment compared to the ACCA.<sup>158</sup> Notably, in his concurrence, Judge Floyd carefully analyzed the application of *Voisine* and the Court's domestic violence jurisprudence within the ACCA context.<sup>159</sup> Judge Floyd observed that "the ACCA does not share the same purpose as the [Lautenberg Amendment]," by seeking to go beyond the context of domestic violence and "target[] the truly purposeful and aggressive criminals." Because of this purpose, he concludes, the ACCA "warrants a narrower reading of the word 'use'" within the force clause.<sup>160</sup> Judge Floyd's concurrence signals that the "divergent contexts and purposes" of the two statutes are critical to his conclusion that a reckless mens rea does not suffice for the ACCA's force clause and places the Fourth Circuit on one side of this circuit split.<sup>161</sup>

## 2. The Fifth, Eighth and Tenth Circuits Extend *Voisine*

The Fifth, Eighth, and Tenth Circuits have sharply diverged from other circuits to find that *Voisine*'s inclusion of a reckless mens rea in a "crime of violence" should suffice as a predicate for an ACCA enhancement. Instead of looking to the context and purposes of the ACCA compared with the Lautenberg Amendment, these courts look to the similarity in phrasing and the degree of violence in the conviction at issue. Noting the identical phrasing of the force clause of the ACCA

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example discussed at length in *Voisine*), or reckless driving, could be sufficient to earn a designation as an armed career criminal.").

<sup>157</sup> *United States v. Middleton*, 883 F.3d 485, 487–88 (4th Cir. 2018).

<sup>158</sup> *Id.* at 490 ("Although the definitions of a misdemeanor crime of domestic violence and a violent felony under the ACCA both contain the term 'physical force,' the Supreme Court has interpreted those terms differently. In *Castleman*, the Court applied the common-law definition of force—'namely, offensive touching'—to the term 'physical force' in § 921(a)(33)(A)." (citations omitted)).

<sup>159</sup> *See id.* at 497–500.

<sup>160</sup> *Id.* at 499.

<sup>161</sup> *Id.* at 499–500.

and the Lautenberg Amendment, in *United States v. Fogg* the Eighth Circuit ruled that a reckless crime could suffice to trigger the ACCA.<sup>162</sup> Previously convicted of “first degree manslaughter, simple robbery and [an] attempted drive by shooting,” the defendant faced an enhanced sentence under the ACCA when he was later arrested carrying an illegal firearm.<sup>163</sup> He appealed the enhancement, arguing that his predicate conviction for the attempted drive-by shooting (or “reckless discharge of a firearm”) did not qualify as a “violent felony” under the ACCA.<sup>164</sup> The Minnesota statute “only criminalize[d] reckless conduct as opposed to that which is intentional or purposeful,” and thus, Fogg argued, this language was insufficient to trigger the statutory enhancement.<sup>165</sup>

In a case of first impression where no Supreme Court precedent directly ruled that reckless discharge of a firearm constituted a violent felony under the ACCA force clause, the Eighth Circuit looked to the recent *Voisine* opinion.<sup>166</sup> Since the Supreme Court’s *Voisine* analysis reviewed a “similarly worded force clause,” the same reasoning could be imported in the case at bar, because both cases discuss “crimes of violence.”<sup>167</sup> Where the Supreme Court found that reckless conduct could constitute a “use of force” under the Lautenberg Amendment, it could also constitute a “use of force” under the ACCA.<sup>168</sup> Thus, Fogg’s conviction for the drive-by shooting would be considered a “violent felony” for the purposes of his conviction and enhanced sentencing under the ACCA.<sup>169</sup> The Tenth Circuit, also reviewing a reckless shooting felony conviction, reached a similar conclusion.<sup>170</sup>

The Fifth Circuit, in the *United States v. Howell*, echoed the Eighth Circuit in deciding that the mental state of recklessness was sufficient to qualify under the ACCA.<sup>171</sup> Judge Owens noted that the underlying assault conviction constituted

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<sup>162</sup> *United States v. Fogg*, 836 F.3d 951 (8th Cir. 2016).

<sup>163</sup> *Id.* at 953.

<sup>164</sup> *Id.* at 956.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*; see also *Holman v. United States*, 1:12CR72-1, 1:14CV549, 2016 WL 6304727, at \*13 (M.D. N.C. 2016) (where a Fourth Circuit district court found that assault and battery with a dangerous weapon fell under the ACCA’s violent felony definition). Cf. *United States v. Parnell*, 818 F.3d 974, 981 n.5 (9th Cir. 2016) (decided prior to *Voisine*, holding that a conviction for assault and battery with a dangerous weapon which contains a recklessness mens rea did not fall into the violent felony definition).

