"BEAT YOUR WIFE, AND LOSE YOUR GUN": DEFENDING LOUISIANA'S ATTEMPTS TO DISARM DOMESTIC ABUSERS[1]

1. 142 CONG. REC. 19415 (1996) (statement of Senator Frank Lautenberg) (describing the effects of the Lautenberg amendment, a model for Louisiana's recent legislation); *see infra* text accompanying notes 73–83.

"When it comes to that gun, in Louisiana, gun is number one, safety is number two."—Louisiana State Representative Barbara Norton[2]

"We clearly have a problem."—Louisiana State Representative Helena Moreno[3]

On the evening of September 5, 2009, Donna Carter was relaxing with her family in Holden, Louisiana, perhaps comforted by the protective order she had obtained against her estranged husband, Dennis.[4] At 10:40 p.m., Dennis barged into the house with a gun, ready to carry out the threats he had been making for years.[5] He shot Donna and his son before heading upstairs to where his pregnant-daughter-in-law Amber and her two-year-old son, Mason, had hidden.[6] When he burst into the bedroom,

2. Lauren Langlois, *Domestic Violence Bills Backed by House Committee*, ADVOCATE (Baton Rouge) (Mar. 26, 2014, 7:21 PM), http://theadvocate.com/news/8739996-123/story.html.

3. *Id.*

4. Dennis Persica, *2-year-old among Four Killed in Livingston Parish Murder-Suicide*, NOLA.COM/TIMES-PICAYUNE (Sept. 6, 2009, 9:48 AM), http://blog.nola.com/tpnorthshore/2009/09/four_killed_in_livingston_pari.html; Scott Stump, *Mom Recounts Saving Unborn Child from Shooting Spree*, TODAY (May 4, 2011, 10:57 PM), http://www.today.com/id/42894882/ns/today-today_news/t/mom-recounts-saving-unborn-child-shooting-spree/#.

5. *Police: Man Shoots Four Family Members, Then Himself*, CNN (Sept. 6, 2009, 11:49 AM), http://www.cnn.com/2009/CRIME/09/06/louisiana.shootings/index.html [hereinafter *Man Shoots*]; Doug Simpson, *Two-year Old, Three Others Dead in La. Murder-Suicide*, NEWSDAY (Sept. 7, 2009, 1:25 AM), http://www.nbcnews.com/id/32712873/ns/us_newscrim_and_courts/#.VRgR50RVHeQ.

6. Stump, *supra* note 4.

Amber leapt from a second-story window with her son in her arms.[7] As she struggled through the window, she was hit eight times; Dennis then followed her downstairs and shot her again as she attempted to flee.[8] Four bullets struck Mason as his mother fled; she could do nothing but cradle him as he died.[9]

Unfortunately, the Carters' tale is not unique in Louisiana. Only three other states have a higher rate of women killed by men.[10] Eighty percent of these women were murdered by a husband, partner, or ex-partner.[11] As many as seventy-four percent of these deaths came from gunshots.[12] Partly in response to these statistics, the 2014 Louisiana legislature enacted two new firearms regulations.[13] One bans possession of firearms by those convicted of domestic abuse battery, while the other imposes a firearms disability on persons subject to a protective order.[14]

By disarming those who pose the greatest threat to victims' safety,[15] these laws provide vital protections to victims of domestic violence. However, the Louisiana Constitution requires courts to apply strict scrutiny to any restrictions on the right to bear arms.[16] This Comment outlines a method by which the Louisiana Supreme Court can apply strict scrutiny, but still uphold these important laws against facial and as-applied challenges.[17]

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7. Stump, *supra* note 4.

8. *Id.*

9. *Id.* When police attempted to pull Dennis Carter over, he killed himself rather than surrender to the police. *Man Shoots*, *supra* note 5.

10. VIOLENCE POLICY CTR., WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2012 HOMICIDE DATA 14 (2014), http://vpc.org/studies/wmmw2014.pdf.

11. Langlois, *supra* note 2 (citing the Louisiana Coalition Against Domestic Violence).

12. *Id.* (citing the Louisiana Coalition Against Domestic Violence); *see also* KAMI E. GEOFFRAY, LA. COAL. AGAINST DOMESTIC VIOLENCE, THE KILLING MUST STOP: DEATH AT THE HANDS OF THE PERSON YOU LOVE 17 (2010), http://www.lcadv.org/docs/dvfr_report.pdf (reporting data between 1997 and 2008 that 66% of domestic violence murders were committed with firearms).

13. Act of May 22, 2014, No. 195, §§ 1–2, 2014 La. Sess. Law Serv. 826, 826–27 (West) (codified as amended at LA. STAT. ANN. §§ 14:95.10, 46:2136.3 (Supp. 2015)).

14. *See infra* text accompanying notes 102–27.

15. *See infra* text accompanying notes 19–21.

16. *See infra* text accompanying note 128.

17. Similar comments have addressed laws or proposals in other states. *See, e.g.*, Michelle M. Deutchman, Note, *Getting the Guns: Implementation and Enforcement Problems with California Senate Bill 218*, 75 S. CAL. L. REV. 185 (2001) (describing challenges in implementing California's requirement for seizure of certain weapons

Part I outlines the scope of the epidemic of domestic violence nationally and in Louisiana, stressing the connection between the availability of firearms and domestic violence homicides. Part II examines federal and Louisiana bans on firearm possession by domestic violence misdemeanants and persons subject to a protective order. Part III explores the legal challenges that Louisiana's laws will face in light of the state constitutional provision that mandates strict scrutiny for any restrictions on the right to bear arms. Specifically, this Comment argues that the laws should survive both facial and as-applied challenges because they are narrowly tailored to serve the compelling state interest of preventing domestic abuse from escalating to murder. Finally, the Comment briefly addresses effective implementation of the new laws so that they will protect the lives of domestic violence victims.

I. DOMESTIC VIOLENCE AND FIREARMS: A DEADLY COMBINATION

In their lifetimes, 27.3% of American women will suffer negative physical, emotional, social, and professional consequences due to their exposure to domestic violence; the number of women who experience intimate partner violence but do not suffer these negative impacts is likely even higher.[18] A pattern of abuse far too often culminates in murder.[19] Ninety-three percent of female murder victims knew their killer, most often a "current or former husband[] or boyfriend[]."[20] Seventy

at a domestic violence scene); Sharon L. Gold, Note, *Why Are Victims of Domestic Violence Still Dying at the Hands of Their Abusers?: Filling the Gap in State Domestic Violence Gun Laws*, 91 KY. L.J. 935 (2003) (outlining proposed gun bans under Kentucky law).

18. CTR. FOR SURVEILLANCE, CTRS. FOR DISEASE CONTROL & PREVENTION, PREVALENCE AND CHARACTERISTICS OF SEXUAL VIOLENCE, STALKING, AND INTIMATE PARTNER VIOLENCE VICTIMIZATION—NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY, UNITED STATES, 2011, at 11 (2014), http://www.cdc.gov/mmwr/pdf/ss/ss6308.pdf (reporting negative impacts including fear, concern for personal safety, PTSD symptoms, physical injury, missed work, and the need for social, medical, and legal services). These impacts are not limited to the partners themselves; children exposed to domestic violence are substantially more likely to suffer a range of negative impacts including suicide attempts, violent crime, domestic abuse (as both victims and perpetrators), and drug and alcohol abuse. *See* Virginia E. Hench, Essay, *When Less is More—Can Reducing Penalties Reduce Household Violence?*, 19 U. HAW. L. REV. 37, 38–39 (1997).

19. *See, e.g.*, Simpson, *supra* note 5.

20. CITY OF NEW ORLEANS, THE NEW ORLEANS BLUEPRINT FOR SAFETY ch. 1, at 11 (2014), http://www.nola.gov/health-department/domestic-violence-prevention/domestic-violence-documents/blueprint-for-safety-opening-pages-and-chapter-one/. The

percent of these women were previously abused by the intimate partner who killed them.[21]

Firearms make an abusive situation even more deadly. "[A]busers who possess guns tend to inflict the most severe abuse."[22] In fact, the mere presence of a gun in a household is "strongly and independently associated with an increased risk of homicide," particularly "at the hands of a family member or intimate acquaintance."[23] For this reason, New Orleans 911 operators have recently been trained to determine the presence of weapons when answering a domestic violence call.[24] Given the

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Blueprint aims to integrate the entire criminal justice system, from first responders through courts and probation officers, into a single unit with a consistent message that domestic violence will not be tolerated; its theoretical underpinning is the idea that intervention can "maximize safety for victims of domestic violence and hold[] offenders accountable while offering them opportunities to change." *Id.* ch. 1, at 2. *See* Hench, *supra* note 18, at 51 (arguing for a "coordinated program which intervenes at the first sign of violence").

21. 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, 1091 (2003), http://ajph.aphapublications.org/doi/abs/10.2105/AJPH.93.7.1089. Though previous abuse was the most significant predictor of future femicide, the second most important predictor was the employment status of the perpetrator; unemployed men were more likely to kill their partners. *Id.* at 1092. Characteristics associated with violent criminals such as prior arrests for other violent crimes generally were not significant predictors for intimate partner femicide. *Id.*

22. *Id.* (finding that although other risk factors for intimate partner homicide somewhat lessened the significance of gun ownership as a risk factor, possession of a firearm nevertheless had "substantial independent effects that increased homicide risks").

23. Arther L. Kellerman et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 NEW ENG. J. MED. 1084, 1087 (1993), http://www.nejm.org/doi/pdf/10.1056/NEJM199310073291506 (reporting that homicide was 2.7 times more likely when a home had a firearm in it and that intimate partner or family member homicide was 7.8 times more likely in a home with a firearm). *But see* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and A Research Agenda*, 56 UCLA L. REV. 1443, 1465–67 (2009) (arguing that there is no consensus in the scientific literature regarding the desirability or effect of gun control laws); Sayoko Blodgett-Ford, Note, *Do Battered Women Have a Right to Bear Arms?*, 11 YALE L. & POL'Y REV. 509, 535 (1993) (arguing that because the Kellerman study included incidents in which women killed their abusers in self-defense in its count of homicides, the study is of limited value when analyzing the potential benefits of gun ownership for victims of domestic abuse). However, the potential benefits of a firearm for self-defense appear to accrue only to those women who do not reside with their abusers (and hence would be unaffected by his disarmament) and even then, the protective effect is far from clear. Campbell et al., *supra* note 21, at 1092.

24. CITY OF NEW ORLEANS, THE NEW ORLEANS BLUEPRINT FOR SAFETY ch. 2, at 14 (2014), http://www.nola.gov/health-department/domestic-violence-prevention/domestic-violence-documents/blueprint-for-safety-chapter-two/.

high rate of recidivism among domestic abusers (calculated at between forty and eighty percent)[25] and the fact that repeat offenders tend to serially victimize their partners,[26] removing firearms from batterers is a logical step toward reducing the overall death rate from domestic violence.[27] As one United States senator bemoaned, "all too often, the difference between a battered woman and a dead woman is the presence of a gun."[28]

On a single day in Louisiana in September 2012, "627 domestic violence victims sought intervention in an emergency shelter, [and] 195 victims made calls to a domestic violence hotline."[29] Annually, about 11,000 domestic dispute calls are made to the New Orleans Police Department, of which roughly 4,000 result in arrests.[30] Of those that are prosecuted, the "vast majority" are for misdemeanors.[31] Sadly, whatever consequences there are for domestic violence do not seem to have reduced recidivism, given that repeat offenders and repeat victims are a

25. Carla Smith Stover, *Domestic Violence Research: What Have We Learned and Where Do We Go From Here?*, 20 J. INTERPERSONAL VIOLENCE 448, 450 (2005), http://www.sagepub.com/isw6/articles/ch2stover.pdf; *see also* United States v. Skoein, 614 F.3d 638, 644 (7th Cir. 2010) (en banc) (collecting studies); BARBARA J. HART & ANDREW R. KLEIN, PRACTICAL IMPLICATIONS OF CURRENT INTIMATE PARTNER VIOLENCE RESEARCH FOR VICTIM ADVOCATES AND SERVICE PROVIDERS 75 (2013), http://www.ncjrs.gov/pdffiles1/nij/grants/244348.pdf (reporting that a "hard core" group of abusers typically re-abuses within one to two years, and that a larger group re-abuses at some future time). In this context, recidivism refers to continuing to abuse, whether or not such abuse results in a future criminal conviction.

26. HART & KLEIN, *supra* note 25, at 74.

27. Campbell et al., *supra* note 21, at 1092 ("[R]estricting abusers' access to guns can potentially reduce both overall rates of homicide and rates of intimate partner femicide").

28. 142 CONG. REC. 24648 (1996) (statement of Senator Frank Lautenberg) (quoting an earlier remark by Senator Paul Wellstone).

29. Emily Lane, *Commission Would Better Address Louisiana's Domestic Violence Problems, Improve Safety Net for Victims*, NOLA.COM/TIMES-PICAYUNE (Apr. 19, 2014, 10:57 AM, *updated* Apr. 21, 2014, 8:26 AM), http://www.nola.com/politics/index.ssf/2014/04/commission_would_better_addres.html.

30. John Simerman, *New Domestic Violence Initiative Follows Deadly Breakdown in New Orleans*, ADVOCATE (Baton Rouge) (Oct. 29, 2014, 8:29 PM), http://theadvocate.com/sports/10622687-123/new-domestic-violence-initiative-follows. This figure represents approximately 2% of the over 509,018 emergency 911 calls received by NOPD that year. *911 Calls for Service—2011*, CITY NEW ORLEANS, http://www.nola.gov/nopd/crime-data/911-calls-for-service/2011/ (last updated Apr. 15, 2013).

31. Katy Reckdahl, *New Orleans Judges Say They Lack the Resources to Protect Domestic Violence Victims*, TIMES-PICAYUNE (New Orleans) (December 19, 2011, 11:11 AM), http://www.nola.com/crime/index.ssf/2011/12/new_orleans_judges_say_they_la.html.

common sight in state courtrooms.[32] Because Louisiana's rate of femicide is among the highest in the nation and the vast majority of these women are killed by current or former intimate partners, many domestic abuse victims will end up dead.[33]

II. FEDERAL AND STATE ATTEMPTS TO PREVENT DOMESTIC VIOLENCE HOMICIDES

This section first examines the protections against domestic abuse that existed in Louisiana prior to the new laws. Because the two federal prohibitions on firearms possession by domestic abusers are models for Louisiana's legislation, Subsection B analyzes the federal bans and how they have withstood various court challenges. The final two subsections address Louisiana's ban on firearms possession by persons convicted of domestic abuse battery and the ban on firearms possession by persons subject to a protective order.

A. LOUISIANA'S DOMESTIC ABUSE PROTECTIONS

Louisiana has a variety of civil and criminal mechanisms that protect domestic abuse victims. The criminal process begins with a law enforcement response to a domestic dispute.[34] If officers have "reason to believe" abuse has occurred, they can arrest the offender.[35] In addition, Louisiana statutes require that officers assist the victim in obtaining medical treatment and transportation and inform her[36] of available civil and criminal

32. Lane, *supra* note 29.

33. GEOFFRAY, *supra* note 12, at 4. The state cited this high murder rate when defending the constitutionality of Louisiana's new ban on firearms possession by persons convicted of domestic abuse battery. *See* State v. Smith, 15-209, p. 4 (La. App. 5 Cir. 5/18/15); No. 15-K-209, 2015 WL 3439104, at *3.

34. *See* CITY OF NEW ORLEANS, THE NEW ORLEANS BLUEPRINT FOR SAFETY ch. 3, at 2 (2014), http://www.nola.gov/health-department/domestic-violence-prevention/domestic-violence-documents/blueprint-for-safety-chapter-three/.

35. Act of June 5, 2015, No. 85, sec. 1, § 2140(A), 2015 La. Sess. Law Serv. 110, 111 (West) (to be codified at LA. STAT. ANN. § 46:2140(A)); LA. STAT. ANN. § 46:2140(B) (2015). State law mandates arrest when an abuser has violated a temporary restraining order or a protective order. LA. STAT. ANN. § 46:2140(B) (2015). State law also encourages the use of arrest as a means to prevent additional abuse, but leaves the decision to arrest to officer discretion if there is no immediate danger. *Id.* Municipalities can institute particular policies that work in conjunction with state law. For instance, New Orleans has a "pro-arrest policy for domestic violence incidents," such that officers are strongly encouraged to arrest an offender. CITY OF NEW ORLEANS, *supra* note 34, ch. 3, at 8.

36. For ease of reading, this Comment will typically refer to perpetrators of abuse as "he" and victims of abuse as "she." Although both homosexual and heterosexual men are victims of domestic violence, the vast majority of intimate partner violence

remedies.[37] At that point, victims may pursue civil relief, criminal relief, or both.

If the offender was arrested, the district attorney opens a criminal case.[38] If there was no arrest, the victim can file a criminal complaint with law enforcement.[39] If subsequent investigation reveals probable cause, law enforcement transfers the case to the district attorney, who may bring charges.[40] Ideally, prosecutors work with the victim and take her concerns and safety into account when determining whether and how to charge abusers.[41] To protect her safety, a criminal order requiring the offender to stay away from his victim may be made a condition of a peace bond,[42] a bail restriction,[43] or sentencing.[44] In addition, parishes such as Orleans have instituted a system of domestic violence victim's advocates who support the victim throughout the criminal process, including helping her obtain a protective order before the offender's release.[45]

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is committed by men on women. HART & KLEIN, *supra* note 25, at 23; *see also* Cheryl Hanna, *Supreme Court Advocacy and Domestic Violence: Lessons from* Vermont v. Brillon *and Other Cases Before the Court*, 24 ST. JOHN'S J. LEGAL COMMENT. 567, 599 (2010) (suggesting that "modern domestic violence remains deeply rooted in a broader legal and social culture that treated women as the inferior sex").

37. LA. STAT. ANN. § 46:2140(B) (2015); *see also* CITY OF NEW ORLEANS, *supra* note 34, ch. 3, at 20.

38. *See, e.g.*, *Understanding the Criminal Process*, OFF. DIST. ATT'Y FOR THE JUD. DIST., http://www.ebrada.org/criminal_process.php (last visited May 7, 2015).

39. CITY OF NEW ORLEANS, *supra* note 34, ch. 3, at 20.

40. *See* CITY OF NEW ORLEANS, THE NEW ORLEANS BLUEPRINT FOR SAFETY ch. 5, at 6–17 (2014), http://www.nola.gov/health-department/domestic-violence-prevention/domestic-violence-documents/blueprint-for-safety-chapter-five/ (discussing the charging framework for prosecutors in New Orleans with an emphasis on providing a consistent message that abuse is not tolerated).

41. *See, e.g., id.* ch. 5, at 3–4, 20.

42. LA. CODE CRIM. PROC. ANN. art. 30(B) (Supp. 2015). In Louisiana, a peace bond is analogous to bail except that while a defendant who posts bail forfeits the bail if he fails to appear at trial, a defendant who posts a peace bond forfeits the bond if he commits a breach of the peace within a specified time period.

43. Act of June 29, 2015, No. 242, sec. 1, art. 327.1, 2015 La. Sess. Law Serv. 521, 521 (West) (to be codified at LA. CODE CRIM. PROC. ANN. art. 327.1); *id.* sec. 1, art. 335.1(A)(1)(a), 2015 La. Sess. Law Serv. at 521–22 (West) (to be codified at LA. CODE CRIM. PROC. ANN. art. 335.1(A)(1)(a)).

44. LA. CODE CRIM. PROC. ANN. art. 871.1 (Supp. 2015).

45. *See* CITY OF NEW ORLEANS, THE NEW ORLEANS BLUEPRINT FOR SAFETY ch. 6, at 3–10 (2014), http://www.nola.gov/health-department/domestic-violence-prevention/domestic-violence-documents/blueprint-for-safety-chapter-six/. An employee of the District Attorney, the advocate attends all court dates, explains court procedures to the victim, and assists her in participating in the process to the degree that she feels comfortable. *Id.*

In addition to general battery and assault statutes, Louisiana also criminalizes domestic abuse battery,[46] domestic abuse aggravated assault,[47] and stalking.[48] Domestic abuse battery is a battery upon a family or household member,[49] while domestic abuse aggravated assault is an assault upon a family or household member with a dangerous weapon.[50] The domestic abuse statutes are somewhat limited in their scope since they define "household member" narrowly, requiring that the victim and the perpetrator be current or former opposite-sex cohabitants or that the victim be the offender's child or a child currently or formerly residing in the offender's home.[51] The definition of "family member" is similarly restrictive, being limited to "spouses, former spouses, parents, children, stepparents, stepchildren, foster parents, and foster children."[52] This definition thus fails to criminalize violence between unmarried nonheterosexual couples, between intimate partners who have never cohabitated, between siblings, and among extended family members.[53] Louisiana's general battery statute will continue to

46. Act of July 1, 2015, No. 440, sec. 1, § 35.3, 2015 La. Sess. Law Serv. 956, 956–57 (West) (amending LA. STAT. ANN. § 14:35.3 (Supp. 2015)).

47. *Id.* sec. 1, § 37.7, 2015 La. Sess. Law Serv. at 957–58 (amending LA. STAT. ANN. § 14:37.7 (Supp. 2015)).

48. *Id.* sec. 1, § 40.2, 2015 La. Sess. Law Serv. at 958 (amending LA. STAT. ANN. § 14:40.2 (Supp. 2015)).

49. *Id.* sec. 1, § 35.3(A), 2015 La. Sess. Law Serv. at 956 (amending LA. STAT. ANN. § 14:35.3(A) (Supp. 2015)) (criminalizing "the intentional use of force or violence committed by one household member or family member upon the person of another household member or family member"). Battery in Louisiana generally follows the common law definition. LA. STAT. ANN. § 14:33 (2007) ("Battery is the intentional use of force or violence upon the person of another; or the intentional administration of a poison or other noxious liquid or substance to another.").

50. Act of July 1, 2015, No. 440, sec. 1, § 37.7(A), 2015 La. Sess. Law Serv. 956, 957 (West) (amending LA. STAT. ANN. § 14:37.7(A) (Supp. 2015)) (defining the crime as "an assault with a dangerous weapon committed by one household member or family member upon another household member or family member"); *see also* LA. STAT. ANN. § 14:2(B)(3) (Supp. 2015) (defining "dangerous weapon" as an "instrumentality, which, in the manner used, is calculated or likely to produce death or great bodily harm").