<sup>170</sup> *United States v. Pam*, 867 F.3d 1191, 1208 (10th Cir. 2017).

<sup>171</sup> See *United States v. Howell*, 838 F.3d 489, 501 (5th Cir. 2017).



a crime of violence, whether or not it involved a reckless mens rea in the definition.<sup>172</sup> By looking at the underlying crime in depth, Judge Owens conducted her own evaluation of the mens rea of the crime to find that a reckless interpretation was still, clearly, a violent one.

#### IV. A CLEAR APPROACH TO A MUDDLED PROBLEM: IMPORTING MENS REA REQUIREMENTS INTO THE LAUTENBERG AMENDMENT

The divergence in lower court rulings require immediate legislative redress. As a starting point, the Supreme Court's rulings on domestic violence issues have consistently emphasized an overarching theme: practical considerations must govern.<sup>173</sup> Words like "violence" can mean something entirely different within the framework of "domestic violence," and must be interpreted that way.<sup>174</sup> By interpreting the Lautenberg Amendment as broadly applicable to a variety of underlying misdemeanor crimes,<sup>175</sup> the Court has validated over fifty years of domestic violence advocates' work by importing their language and understanding into a key dispossession regime. In doing so, the Court has acted discretely with regards to other federal criminal statutes, and has made it clear that the statute's definitional language only applies to domestic violence cases.<sup>176</sup> As federal district and circuit courts across the country are faced with arguments applying the *Voisine* holding to federal criminal statutes with similar statutory language, in the absence of another Supreme Court decision, legislative action is necessary. The "comical misfit" of applying the Lautenberg Amendment-required mens rea to violent felonies, as the Fifth, Eighth, and Tenth Circuits have done, must be legislatively addressed.

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<sup>172</sup> *Id.* at 490–91.

<sup>173</sup> See *United States v. Hayes*, 555 U.S. 415, 426 (2009) ("Practical considerations strongly support our reading of § 921(a)(33)(A)'s language.")

<sup>174</sup> *United States v. Castleman*, 134 S. Ct. 1405, 1411 (2014).

<sup>175</sup> See *Snyder*, *supra* note 1.

<sup>176</sup> See *Castleman* 134 S. Ct. at 1411–13 (distinguishing *Johnson*'s definition of "use of force" clause in the Gun Control Act); *Voisine*, 136 S. Ct. at 2279–80.

A. *Clarification of the Force Clause Comports with Statutory Interpretation Principles*

Prior to the decision in *Voisine*, enforcement of the Lautenberg Amendment remained low.<sup>177</sup> Whether the decision in *Voisine* changes enforcement patterns remains to be seen.<sup>178</sup> Unfortunately, since the *Voisine* holding is already being applied in a variety of ways by lower courts,<sup>179</sup> it is possible that prosecutors may be unsure of what they can charge against a defendant until the scope is clarified.

Congress should respond to lower courts' misapplication by adding additional language to the definitional section of the Lautenberg Amendment.<sup>180</sup> By amending the force clause, Congress could apply the principles that have been shown to work in the domestic violence context, and add additional language clarifying the clause's application. After Section 921(a)(33)(A)(ii), Congress should add clarification language that reads:

(iii) the use or attempted use of physical force is defined as a reckless, knowledgeable, or intentional acts, or any common law definition contained or similar hereto, and this definition is exclusive to misdemeanor crimes of domestic violence.

Whether reckless misdemeanors should qualify in the contexts of other federal criminal statutes should be up to separate judicial or congressional inquiries.<sup>181</sup> As noted above, the strength and clarity afforded to the Lautenberg Amendment should be irrespective of other criminal laws. Although the Supreme Court has already interpreted the mens rea requirement of the Lautenberg Amendment's force clause in *Voisine* and *Castleman*, congressional approval of a statute that

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<sup>177</sup> Lininger, *supra* note 65 at 531–32; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GUN CONTROL: ANALYZING AVAILABLE DATA COULD HELP IMPROVE BACKGROUND CHECKS INVOLVING DOMESTIC VIOLENCE RECORDS 11–14 (2016), <http://www.gao.gov/assets/680/678315.pdf> [<https://perma.cc/FFE5-4RXJ>].

<sup>178</sup> *See* Lininger, *supra* note 9, at 187–88.

<sup>179</sup> *See* Laura Lee Gildengorin, *Smoke and Mirrors: How Current Firearm Relinquishment Laws Fail to Protect Domestic Violence Victims*, 67 HASTINGS L.J. 807, 819 (2016).