51. Act of July 1, 2015, No. 440, sec. 1, § 35.3(B)(5), 2015 La. Sess. Law Serv. 956, 957 (West) (to be codified at LA. STAT. ANN. § 14:35.3(B)(5)).

52. *Id.* sec. 1, § 35.3(B)(4), 2015 La. Sess. Law Serv. at 957 (West) (to be codified at LA. STAT. ANN. § 14:35.3(B)(4)).

53. *See also* Jarvis DeBerry, Editorial, *Let's Write a Better Domestic Violence Law for Louisiana*, NOLA.COM/TIMES-PICAYUNE (July 16, 2014, 9:10 AM), http://www.nola.com/opinions/index.ssf/2014/07/lets_write_a_better_domestic_v.html (opining that same sex relationships and romantic relationships where the partners do not live together deserve equal protection in domestic violence statutes); Ken

apply, but a conviction for simple battery does not trigger a firearms prohibition.[54]

In a civil context,[55] the process typically begins with a victim appearing at district court and filing a "Petition for Protection from Abuse."[56] Since many victims appear in court *pro se*, Louisiana has devised a standardized form available in the offices of Clerks of Court that elicits the information a judge will need to determine whether to grant protection to a petitioner.[57] A judge then reviews the petition *ex parte*, and, if it shows "good cause," will issue a temporary restraining order (TRO).[58] A showing of an "immediate and present danger of abuse" constitutes good cause.[59] The Revised Statutes define such abuse broadly as a physical or nonphysical offense against the person prohibited by the Criminal Code when the victim is the abuser's dating partner or a member of the abuser's family or household.[60] Although the

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Daley, *DA Backs off Attempted Murder Charge Against NOPD Detective*, NOLA.COM/TIMES-PICAYUNE (July 15, 2014, 9:08 PM, *updated* July 16, 3:54 AM), http://www.nola.com/crime/index.ssf/2014/07/attempted_murder_charge_agains.html (describing a prosecutor unable to seek an increased sentence in a strangulation case due to the absence of a domestic relationship).

54. The punishment for simple battery is only a fine or imprisonment not at hard labor, LA. STAT. ANN. § 14:35 (Supp. 2015), and a felony is a crime that may be punished by death or imprisonment, while a misdemeanor is a crime that is not a felony, *id.* § 14:2(A)(4), (6). Because simple battery is a misdemeanor, *id.*; *id.* § 14:35(B), it does not trigger a firearms prohibition, *see* LA. STAT. ANN. § 14:95.1 (2012) (prohibiting firearms possession for most felony convictions).

55. Civil protections include the Protection from Family Violence Act, LA. STAT. ANN. §§ 46:2121–47 (2010 & Supp. 2015), the Protection from Dating Violence Act, LA. STAT. ANN. § 46:2151 (2010), and the Post-Separation Family Violence Relief Act, LA. STAT. ANN. §§ 9:361–69 (2008 & Supp. 2015).

56. For a copy of the standard form for this petition, see *Petition for Protection from Abuse,* PARISH ORLEANS CIV. DISTRICT CT., http://www.orleanscdc.com/forms/cdc/abuse.pdf (last visited Jan. 4, 2016).

57. *Id.*

58. Act of June 5, 2015, No. 85, sec. 1, § 2135, 2015 La. Sess. Law Serv. 110, 111 (West) (to be codified at LA. STAT. ANN. § 46:2135).

59. *Id.*

60. *Id.* sec. 1, § 2132(3), 2015 La. Sess. Law Serv. at 111 (West) (to be codified at LA. STAT. ANN. § 46:2135) (to be codified at LA. STAT. ANN. § 46:2132(3)) (defining abuse to include nonphysical abuse but to exclude negligent injury and defamation). This definition appears to legislatively overrule prior jurisprudence. *See, e.g.*, Shipp v. Callahan, 47,928, p. 4 (La. App. 2 Cir. 4/10/13); 113 So. 3d 454, 456 (arguing that the definition of abuse in the former version of LA. STAT. ANN. § 46:2132(3) did "not incorporate nonphysical acts"). The abuse need not be recent, but there must be a showing of a *danger* of abuse at the time of the order. Act of June 5, 2015, No. 85, sec. 1, § 2135, 2015 La. Sess. Law Serv. 110, 111 (West) (to be codified at LA. STAT. ANN. § 46:2135) ("The court shall consider any and all past history of abuse, or threats thereof, in determining the existence of an immediate and present danger of

definitions of family and household member are similar to those in the criminal statutes, dating partners are defined by reference to another provision that protects any current or former relationship of a "romantic or intimate nature" without regard to the partners' sex or whether they have cohabitated.[61]

A TRO prohibits a defendant from "abusing, harassing, or interfering with" a family member or dating partner and from approaching the victim's home or place of employment.[62] A TRO may also grant the protected person the possession of shared property and temporary custody of children.[63]

The TRO must be served within twenty-four hours and a rule to show cause why a protective order should issue must be set within twenty-one days.[64] At the adversarial hearing, the victim must prove abuse by a preponderance of the evidence.[65]

If the judge grants the protective order, it may extend for no longer than eighteen months except for any portion directly prohibiting abuse, harassment, or interference; such portions may be made indefinite.[66] The protective order may include all

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abuse. There is no requirement that the abuse itself be recent, immediate, or present."); *see also* Okechukwu v. Okechukwu, 2013-1421, pp. 5–6 (La. App. 3 Cir. 5/21/14); 139 So. 3d 1135, 1138–39, *writ denied*, 2014-1276 (La. 9/26/14); 149 So. 3d 266 (finding that the fact that a woman went into hiding immediately after filing for divorce and alleged frequent abuse prior to her departure from the family had provided sufficient evidence of an immediate and present danger of abuse in order to justify a temporary restraining order eleven months later).

61. LA. STAT. ANN. § 46:2151 (2010) (granting current and former dating partners "all services, benefits, and other forms of assistance provided by" the domestic abuse statutes); *see* Thomas v. Hyatt, 2012-1891, pp. 10–11 (La. App. 1 Cir. 8/6/13); 2013 WL 4007777, at *5 (holding that the statute explicitly protects both current and former dating partners because "[t]o hold otherwise would render those who have terminated a relationship defenseless").

62. LA. STAT. ANN. § 46:2135(A)(1) (2015). Additional relief includes the exclusive use of jointly owned or leased property, the return of personal property, sole custody of minor children, prohibitions on alienation of property, and protection for pets. *Id.*

63. *Id.* § 46:2135(A)(2)–(7).

64. *Id.* § 46:2135(C). If no TRO issues, the court sets a rule to show cause why a protective order should not issue within ten days, at which time the petitioner can receive a protective order if she proves abuse by a preponderance of the evidence. *Id.* § 46:2135(D).

65. *Id.* § 46:2135(B). Trial courts have wide latitude when assessing whether a plaintiff bore her burden of proof regarding past incidents of abuse. Alfonso v. Cooper, 2014-0145, p. 13 (La. App. 4 Cir. 7/16/14); 146 So. 3d 796, 805 (applying an abuse of discretion standard to appellate review of a protective order).

66. LA. STAT. ANN. § 46:2136(F) (2015). Interference includes conduct such as cancelling utilities or obstructing mail delivery. *See, e.g.*, Beard v. Beard, 05-302, p. 5 (La. App. 5 Cir. 11/29/05); 917 So.2d 1160, 1163.

relief available under a TRO, as well as temporary support and medical evaluations of the defendant, the abused person, or both.[67] Additionally, if a victim is seeking a divorce or separation, a judge must enjoin the offender from abusing the victim.[68] Protective orders may be extended by the court following a contradictory hearing.[69]

Louisiana has protections in place for domestic abuse victims that can imprison serious offenders and, at the very least, order abusers to stay away from their victims. However, until 2014, Louisiana did not attempt to disarm abusers. Thus, victims were vulnerable to gun violence if, as regularly happens, an abuser violated a protective order.[70]

B. FEDERAL GUN BANS

1. ENACTING THE BANS

In response to the national epidemic of domestic violence, Congress restricted domestic abusers' right to possess firearms as part of the Violent Crime Control and Law Enforcement Act of 1994 (hereinafter, federal protective order ban).[71] The statute forbids a person subject to a state domestic violence protective order from shipping, transporting, possessing, or receiving a firearm that has travelled in interstate commerce.[72] To trigger the ban on firearms possession, the protective order must include either a finding that the subject poses a "credible threat to the physical safety" of the protected person or an explicit prohibition on the "use, attempted use, or threatened use of physical force

67. LA. STAT. ANN. § 46:2136(A)(1)–(4) (2015).

68. LA. STAT. ANN. §§ 9:362(5), 366 (Supp. 2015) (defining the terms of the injunction and making it mandatory).

69. LA. STAT. ANN. § 46:2136(F) (2015). A motion for a contradictory hearing must be served upon the adverse party. LA. CODE CIV. PROC. ANN. art. 963 (2005).

70. ANDREW R. KLEIN, NAT'L INST. OF JUSTICE, PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS AND JUDGES 57–58 (2009), http://www.nij.gov/topics/crime/intimate-partner-violence/practical-implications-research/ch7/pages/violate-protectiveorders.aspx (collecting studies that report violation rates of protective orders at 23% over two years, 35% within 6 months, 60% within twelve months, and 48.8% within two years).

71. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110401, 108 Stat. 1796, 2014–15 (codified at 18 U.S.C. §§ 921(a)(32), 922(d)(8), (g)(8) (2012)). For an overview of the legislative process that led to the final form of the federal gun bans, see Tom Lininger, *A Better Way to Disarm Batterers*, 54 HASTINGS L.J. 525, 538–44, 551–58 (2003).

72. 18 U.S.C. § 922(g)(8) (2012).

[against the protected person] . . . that would reasonably be expected to cause bodily injury."[73] The order must also have issued after a hearing of which the subject had actual notice and at which he had an opportunity to participate.[74] Soldiers, police officers, and other government employees who must possess firearms as part of their employment are exempt from this firearms disability.[75]

Two years after this first attempt to protect domestic abuse victims from firearms wielded by their batterers, Congress approved the Lautenberg Amendment to the Omnibus Appropriations Act of 1997.[76] Named for its sponsor, Senator Frank Lautenberg of New Jersey, the amendment imposes a firearms disability on persons convicted of domestic violence misdemeanors.[77] The senator reasoned that existing firearms bans for felons were insufficient to disarm domestic abusers likely to commit future gun violence because prosecutors frequently charge domestic abuse as a misdemeanor even if the conduct is fundamentally felonious.[78] The Lautenberg Amendment bans persons convicted of misdemeanor crimes of domestic violence under federal, state, or tribal law from shipping, transporting, possessing, or receiving a firearm that has travelled in interstate commerce.[79] The predicate offense must penalize the "use or attempted use of physical force, or the threatened use of a deadly

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73. 18 U.S.C. § 922(g)(8)(C) (2012). A protective order is a civil remedy, *see supra* text accompanying notes 55–69, in contrast to a criminal remedy such as a domestic abuse battery conviction, *see supra* text accompanying notes 38–54.

74. *Id.* § 922(g)(8)(A).

75. *Id.* § 925(a)(1).

76. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 658, 110 Stat. 3009, 3371–72 (1996) (codified at 18 U.S.C. §§ 921(a)(33), 922(g)(9), 925(c) (2012)).

77. 18 U.S.C. § 922(g)(9) (2012).

78. 142 CONG. REC. 22985 (1996) (Statement of Senator Lautenberg); *see also* United States v. Hayes, 555 U.S. 415, 426–29 (discussing the Congressional intent behind the Lautenberg Amendment). On undercharging of domestic violence crime, see Sarah Eaton & Ariella Hyman, *The Domestic Violence Component of the New York Task Force Report on Women in the Courts*, 19 FORDHAM URB. L.J. 391, 461–62 (1992); *see also* Act of June 5, 2015, No. 85, sec. 1, § 2131, 2015 La. Sess. Law Serv. 110, 110 (West) (to be codified at LA. STAT. ANN. § 46:2131) ("The legislature further finds that previous societal attitudes have been reflected in the policies and practices of law enforcement agencies and prosecutors which have resulted in different treatment of crimes occurring between family members, household members, or dating partners and those occurring among strangers.").

79. 18 U.S.C. § 922(g)(9) (2012). The definition of a misdemeanor crime of domestic violence is found in the definition portion of the Gun Control Act. *Id.* § 921(a)(33).

weapon" by a spouse, a former spouse, a parent, a guardian, a co-parent, a current or former cohabitant, or a similarly situated person.[80] If a domestic violence misdemeanant is subsequently found in possession of a firearm, he may only be convicted of a violation of the Lautenberg Amendment if he was represented by counsel during the predicate offense (or waived this right) and, if he was entitled to one, either received a jury trial or waived this right.[81] The disability is perpetual unless lifted by a pardon, expungement, or restoration of civil rights.[82] Unlike the federal protective order ban, the Lautenberg Amendment makes no exception for government employees.[83]

2. THE BANS SURVIVE CHALLENGES IN FEDERAL COURT

Although both statutes survived constitutional review soon after their passage,[84] the landscape of gun rights changed when the Supreme Court handed down *District of Columbia v. Heller*.[85] In overturning a ban on handguns and a requirement that other

80. 18 U.S.C. § 921(a)(33)(A)(ii) (2012). *But see* Lininger, *supra* note 71, at 575–78 (arguing that the Lautenberg Amendment's "'use of force' requirement" and its exclusion of children as possible assailants limit the effectiveness of the statute).

81. 18 U.S.C. § 921(a)(33)(B)(i) (2012). *But see* Lininger, *supra* note 71, at 587–93 (criticizing the counsel and jury requirements as "cumbersome procedure[s] that further hinder[] the enforcement of the Lautenberg Amendment.").

82. 18 U.S.C. § 921(a)(33)(B)(ii) (2012).

83. *Id.* § 925(a)(1); *see* Emily J. Sack, *Confronting the Issue of Gun Seizure in Domestic Violence Cases* 6 J. CENTER FOR FAMILIES, CHILD., & CTS. 3, 8 (2005) (noting that the Lautenberg Amendment "has been particularly unpopular in the law enforcement community"); *see also* Gillespie v. City of Indianapolis, 13 F. Supp. 2d 811, 819–828 (S.D. Ind. 1998) (upholding the Lautenberg Amendment as applied to a police officer against a variety of constitutional challenges), *aff'd*, 185 F.3d 693 (7th Cir. 1999).

84. *See, e.g.*, United States v. Emerson, 270 F.3d 203, 260–63 (5th Cir. 2001) (upholding the constitutionality of the federal protective order ban under the Second Amendment); United States v. Pierson, 139 F.3d 501, 502–04 (5th Cir. 1998) (upholding the constitutionality of the federal protective order ban under the Commerce power); Gillespie v. City of Indianapolis, 13 F. Supp. 2d 811, 819–28 (S.D. Ind. 1998), *aff'd*, 185 F.3d 693 (7th Cir. 1999) (upholding the constitutionality of the Lautenberg Amendment under the Commerce power, the Tenth Amendment, the Fifth Amendment, and the Second Amendment). For a summary of jurisprudence prior to *District of Columbia v. Heller*, 554 U.S. 570 (2008), see Sack, *supra* note 83, at 4–15.

85. *Heller*, 554 U.S. at 570. Some commentators have suggested that "*Heller*'s bark is much worse than its right." Adam Winkler, Heller*'s Catch-22*, 56 UCLA L. REV. 1551, 1553 (2009); *see also* George A. Nation III, *The New Constitutional Right to Guns: Exploring the Illegitimate Birth and Acceptable Limitations of this New Right*, 40 RUTGERS L.J. 353, 417 (2009) (arguing that, because *Heller* leaves room for a great deal of legislation short of a total ban, "its practical effect may be much more muted" than first anticipated).

firearms be rendered inoperable while stored,[86] the *Heller* Court established a "right of law-abiding, responsible citizens to use arms in defense of hearth and home."[87] However, the Court emphasized in dicta:

> [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[88]

Since the Court found that the handgun ban at issue in *Heller* would not survive any standard of scrutiny, it left to lower courts the task of determining the appropriate standard for other restrictions on the right to bear arms.[89] Two years later, in *McDonald v. City of Chicago*, the Court held that the Second Amendment applies to the states, but again declined to identify a standard of scrutiny.[90]

While the Supreme Court has yet to rule on the constitutionality of the federal domestic violence statutes post-*Heller*, the Court in *United States v. Castleman* noted that it found "no anomaly in grouping domestic violence abusers . . . together with the others whom [federal law] disqualifies from gun ownership."[91] In *Heller*, the Court suggested felons and the

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86. District of Columbia v. Heller, 554 U.S. 570, 574–75 (2008). Specifically, the District of Columbia made it a crime to possess an unregistered firearm and prohibited registering handguns; the District also prohibited carrying a handgun without a license, but did authorize the chief of police to issue annual licenses. *Id.* Any lawfully registered firearms had to be rendered inoperable while stored. *Id.* at 575. Heller was a federal police officer who wished to keep an operable handgun in his home. *Id.* His application for a handgun license was rejected. *Id.*

87. *Id.* at 635.

88. *Id.* at 626–27 (dicta).

89. *Id.* at 628–29, 634–35. Thus, the Court did not select among strict scrutiny (requiring that a statute be necessary to serve a compelling government interest), intermediate scrutiny (requiring that a statute substantially serve an important government interest), or rational basis review (requiring that a statute be rationally related to a legitimate government interest).

90. McDonald v. City of Chicago, 561 U.S. 742 (2010). The *McDonald* plaintiffs challenged a Chicago ordinance requiring registration of any firearms, but "effectively banning handgun possession for almost all private citizens who reside in the City." *Id.* at 750.

91. United States v. Castleman, 134 S. Ct. 1405, 1412 (2014) (dicta). In *Castleman*, the Court held that the definition of "physical force" applicable to the Lautenberg Amendment is the same as the common law definition of force, i.e., offensive touching. *Id.* at 1410. Because the case was resolvable on statutory

mentally ill as examples of persons whose right to bear arms could lawfully be restricted.[92] By equating domestic abusers with felons and the mentally ill, *Castleman* suggested that the Court would likely uphold the federal protective order ban and the Lautenberg Amendment as appropriate restrictions on Second Amendment rights.

Lower courts have consistently found both statutes to be compatible with the *Heller* Court's personal-rights approach to firearm possession.[93] In the most common analysis, a lower court first asks whether the statute at issue burdens Second Amendment rights.[94] Because domestic violence misdemeanants and persons subject to a protective order have not been historically excluded from firearm possession, their Second Amendment rights are intact.[95] Next, the court determines the appropriate standard of scrutiny by asking whether the criminalized conduct is within the core protections of the Second Amendment—that is, whether the conduct is the possession of a gun for self-defense in the home by a responsible and law-abiding citizen.[96] If the conduct falls outside of the Second Amendment's core, it is subject to intermediate scrutiny; if the conduct falls within the core, the statute is subject to a higher standard, "if not quite strict scrutiny."[97] Since persons convicted of a misdemeanor

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grounds, the Court elected not to address Castleman's Second Amendment claims. *Id*. at 1416.

92. District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

93. A minority of courts analogize a firearms ban imposed on domestic abusers to other "presumptively lawful" bans; if the prohibition falls on a group similarly positioned to a group mentioned in *Heller* (i.e., felons and the mentally ill), the statute will stand. *See, e.g.*, United States v. White, 593 F.3d 1199, 1205–06 (11th Cir. 2010).

94. *See* United States v. Chovan, 735 F.3d 1127, 1137–38 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 187 (2014); United States v. Chester, 628 F.3d 673, 680–82 (4th Cir. 2010).

95. *Chovan*, 735 F.3d at 1137 (9th Cir. 2013); *Chester*, 628 F.3d at 681–82.

96. *Chovan*, 735 F.3d at 1137–38; *see also* Moreno v. N.Y. Police Dep't, No. 10 Civ. 6269(DAB)(RLE), 2011 WL 2748652, at *3 (S.D.N.Y. May 7, 2011), *adopted by* 10 Civ. 63269(DAB), 2011 WL 2802934 (S.D.N.Y. July 14, 2011) (finding that having a gun to further a career as an armed guard is not within the core protections of *Heller*).

97. Ezell v. City of Chicago, 651 F.3d 684, 708 (7th Cir. 2011) (comparing domestic violence misdemeanants who fall outside of the core of the Second Amendment to the availability of firing ranges for firearms training, which fall within the core of the Second Amendment and so must be subjected to "a more rigorous showing . . . if not quite 'strict scrutiny'"); *see also* Stephen Kiehl, Comment, *In Search of a Standard: Gun Regulations After* Heller *and* McDonald, 70 MD. L. REV. 1131, 1164–66 (2011) (arguing that strict scrutiny should be applied to regulations burdening the right to keep firearms in the home for self-defense and

are, by definition, not law-abiding and those subject to a protective order are likely irresponsible,[98] circuit courts have held that both groups fall outside the core and therefore subject the laws to intermediate scrutiny.[99] Given the prevalence of domestic violence and the risk of death by firearms, courts have easily found that preventing domestic violence deaths is an important government objective.[100] In light of the risk of recidivism, the danger posed by the presence of guns in a volatile situation, and the regular undercharging of felonious conduct in domestic violence circumstances, courts have found that disarming abusers substantially serves that objective.[101]

C. LOUISIANA'S FIREARMS BAN FOR DOMESTIC VIOLENCE MISDEMEANANTS

1. THE STATUTE

Modeled on the Lautenberg Amendment, Louisiana Revised Statute § 14:95.10 (hereinafter, Louisiana batterers' ban) imposes a firearms disability upon persons convicted of domestic abuse battery.[102] As with the Lautenberg Amendment, the offender must have either been represented by counsel during the domestic abuse battery proceedings or have waived that right and must have had the opportunity for a jury trial, if one was

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that any bans will likely be invalidated).

98. *See* United States v. Chapman, 666 F.3d 220, 226 (4th Cir. 2012) (finding a person subject to a protective order irresponsible because the state court found that he likely committed domestic abuse, he was subject to a 180-day protective order, he had attempted suicide with a firearm in a manner that endangered his ex-wife (not the person subject to the protective order), and he had shot at his ex-wife).

99. *See* United States v. Chovan, 735 F.3d 1127, 1139–41 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 187 (2014); United States v. Chester, 628 F.3d 673, 682–83 (4th Cir. 2010); United States v. Skoein, 614 F.3d 638, 641–42 (7th Cir. 2010) (en banc).