<sup>180</sup> *See* Nora Caplan-Bricker, *The Supreme Court Upheld the Law Against Domestic Abusers Owning Guns. If Only Someone Would Enforce It*, SLATE: THE XX FACTOR BLOG (June 27, 2016), [http://www.slate.com/blogs/xx\\_factor/2016/06/27/in\\_voisine\\_sotus\\_says\\_domestic\\_abusers\\_can\\_t\\_have\\_guns.html](http://www.slate.com/blogs/xx_factor/2016/06/27/in_voisine_sotus_says_domestic_abusers_can_t_have_guns.html) [<https://perma.cc/9EPY-3BPF>].

<sup>181</sup> *See, e.g.*, *United States v. Fogg*, 836 F.3d 951, 953 (8th Cir. 2016); *Bennett v. United States*, No. 1:16-CV-251-GZS, 2016 WL 3676145, at \*3 (D. Me. July 6, 2016).

narrows its application to domestic violence contexts will avoid “the dangers of excessive federalization of the criminal law.”<sup>182</sup>

### B. *The Impracticability of Legislative Inaction*

As it stands, the Supreme Court is stuck with interpreting sections of the Gun Control Act on a case-by-case basis.<sup>183</sup> Previous decisions have noted the Court is “tired” of resolving these types of issues ad hoc, finding them “bothersome.”<sup>184</sup> Although Congress can find adding a “list” of applicable statutes impracticable, it must be clearer as to when it wants specific interpretations of the law to apply.<sup>185</sup>

Furthermore, given the highly contextual reading that the Supreme Court has given the Lautenberg Amendment when compared with the ACCA, it is up to Congress to import some of this language into the statute. To allow for disjunctive readings without legislative clarity only confuses lower courts further, and requires more research in order to make sure that they are making decisions only after doing substantial research that could be otherwise more efficiently applied.

## CONCLUSION

As the advocate Bryan Stevenson notes, “the true measure of our commitment to justice . . . cannot be measured by how we treat the rich, the powerful, the privileged. The true measure of our character is how we treat the poor, the disfavored, the accused, the incarcerated, and the condemned.”<sup>186</sup> When the *Castleman* Court says that a “squeeze of the arm” can be a battery, or the *Voisine* Court allows for punishment of soapy-handed partner throwing plates at his

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<sup>182</sup> Note, *Mens Rea in Federal Criminal Law*, 111 HARV. L. REV. 2402, 2402 (1998).

<sup>183</sup> See *Voisine v. United States*, 136 S. Ct. 2272 (2016); *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Johnson II*); *United States v. Castleman*, 134 S. Ct. 1405 (2014); *Johnson v. United States*, 559 U.S. 133, 136 (2010) (*Johnson I*); *United States v. Hayes*, 555 U.S. 415 (2009).

<sup>184</sup> See *Johnson II*, 135 S. Ct. at 2573–74 (Alito, J., dissenting) (invalidating the residual clause of the ACCA for vagueness concerns, after several recent decisions went back-and-forth on the application of the clause).

<sup>185</sup> See generally *United States v. Tavares*, 843 F.3d 1, 19 (1st Cir. 2016) (“In a sensible world, Congress and/or the Sentencing Commission would have made a list of state and federal laws deemed to be crimes of violence that warranted the desired penalties and sentencing enhancements. At its margins, such a list might be over- or under-broad. It would, though, be straightforward. Instead of using a simple list, the drafters adopted abstract descriptions of the crimes that would appear on such a list, employing terms such as ‘physical force,’ ‘use,’ ‘injury,’ and so on.”).

<sup>186</sup> BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 18 (2014).

spouse to scare her,<sup>187</sup> the justice system is recognizing the plight of those who are too often coerced to remain quiet. The resulting contextual interpretation of the Lautenberg Amendment has allowed for a significantly broad reading of the mens rea requirement, which strengthens prosecutors' ability to dispossess domestic abusers of their guns. But this interpretation should not be extended to the violent crime context; the risk of over-sentencing is too great. In response to this split among the circuits, Congress must continue to define and recognize the parameters of domestic violence and stop interpretive spillover in the Gun Control Act.

*Rachel B. Polan*<sup>†</sup>

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<sup>187</sup> See *Castleman*, 134 S. Ct. at 1412; *Voisine*, 136 S. Ct. at 2279–82.

<sup>†</sup> J.D. Candidate, Brooklyn Law School, 2018; B.A. Boston University, 2009. Thank you to Anne Conroy, Charlie Wood, Alexa Bordner, Katherine Higginbotham and the entire *Brooklyn Law Review* staff. A special note of thanks to my loving family for their unwavering support and kindness. All errors are my own.