100. *See, e.g.*, United States v. Booker, 644 F.3d 12, 25 (1st Cir. 2011) (holding that the government's interest in disarming batters is "undeniably important").

101. *See Skoein*, 614 F.3d at 642 (holding the law to intermediate scrutiny without explicitly saying so); *Chovan*, 735 F.3d at 1139–42 (upholding the law under intermediate scrutiny because of the undercharging of domestic violence crimes, the high rate of recidivism, and the fact that gun use by domestic abusers more likely results in death); United States v. Staten, 666 F.3d 154, 161–67 (4th Cir. 2011) (upholding the law under intermediate scrutiny because it is narrowly focused on domestic abusers, includes procedural safeguards, and social science research demonstrates a significant risk of recidivism for domestic abusers).

102. LA. STAT. ANN. § 14:95.10 (Supp. 2015); *see also* Act of July 1, 2015, No. 440, sec. 1, § 35.3(A), 2015 La. Sess. Law Serv. 956, 956 (West) (amending LA. STAT. ANN. § 14:35.3(A) (Supp. 2015)) (defining the crime of domestic abuse battery as "the intentional use of force or violence committed by one household member or family member upon the person of another household member or family member").

available for the offense.[103] Similarly, the disability is lifted if the predicate offense is expunged or pardoned or the offender's civil rights are restored.[104] Parallel to Louisiana's felon-in-possession statute, the firearms disability for a person convicted of domestic abuse battery expires ten years from the "date of completion of sentence, probation, parole, or suspension of sentence."[105] Finally, the statute explicitly defines "firearm."[106]

2. CONTRASTS WITH THE FEDERAL MODEL

The scope of the Louisiana batterers' ban is somewhat narrower than that of the Lautenberg Amendment, because the federal law imposes a firearms disability following an "attempted use of physical force"[107] or a "threatened use of a deadly

103. LA. STAT. ANN. § 14:95.10 (Supp. 2015). A defendant on trial for domestic abuse battery does not have the right to a jury trial for a first offense because the available punishments are insufficiently serious to trigger the right, but would have the right for second and subsequent offenses due to the greater severity of the potential punishments. *See id.* § 14:35.3(C)–(G) (defining the punishments for domestic abuse battery); LA. CODE CRIM. PROC. ANN. art. 779 (1998).

104. LA. STAT. ANN. § 14:95.10(C) (Supp. 2015). *See infra* text accompanying notes 185–91.

105. LA. STAT. ANN. § 14:95.10(E) (Supp. 2015); *cf.* LA. STAT. ANN. § 14.95.1(C) (2012) (the same provision in the felon-in-possession statute).

106. LA. STAT. ANN. § 14:95.10(D) (Supp. 2015) ("'[F]irearm' means any pistol, revolver, rifle, shotgun, machine gun, submachine gun, black powder weapon, or assault rifle which is designed to fire or is capable of firing fixed cartridge ammunition or from which a shot or projectile is discharged by an explosive."); *cf.* LA. STAT. ANN. § 14:95.1(D) (2012) (the identical definition in the felon-in-possession statute). One open question is whether antique firearms that are inoperable fall under the ban. *Compare* LA. STAT. ANN. § 14:95.10 (D) (Supp. 2015) *with* 18 U.S.C. § 921(a)(3) (2012) ("Such term [i.e., firearm] does not include an antique firearm."). While not capable of firing, they are "designed to fire." Before this detailed definition was added to the felon-in-possession statute in 2009, Act of June 26, 2009, No. 154, § 1, 2009 La. Acts 1902 (codified at LA. STAT. ANN. 14:95.1 (2012)), the state courts and the Attorney General were in agreement that Louisiana's statute could be applied even to firearms that were antiques or inoperable, *see, e.g.*, 1994-95 La. Op. Att'y Gen. 62 (1994) (stating that the opinion of the attorney general is that an antique black powder weapon is a firearm for purposes of Louisiana's felon-in-possession ban); State v. Rogers, 494 So. 2d 1251, 1254–55 (La. App. 2 Cir. 1986) (holding that the form of the felon-in-possession ban that existed prior to the addition of the explicit definition neither required that firearms be operable nor included an exemption for antique weapons). Louisiana courts have yet to make an explicit holding as to whether antique firearms fall under the more explicit definition. However, given that the definition of firearm specifically includes black powder weapons and also includes the disjunctive "or" between "designed to fire" and "capable of firing," it seems likely that an antique or otherwise inoperable firearm would still be sufficient for prosecution under the firearms statutes.

107. In Louisiana, an attempted battery is an assault. LA. STAT. ANN. § 14:36 (2007).

weapon,"[108] while the Louisiana batterers' ban requires actual "force or violence."[109] Moreover, the Louisiana batterers' ban, because it applies only to family members and household members, excludes victims involved in non-marital homosexual relationships and victims who do not reside with their abusers.[110]

Additionally, Louisiana lifts its firearms ban for domestic violence misdemeanants ten years after the offender completes his punishment for the offense; the Lautenberg Amendment imposes a perpetual ban on firearms possession.[111] Thus, even though Louisiana's prohibition is lifted, any person convicted of domestic abuse battery in Louisiana will still be subject to the federal prohibition unless his offense is pardoned or expunged.[112]

On the other hand, the Louisiana batterers' ban improves on the Lautenberg Amendment because the predicate offense has a precise statutory definition.[113] Hence, unlike their federal counterparts, Louisiana courts need not debate whether the predicate offense must have the domestic relationship as an element of the offense[114] or whether reckless conduct is sufficient

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108. In Louisiana, such threatened use of such a weapon is domestic abuse aggravated assault, a felony; the crime is a felony because the sentence must be served at hard labor. LA. STAT. ANN. § 14:37.7(C) (Supp. 2015); *id.* § 14:2(B)(4) (defining "felony"). Another bill from the 2014 legislative session, by defining domestic abuse aggravated assault as a crime of violence, made Louisiana's firearms prohibition for selected felons apply to persons convicted of that offense. *See* Act of May 28, 2014, No. 280, sec. 1, § 2(B)(45), 2014 La. Sess. Law Serv. 349, 350 (West) (codified at LA. STAT. ANN. § 14:2(B)(45) (Supp. 2015)); LA. STAT. ANN. § 14:95.1 (2012) (banning firearms possession for felons convicted of crimes of violence).

109. LA. STAT. ANN. § 14:35.3 (Supp. 2015).

110. *But see* 18 U.S.C. § 921(a)(33)(ii) (2012) (providing protection for "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"). *See supra* text accompanying notes 51–52.

111. *Compare* LA. STAT. ANN. § 14:95.10(E) (Supp. 2015) *with* 18 U.S.C. § 922(g)(9) (2012).

112. *See infra* text accompanying notes 185–91. A person can thus legally possess a firearm under state law, while federal law continues to ban that possession. United States v. Chovan, 735 F.3d 1127, 1130 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 187 (2014).

113. *See* Act of July 1, 2015, No. 440, sec. 1, § 35.3(A), 2015 La. Sess. Law Serv. 956, 956 (West) (amending LA. STAT. ANN. § 14:35.3(A) (Supp. 2015)) (defining "domestic abuse battery").

114. *See, e.g.,* United States v. Hayes, 555 U.S. 415, 418 (2009) (holding that, although a domestic relationship must be established to trigger application of the Lautenberg Amendment, the predicate state offense need not include the domestic relationship as an element).

to trigger a firearms disability.[115]

D. LOUISIANA'S FIREARMS BAN FOR PERSONS SUBJECT TO A PROTECTIVE ORDER

1. THE STATUTE

Louisiana Revised Statute § 46:2136.3 (hereinafter, Louisiana protective order ban) adapts the language of the federal protective order ban to Louisiana, thereby joining thirty-three other states in imposing a firearms disability on persons subject to a protective order.[116] Like its federal counterpart, Louisiana's statute requires notice and an opportunity to be heard.[117] Possessing a firearm or carrying a concealed weapon by a person subject to a protective order exposes an abuser to criminal liability.[118]

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115. *See, e.g.*, United States v. Booker, 644 F.3d 12, 21 (1st Cir. 2011) (holding that a conviction carrying a mens rea of recklessness is sufficient to trigger the federal firearms disability).

116. Editorial, *Legislature Should Toughen Laws on Domestic Violence, Protect Victims*, NOLA.COM/TIMES-PICAYUNE (May 2, 2014, 8:26 AM), http://www.nola.com/opinions/index.ssf/2014/05/legislature_should_toughen_law.html. The Louisiana statute imposes a firearms disability upon persons made subject to an order "pursuant to a court-approved consent agreement or pursuant to the provisions of R.S. 9:361 et seq., R.S. 9:372, R.S. 46:2136, 2151, or 2173, Children's Code Article 1570, Code of Civil Procedure Article 3607.1, or Code of Criminal Procedure Articles 30, 327.1, 335.1, 335.2, or 871.1." Act of July 1, 2015, No. 440, sec. 3, § 2136.3(A), 2015 La. Sess. Law Serv. 956, 959 (West) (amending LA. STAT. ANN. § 46:2136.3(A) (Supp. 2015)). As a result, the firearms disability attaches both to protective orders and to injunctions against abuse.

117. Act of July 1, 2015, No. 440, sec. 3, § 2136.3(A), 2015 La. Sess. Law Serv. 956, 956 (West) (amending LA. STAT. ANN. § 46:2136.3(A) (Supp. 2015)). As a technical matter, Louisiana's firearms disability statute differs in form from the federal statute since Louisiana's statute merely references the various protective order statutes by number and those statutes include the hearing requirement, whereas the federal protective order ban includes the due process requirement as an element of the criminal statute. *Compare id. with* 18 U.S.C. § 922(g)(8)(A) (2012). However, when the protective order is issued pursuant to a consent decree, *see* LA. STAT. ANN. 46:2136(B)(2015) (allowing a court to impose a protective order if "[t]he parties enter into a consent agreement"), the firearms disability will not attach unless at some point in the proceedings, a judge has made a finding that the person to be subject to the protective order represents a credible threat to the safety of the protected person, LA. STAT. ANN. § 46:2136.3(A)(1) (Supp. 2015); *cf.* United States v. Spruill, 292 F.3d 207, 217 (5th Cir. 2002) (noting that court approval of a consent judgment "clearly does not carry with it the same degree of assurance that the issuing court itself determine that such an order was necessary in order to prevent family violence as would an order issued after an actual hearing" and hence that the due process requirements of the federal protective order ban are not satisfied by a consent judgment).

118. LA. STAT. ANN. § 14:79 (Supp. 2015) (criminalizing violations of a protective

2. CONTRASTS WITH THE FEDERAL MODEL

Louisiana's statute improves upon its federal model in two ways. First, Louisiana requires that the protective order contain a statement on its face that firearms possession is prohibited under state and federal law.[119] This notice requirement resolves any potential unfairness to a person subject to a protective order who is ignorant of the fact that both federal and state law prohibit him from possessing firearms.[120]

Second, Louisiana requires a more specific judicial finding before a firearms disability attaches. The federal protective order ban requires either a finding that the person subject to the order poses a "credible threat to physical safety" or an explicit prohibition on the "use, attempted use, or threatened use of physical force."[121] By contrast, Louisiana requires that the protective order contain a finding that the person subject to it "represents a credible threat to the physical safety of a family member or household member."[122] A statute that subjects persons to a firearms disability merely "because they're subject to a court order that has been entered with no finding of past violence or future dangerousness" is almost certainly unconstitutional in light of *Heller*.[123] By effectively limiting the law's application to those judicially determined to pose a significant risk, Louisiana's requirement addresses this potential concern.

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order).

119. LA. STAT. ANN. § 46:2136.3 (Supp. 2015) (requiring that the protective order inform the person subject to it that he is "prohibited from possessing a firearm pursuant to the provisions of 18 U.S.C. § 922(g)(8) and R.S. 46:2136.3").

120. *See* United States v. Wilson, 159 F.3d 280, 293–96 (7th Cir. 1998) (Posner, J., dissenting) (arguing that the application of the federal protective order ban without notice is a "trap"). Judge Posner's position is in the minority; circuit courts that have considered the issue have held that so long as a defendant had knowledge of the facts (that he was subject to a protective order and that he possessed a gun), knowledge that the combination of these acts was illegal is not a required element of the offense. *See* United States v. Miller, 646 F.3d 1128, 1333 & n.6 (8th Cir. 2011) (collecting cases).

121. 18 U.S.C. § 922(g)(8) (2012).

122. LA. STAT. ANN. § 46:2136.3(A)(1) (Supp. 2015); *see generally* Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 TEX. REV. L. & POL. 157 (arguing that the federal protective order ban is constitutionally suspect because it does not require a finding that the person subject to the protective order poses a threat to the protected persons).

123. Volokh, *supra* note 23, at 1504–07.

The scope of the protection afforded by Louisiana's statute is also somewhat narrower than that of the federal protective order ban. Louisiana imposes a firearms disability only when a protective order protects a household member or a family member.[124] Homosexual relationships can justify a protective order if abuse occurs.[125] Nevertheless, because such relationships do not meet the definition of "household,"[126] abuse within those relationships only triggers the firearms disability if the offender and victim are married.[127]

III. LIKELY LEGAL CHALLENGES TO LOUISIANA'S FIREARMS BANS

A. LOUISIANA'S RIGHT TO BEAR ARMS

1. LOUISIANA'S CONSTITUTIONAL PROVISION MANDATING STRICT SCRUTINY

In 2012, Louisiana voters approved a constitutional amendment, supplanting Louisiana's earlier right to bear arms provision with something much more protective: "The right of each citizen to keep and bear arms is fundamental and shall not be infringed. Any restriction on this right shall be subject to strict scrutiny."[128] The debates leading up to the ballot measure reveal that the legislature did not intend to change any

124. *Compare* LA. STAT. ANN. § 2136.3(A)(1) (Supp. 2015) (requiring that the order protect "the physical safety of a family member or a household member" for the firearms disability to attach) *with* 18 U.S.C. § 921(a)(32) (2012) (defining "intimate partner" as a spouse, former spouse, co-parent, or current or former cohabitant).

125. Since the "Protection from Dating Violence Act" does not make protection contingent upon the sex of the dating partners, it authorizes protective orders for nonheterosexual intimate relationships. LA. STAT. ANN. § 46:2151 (2015).

126. *See supra* notes 51–54 and accompanying text.

127. It is possible that this limitation of protection to family members and household members is an unintentional oversight since the "Protection from Dating Violence Act" specifically incorporates all protections available in the section of the Revised Statutes in which the Louisiana protective order ban has been placed, LA. STAT. ANN. § 46:2151 (2010), and because the Louisiana protective order ban specifically mentions that the firearms disability attaches under the "Protection from Dating Violence Act," LA. STAT. ANN. § 46:2136.3 (Supp. 2015).

128. LA. CONST. ANN. art. 1, § 11 (Supp. 2015). The earlier provision read: "The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person." *Id.* (amended 2012); *see also* K. Connor Long, Comment, *Firing Blanks: Louisiana's New Right to Bear Arms*, 74 LA. L. REV. 289 (2013) (discussing the amendment and its likely application to concealed carry and felon-in-possession statutes).

established gun laws or restrictions.[129] Rather, the measure's purpose was to protect the right to bear arms "in light of the Supreme Court's narrow 5–to–4 majority opinions in *District of Columbia v. Heller* and *McDonald v. City of Chicago*."[130]

When applying strict scrutiny under the Louisiana Constitution, courts must find that a restriction on firearm possession is "narrowly tailored" to serve a "compelling governmental interest."[131] While strict scrutiny does not automatically invalidate a law, the state bears a high burden of proving both prongs.[132] Although admitting that there are few standards by which to judge whether a given interest is compelling, the Louisiana Supreme Court has noted that because of the hierarchical arrangement of the constitutional scrutiny analysis, a compelling interest must be more than legitimate (the rational basis standard) and more than important (the intermediate scrutiny standard).[133] This arrangement thus highlights the difficulty of proving a compelling interest.[134] The Louisiana Supreme Court has also suggested that under-inclusiveness weakens the compelling force of a given interest.[135] To demonstrate narrow tailoring, the state must do more than show that a given law affects only that portion of the population

129. State v. Eberhardt, 2013-2306, 2014-0209, p. 10 (La. 7/1/14); 145 So. 3d 377, 384 (reporting the statements of Senator Riser, the measure's sponsor during the floor debate).

130. *Id.* (reporting that the concern of the measure's sponsor was that the slim *Heller* majority might disappear if the Court's composition changed).

131. *In re* Warner, 2005-1303, p. 42 (La. 4/17/09); 21 So. 3d 218, 249. In its first examination of a firearms restriction in light of the constitutional amendment, the Louisiana Supreme Court relied upon the *Warner* definition of strict scrutiny. *See* State v. Draughter, 2013-0914, pp. 8, 17 (La. 12/10/13); 130 So. 3d 855, 862, 867–68; *see also* State in the Interest of J.M., 2013-1717, 2013-1772, pp. 9–13 (La. 1/28/14); 144 So. 3d 853, 860–62 (applying the *Warner* formulation of strict scrutiny to uphold a ban on handgun possession by juveniles).

132. *J.M.*, 2013-1717, 2013-1772, p. 8; 144 So. 3d at 860 (citing *Grutter v. Bolinger*, 539 U.S. 306, 327 (2003)).

133. *Warner*, 2005-1303, pp. 45–46; 21 So. 3d at 251–52.

134. *See id.*

135. *Warner*, 2005-1303, pp. 46–47; 21 So. 3d at 252 (citing The Florida Star v. B.J.F., 491 U.S. 524, 540 (1989). A law is under-inclusive when "it leaves appreciable damage to the supposedly vital state interest unprohibited." *Id.* at 47; 21 So. 3d at 253 (quoting Republican Party of Minn. v. White, 536 U.S. 765, 780 (2002)). Thus, if a given statute fails to include a group or a set of circumstances that ought to be included in order for the statue to serve the compelling state interest, the statute is under-inclusive. In contrast, a statute is over-inclusive when it "prohibits more conduct than necessary." *J.M.*, 2013-1717, p. 17; 144 So. 3d at 865.

creating the problem that the law seeks to solve.[136] The state must demonstrate that the statute is narrowly tailored by balancing the following factors: that the statute actually advances the state interest, that the statute is reasonably necessary to advance that interest, that the statute is neither over-inclusive nor under-inclusive, and that no less restrictive alternatives exist that will serve the interest.[137]

2. THE LOUISIANA SUPREME COURT'S APPLICATION OF STRICT SCRUTINY TO FIREARMS RESTRICTIONS

The constitutional amendment has given rise to "substantial litigation."[138] In its rulings since 2012, the Louisiana Supreme Court has clarified that the amendment did not change the status of the right to bear arms, which was always fundamental under the Louisiana Constitution; the strict scrutiny requirement merely reflects more sophisticated constitutional analysis.[139] However, the court has also interpreted the phrase "any restriction"[140] in the constitutional amendment to indicate an "expectation of sensible firearm regulation" on the part of the voters who approved the amendment.[141] With more than a nod to *Heller*, the Louisiana Supreme Court has upheld such "longstanding prohibitions"[142] as felon-in-possession laws,[143] juvenile-in-possession laws,[144] carrying-concealed-weapons-without-a-permit laws,[145] and an enhancement for simultaneous possession of firearms and illegal drugs.[146]

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136. *In re* Warner, 2005-1303, p. 42 n.63 (La. 4/17/09); 21 So. 3d 218, 249 n.63.

137. *Id.* pp. 48–49; 21 So. 3d at 253–54.

138. State v. Webb, 2013-1681, p.4 (La. 5/7/14); 144 So. 3d 971, 975.

139. State v. Draughter, 2013-0914, p. 10 (La. 12/10/13); 130 So. 3d 855, 863. The strict scrutiny aspect of the law applies prospectively to future actions and retroactively only to those actions pending on the date the amendment became effective. *Id.* at 10–11; 130 So. 3d at 864.

140. LA. CONST. ANN., art. I, § 11 (Supp. 2015).

141. State in the Interest of J.M., 2013-1717, 2013-1772, p. 8 (La. 1/28/14); 144 So. 3d 853, 860.

142. State v. Eberhardt, 2013-2306, 2014-0209, p. 11 (La. 7/1/14); 145 So. 3d 377, 385 (quoting Dist. of Columbia v. Heller, 554 U.S. 570, 626 (2008)).

143. *Draughter*, 2013-0914; 130 So. 3d 855; *Eberhardt*, 2013-2306, 2014-0209; 145 So. 3d 377; *see* LA. STAT. ANN. § 14:95.1 (2007).

144. *J.M.*, 2013-1717, 2013-1772; 144 So. 3d 853; *see* LA. STAT. ANN. § 14:95.8 (2012) (prohibiting handgun possession by juveniles in most instances).

145. *J.M.*, 2013-1717, 2013-1772; 144 So. 3d 853; *see* LA. STAT. ANN. § 14:95(A)(1) (Supp. 2015) (prohibiting concealed carrying of firearms without a permit).

146. State v. Webb, 2013-1681 (La. 5/7/14); 144 So. 3d 971; *see* LA. STAT. ANN. § 14:95(E) (Supp. 2015) (enhancing sentences for firearms possession during crimes of violence or drug dealing).

Because the statute prohibiting possession of firearms by felons[147] has been subject to the most sustained examination by the Louisiana courts, its treatment may suggest how the Louisiana Supreme Court will rule on the constitutionality of the domestic violence gun bans.[148] When the Louisiana Supreme court first considered the question in *State v. Draughter*, the court ruled narrowly, holding that the law was constitutional as applied to probationers.[149] The court could comfortably decide that the law was narrowly tailored since probationers:

> have necessarily shown a lapse in ability to control and conform their behavior to the legitimate standards of society by the normal impulses of self-restraint; they have shown an inability to regulate their conduct in a way that reflects either a respect for law or an appreciation of the rights of others.[150]

Moreover, the state has a compelling interest in limiting access to firearms for "'persons who, by their past commission of certain specified serious felonies, have demonstrated a dangerous disregard for the law and present a potential threat of further or future criminal activity.'"[151] Applying this reasoning, the Louisiana first circuit found that the felon-in-possession statute is narrowly tailored because it imposes the disability only for the first ten years after completion or suspension of the sentence, imposes it only for certain enumerated felonies (generally crimes of violence), and explicitly defines "firearm."[152]

In *State v. Eberhardt*, the Louisiana Supreme Court revisited the felon-in-possession statute and held that the firearms prohibition could be constitutionally applied to felons who were not on probation at the time of their subsequent

147. LA. STAT. ANN. § 14:95.1 (2012).

148. The Louisiana Fifth Circuit recently adopted this approach when evaluating the Louisiana batterers' ban. State v. Smith, 15-209, pp. 3–5 (La. App. 5 Cir. 5/18/15); No. 15-K-209, 2015 WL 3439104, at *2–3 (referencing the logic of *Eberhardt* and *J.M.*).

149. State v. Draughter, 2013-0914, pp. 15–17 (La. 12/10/13); 130 So. 3d 855, 867–68 (limiting its holding because the defendant was still "under state supervision" at the time of his arrest for firearms possession).

150. *Id.* at p. 15; 130 So. 3d at 867 (quoting Hudson v. Palmer, 468 U.S. 517, 526 (1984)) (applying the United States Supreme Court's characterization of inmates to felons on probation or parole).

151. *Id.* at p. 15; 130 So. 3d at 867 (quoting State v. Amos, 343 So.2d 166, 168 (La. 1977)).

152. State v. Wiggins, 2013-0649, p. 10 (La. App. 1 Cir. 1/31/14); 139 So. 3d 1, 8.

offense.[153] In particular, the court suggested that the relatively short time frame between release and re-offense of the three defendants proved a general rule that felonious offenders are more likely to reoffend using firearms.[154] The court thus pronounced itself "satisfied that it is reasonable for the legislature in the interest of public welfare and safety to regulate the possession of firearms, for a limited period of time, by citizens who have committed certain specified serious felonies."[155]

B. LIKELY CHALLENGES TO LOUISIANA'S BAN ON FIREARMS POSSESSION BY DOMESTIC VIOLENCE MISDEMEANANTS

Despite the promise of the Louisiana batterers' ban, court challenges are likely inevitable.[156] Defendants prosecuted under this statute will likely bring a facial challenge. Indeed, a defendant has already brought an unsuccessful one in Louisiana's Fifth Circuit Court of Appeal.[157] Litigants may also pursue four

153. State v. Eberhardt, 2013-2306, 2014-0209, p. 8 (La. 7/1/14); 145 So. 3d 377, 383.

154. *Id.* at pp. 13–14; 145 So. 3d at 386 (applying Louisiana's felon-in-possession statute to felons who reoffended within three weeks, two years, and four years after their respective releases).

155. *Id.* at 11; 145 So. 3d at 385.

156. Interestingly, one expected challenger will not be part of the fray: the National Rifle Association (NRA). As the bill containing the two new firearms restrictions was moving through the legislature, the NRA objected strongly to a provision authorizing law enforcement officers to seize certain firearms without a warrant at the scene of a domestic disturbance. Lauren McGaughy, *NRA, New Orleans Lawmaker Agree to Tweak Domestic Violence Gun Bill,* NOLA.COM/TIMES-PICAYUNE, (Mar. 25, 2014, 4:26 PM), http://www.nola.com/politics/index.ssf/2014/03/nra_guns_domestic_violence_lou.html [hereinafter McGaughy, *NRA*]. Some lawmakers and sheriffs also objected to making the seizure provisions mandatory rather than discretionary, but it appears that the NRA was the main engine preventing passage of the bill with the seizure provision in place. Lauren McGaughy, *Cheers and Tears as Anti-domestic Violence Bills Sail Through Louisiana Committee*, NOLA.COM/TIMES-PICAYUNE (Mar. 26, 2014, 1:10 PM, *updated* Mar. 26, 2014, 4:56 PM), http://www.nola.com/politics/index.ssf/2014/03/domestic_violence_abuse_guns_louisiana.html. To prevent the NRA from pressuring legislators to vote against any firearms restriction for domestic abusers, the bill's sponsor (Representative Helena Moreno) offered to amend her own bill to remove the seizure authorization. McGaughy, *NRA*, *supra*. In response, the NRA took an officially neutral stance on the bans, enabling legislators to vote for them without damaging their NRA "grade." *Id.*

157. State v. Smith, 15-209 (La. App. 5 Cir. 5/18/15); No. 15-K-209, 2015 WL 3439104 (affirming trial court's refusal to quash the indictment under the Louisiana batterer's ban). Interestingly, despite being decided seven months ago, this opinion has not been released for publication in the permanent case reporters. In addition to his unsuccessful constitutional challenge, the defendant also argued that the Louisiana batterers' ban constituted double jeopardy and conflicted with the

as-applied challenges: whether the law can be applied to cases of constructive possession, whether the law can be applied if a court has not made a finding that the abuser poses a continuing danger, whether the law can be applied to a defendant unaware that possession of a firearm was forbidden, and whether the law can be applied when mechanisms described in the law for removing the disability are unavailable in Louisiana.[158]

1. FACIAL CHALLENGE

When confronted with a facial challenge, the Louisiana Supreme Court should uphold the ban.[159] Like the courts that have addressed the Lautenberg Amendment, the Louisiana Supreme Court should have little trouble identifying a compelling interest.[160] When considering the firearms prohibition for felons in *Draughter*, the Louisiana Supreme Court identified reducing the threat of "further or future criminal activity" as a compelling motivation.[161] Since the recidivism rate for domestic abusers is at

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domestic abuse battery statute. *Id.* at pp. 5–6; 2015 WL 3439104, at *3–4. Because a conviction for violating the Louisiana batterers' ban requires possession of a firearm, a separate fact differentiates the two offenses; thus, the court found that a conviction for violating the Louisiana batterers' ban does not constitute double jeopardy even though a conviction for domestic abuse battery is a necessary predicate. *Id.* at p. 6; 2015 WL 3439104, at *4. Furthermore, the court found no conflict between the two statutory schemes nor any ambiguity in their definition of unlawful conduct or in the nature of their punishments. *Id.* at p. 7; 2015 WL 3439104, at *5. Since this Comment focuses on the constitutionality of the statute as regards the right to bear arms, no further consideration will be given to these alternative arguments.

158. These challenges are suggested by those brought by defendants challenging the Lautenberg Amendment. Since the statutes are so similar, Louisiana defendants will likely raise similar challenges.

159. In an unpublished opinion, the Louisiana Fifth Circuit Court of Appeal has also upheld the ban. State v. Smith, 15-209, pp. 4–5 (La. App. 5 Cir. 5/18/15); No. 15-K-209, 2015 WL 3439104, at *3.

160. The Public Policy Committee Chair for the United Way of Southeast Louisiana, who was instrumental in drafting the legislation, believes that the bill is sufficiently tailored and serves a compelling governmental interest in protecting victims. Lauren McGaughy, *New Orleans Lawmakers Take Aim at Louisiana Domestic Violence Problem*, NOLA.COM/TIMES-PICAYUNE (Feb. 28, 2014, 2:39 PM), http://www.nola.com/politics/index.ssf/2014/02/domestic_violence_bills_louisi.htm
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161. State v. Draughter, 2013-2306, 2014-0209, p. 17 (La. 12/10/13); 130 So. 3d 855, 867 (quoting State v. Amos, 343 So.2d 166, 168 (La. 1977)); *cf.* Gillespie v. City of Indianapolis, 13 F. Supp. 2d 811, 827 (S.D. Ind. 1998) (upholding the Lautenberg Amendment based on the government's interest in "preventing victims of domestic violence from being killed by their attackers with a firearm"), *aff'd*, 185 F.3d 693 (7th Cir. 1999).

least forty percent, and may be as high as eighty percent,[162] the threat of "future criminal activity" is substantial. Following the logic of *Draughter*, the court should find that Louisiana has a compelling interest in reducing deaths associated with this recidivism.

Moreover, the *Eberhardt* court affirmed "public welfare and safety" as a compelling interest justifying the felon-in-possession statute.[163] Similarly, in an unpublished opinion, the Louisiana fifth circuit relied upon the "correlation between the presence of firearms in the household and domestic violence homicides" to find a compelling interest for the Louisiana batterers' ban.[164] As a result, the Louisiana Supreme Court can employ public safety as the compelling interest required to uphold the Louisiana batterers' ban. Victims' lives are directly threatened by their abusers' access to firearms.[165] By removing firearms from the hands of abusers, the Louisiana batterers' ban serves the state's compelling interest in saving lives. Indeed, the lives saved are not only those of victims. Many domestic violence incidents end not merely in murder, but in murder-suicide, suggesting that firearms prohibitions can save the lives of the abuser and the abused.[166] Even the public may be more protected; the gunman who murdered two strangers in a Lafayette movie theater in August 2015 had a history of domestic violence.[167]

Turning to the narrow tailoring prong, keeping guns away from those who have been convicted of abusing their children or intimate partners is necessary to protect victims' lives and safety.[168] Guns substantially increase the risk that a violent

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162. Stover, *supra* note 25, at 450.

163. State v. Eberhardt, 2013-2306, 2014-0209, p. 11 (La. 7/1/14); 145 So. 3d 377, 385.

164. State v. Smith, 15-209, p. 4 (La. App. 5 Cir. 5/18/15); No. 15-K-209, 2015 WL 3439104, at *3 (quoting the State's opposition to Smith's motion to quash the indictment).

165. *See supra* text accompanying notes 22–28.

166. *See, e.g.,* Ramon Antonio Vargas, *Covington Police Department Employee, Husband Dead in Possible Murder Suicide, Sources Say*, NOLA.COM/TIMES-PICAYUNE (Sept. 22, 2012, 12:25 PM, *updated* Sept. 22, 2012, 1:20 PM), http://www.nola.com/crime/index.ssf/2012/09/covington_police_department_em.html.

167. *See* Sara Ritchey, Op-Ed., *Stricter Gun Laws for Abusers Could Save Precious Lives*, NOLA.COM/TIMES-PICAYUNE (Aug. 18, 2015, 6:36 AM), http://www.nola.com/politics/index.ssf/2015/08/guns_domestic_violence.html (arguing that stricter laws preventing firearms possession by domestic abusers might have prevented the shooting).

168. *See Smith*, 15-209, p. 4; 2015 WL 3439104, at *3 (finding that the

situation will turn deadly.[169] In *Eberhardt*, the Louisiana Supreme Court explicitly emphasized the likelihood of re-offense while using firearms as a reason to restrict felons from enjoying their fundamental right to bear arms.[170] Federal courts have found there to be no "meaningful distinction" between felons and domestic violence misdemeanants in terms of the ability of the conviction to serve as a predictor of future violent misconduct.[171] Hence, the Louisiana Supreme Court should adopt a similar perspective and find that a ban on firearms possession by those convicted of domestic violence battery is reasonably necessary to prevent future gun violence.

Although a defendant may argue that the statute is over-inclusive, Louisiana's statute is less restrictive than the comparable federal statute.[172] While the Lautenberg Amendment imposes a lifetime ban,[173] the Louisiana batterers' ban imposes a disability only for the ten years following conviction.[174] The *Eberhardt* court found that the identical provision made the felon-in-possession statute narrowly tailored.[175] Thus, if a relevant case reaches the Louisiana Supreme Court, the court should find that the ten-year limitation similarly tailors the

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requirement of a prior conviction for domestic abuse battery makes the Louisiana batterers' ban narrowly tailored).

169. Linda E. Salzman et al., *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 J. AM. MED. ASS'N 3043, 3044 (1992) (finding that domestic abuse assaults with firearms are twelve times more likely to result in death than those conducted with knives or fists).

170. State v. Eberhardt, 2013-2306, 2014-0209, p.14 (La. 7/1/14); 145 So. 3d 377, 386.

171. United States v. Booker, 570 F. Supp. 2d 161, 164–65 (D. Me. 2008), *aff'd*, 644 F.3d 12 (1st Cir. 2011); State v. Smith, 15-209, p. 4 (La. App. 5 Cir. 5/18/15); No. 15-K-209, 2015 WL 3439104, at *3 ("This compelling governmental interest of public safety is applicable regardless of whether the previous crime is classified as a felony or a misdemeanor."); *see* Volokh, *supra* note 23, at 1498 (describing the argument that if a ban on a felon possessing a firearm is upheld because felons "pose an unusual danger to society," then other persons could be disarmed by analogy). Volokh goes on to discuss the "peaceable citizen" theory in which some commentators argue that the Founders understood gun rights to be limited to peaceable citizens. *Id.* at 1500. However, since Louisiana's right to bear arms does not spring from the same historical source as the Second Amendment, it seems that determining the beliefs of the Founding Generation is less significant than determining the intention of Louisiana's voters in 2011.

172. *Compare* LA. STAT. ANN. § 14:95.10 (Supp. 2015) *with* 18 U.S.C. § 922(g)(9) (2012).

173. 18 U.S.C. § 922(g)(9) (2012).

174. LA. STAT. ANN. § 14:95.10(E) (Supp. 2015).

175. *Eberhardt*, 2013-2306, 2014-0209, p. 12; 145 So. 3d at 385.

Louisiana batterers' ban.[176] Additionally, Louisiana's crime of domestic abuse battery is narrower in definition than the predicate offenses in the federal statute, because it requires actual force as opposed to attempted or threatened force.[177] Hence, the Louisiana firearms disability attaches only to those who have proven their capacity for physical violence.[178] Accordingly, the Louisiana Supreme Court should hold that the Louisiana batterer's ban is sufficiently narrowly tailored to survive a facial challenge.

A defendant could also argue that the statute is under-inclusive, because it fails to include domestic violence aggravated assault as a trigger for the firearms disability. Thus, it would appear that the statute fails to criminalize the possession of firearms by persons who are just as dangerous as those convicted of domestic abuse battery. However, the penalties for domestic abuse aggravated assault make the crime a felony;[179] so, an abuser convicted of violating that statute is already prohibited from possessing a firearm by means of the felon-in-possession ban. Ergo, when considered in the context of the Criminal Code as a whole, the Louisiana batterers' ban is not under-inclusive.

Moreover, the most commonly suggested modifications that might make the law less restrictive are impractical. For instance, limiting the firearms restriction to a prohibition on keeping firearms in the home discounts their easy transportability.[180] Likewise, imposing a prohibition only if a firearm was used in the predicate offense fails to address the fact that domestic violence is

176. In doing so, the court would effectively affirm the same holding in a recent unpublished opinion by the Louisiana Fifth Circuit Court of Appeal. State v. Smith, 15-209, pp. 4–5 (La. App. 5 Cir. 5/18/15); No. 15-K-209, 2015 WL 3439104, at *3.

177. *Compare* LA. STAT. ANN. § 14:35.3 (Supp. 2015) *with* 18 U.S.C. § 921(a)(33) (2012); *see also* State v. Eberhardt, 2013-2306, 2014-0209, p. 12 n. 6 (La. 7/1/14); 145 So. 3d 377, 385 n.6. (describing Louisiana's felon-in-possession law as less restrictive than the federal version).

178. *See Smith*, 15-209, p. 4; 2015 WL 3439104, at *3 ("The statute is narrowly tailored as it only applies to those previously convicted of domestic abuse battery.").

179. Domestic abuse aggravated assault is a felony because the sentence must be served at hard labor. LA. STAT. ANN. § 14:37.7(C) (Supp. 2015); *id.* § 14:2(A)(4) (defining "felony"). Because domestic abuse aggravated assault is also a "crime of violence," *id.* 14:2(B)(45) and crimes of violence trigger the prohibitions on felons possessing firearms, LA. STAT. ANN. 14:95.1(A) (2007), a conviction for domestic abuse aggravated assault results in a ban on firearms possession.

180. United States v. Tooley, 717 F. Supp. 2d 580, 596 (S.D.W. Va. 2010) (finding that it is impractical to have a firearm restriction that applies only outside the home or only when the person subject to a disability is with a particular partner), *aff'd*, 468 Fed. App'x 357 (4th Cir. 2012).

"commonly a crime of passion in which many abusers would use the weapon most readily available."[181] This suggestion also ignores the escalating nature of domestic abuse, i.e. the next step from battery may be murder. Narrow tailoring only requires the least restrictive means that still serve the state objective. These suggestions, while less restrictive than the current form of the statute, do not adequately serve that interests in public safety.

A defendant could also argue that the law is unconstitutionally vague. A criminal law is only vague if it leaves a person of ordinary intelligence in doubt as to what he must do to comply with it.[182] In language copied directly from the Lautenberg Amendment,[183] the statute states that the firearms prohibition can be removed when (1) the conviction has been expunged; (2) the conviction has been set aside; (3) the defendant has been pardoned; (4) the defendant's civil rights have been restored.[184] Because two of these mechanisms are unavailable to domestic violence misdemeanants in Louisiana, a defendant may attempt to make a vagueness argument.

While convictions for domestic abuse battery can be set aside by a judge[185] or pardoned by the governor,[186] the Code of Criminal Procedure prohibits expungement of domestic abuse battery convictions unless the convictions have been set aside.[187] Moreover, a person convicted of misdemeanor domestic abuse battery cannot have his civil rights restored.[188] Misdemeanor convictions do not strip civil rights; thus, there are no missing rights to restore. Even if a misdemeanant could have his civil

181. *See* United States v. Tooley, 717 F. Supp. 2d 580, 596 (S.D.W. Va. 2010)) (citing Arthur L. Kellerman & Donald T. Reay, *Protection or Peril?: An Analysis of Firearm-Related Deaths in the Home*, 314 NEW ENG. J. MED. 1557, 1559 (1986)), *aff'd*, 468 Fed. App'x 357 (4th Cir. 2012).

182. State v. Lindsey, 310 So. 2d 89, 90 (La. 1975) (requiring that criminal statutes "describe the unlawful conduct with sufficient particularity and clarity such that ordinary men of reasonable intelligence are capable of discerning its meaning and conforming their conduct thereto").

183. 18 U.S.C. § 921(a)(33) (2012).

184. LA. STAT. ANN. § 14:95.10(C) (Supp. 2015).

185. LA. CODE CRIM. PROC. ANN. art. 894(B) (2008) (allowing a conviction to be set aside if a judge initially defers the sentence and the defendant is not convicted of a subsequent crime during the term of the deferred sentence).

186. LA. STAT. ANN. § 15:572 (2012).

187. LA. CODE CRIM. PROC. ANN. art. 977(C)(2) (Supp. 2015).

188. A misdemeanor pardon does not restore civil rights. LA. BD. OF PARDONS, NO. 02-201-POL, BOARD POLICY: TYPES OF CLEMENCY 2 (2012), http://www.doc.la.gov/wp-content/uploads/2013/07/02-201-Types-of-Clemency.pdf.

rights restored, this would not restore his right to bear arms. In Louisiana, the rights of citizenship to include only "a limited number of customary rights . . . such as the rights to vote, work, and hold public office."[189] The Louisiana Supreme Court has cited this jurisprudence to distinguish the right to bear arms from other civil rights and so uphold the ban on firearms possession by felons whose civil rights have been restored.[190] Thus, despite the statute's promise, the only means by which a defendant can remove the firearms disability before ten years have passed are via setting aside the conviction or a governor's pardon.[191]

A criminal statute is vague when a person of ordinary intelligence would be unable to determine whether a proposed course of conduct would be unlawful.[192] A person to whom the Louisiana batterers' ban applies knows that he cannot possess a firearm before ten years have elapsed or one of four conditions have been met. The fact that two of the conditions (expungement and civil rights restoration) cannot be met in Louisiana does not render the law vague because a person subject to the law could never reasonably believe that these two conditions had been met. As a result, he would know that he remained subject to the ban unless his offense was set aside or pardoned.[193] Hence, although the statute could arguably be better written to more accurately

189. State v. Riser, 30,201, p. 3 (La. App. 2 Cir. 12/12/97); 704 So. 2d 946, 949.

190. State v. Eberhardt, 2013-2306, 2014-0209, p. 15 n.7 (La. 7/1/14); 145 So. 3d 377, 387 n.7.

191. The Louisiana batterers' ban does not address whether an authorization to carry firearms without a pardon or a restoration of civil rights suffices to lift the disability. Such an authorization is within the power of the Board of Pardons. *See* LA. BD. OF PARDONS, *supra* note 188, at 2. This area of uncertainty into which a court may be required to wade highlights the challenges posed by transposing the language of a statute from one context to another without ensuring that the statute matches the particulars of its destination.

192. State v. Lindsey, 310 So. 2d 89, 90 (La. 1975).

193. Federal courts have held with regard to the Lautenberg Amendment that Congressional intent is satisfied so long as a state provides at least one mechanism for lifting the firearms prohibition. United States v. Chovan, 735 F.3d 1127, 1133 (9th Cir. 2013) (citing United States v. Hancock, 231 F.3d 557, 566–67 (9th Cir. 2000)) (holding that California need not provide a mechanism for domestic violence misdemeanants to have their civil rights restored since California enables them to remove themselves from the reach of the Lautenberg Amendment via pardon, expungement, and setting aside of the conviction)), *cert. denied*, 135 S. Ct. 187, 190 (2014); *see also* Fisher v. Kealoha, 49 F. Supp. 3d 727, 747–48 (D. Haw. 2014) (holding that the Lautenberg Amendment is not unconstitutional when applied in Hawai'i even though Hawai'i only allows for a pardon, but not for a post-conviction expungement). *See generally* Natalie J. Nichols, Note, *Eighth Circuit Revisits Restoration Exception to Domestic Violence Gun Ban and Says "Restore" Means "Restore:"* United States v. Kirchoff, 71 MO. L. REV. 267 (2006).

reflect the post-conviction procedures available in Louisiana, the Louisiana Supreme Court should still reject any challenges based on alleged vagueness.

2. AS-APPLIED CHALLENGES TO LOUISIANA'S BAN ON FIREARMS POSSESSION BY DOMESTIC VIOLENCE MISDEMEANANTS

In addition to a facial challenge, the law will likely face three major as-applied challenges: (1) that constructive possession should be insufficient to support application of the ban; (2) that the law should not apply unless a court has found that the defendant poses a continuing risk to the victim; and (3) that the law should not apply if the defendant lacked actual knowledge that possession of a firearm was unlawful.[194] This Comment will discuss each in turn.

First, a defendant could argue that while actual possession satisfies the narrow tailoring prong of strict scrutiny analysis, constructive possession does not. The Louisiana batterers' ban prohibits possession of a firearm or carrying of a concealed weapon if a person has been convicted of domestic abuse battery. Possession for purposes of firearms restrictions may be actual or constructive; constructive possession is the exercise of "dominion and control" over the weapon.[195] Hence, a domestic violence misdemeanant could be charged with a violation of the Louisiana batterers' ban if another resident of his home kept a gun on the premises because the gun could be under the misdemeanant's control.[196] A defendant could argue that the threat posed by that gun may be lower than the threat posed by a gun that he actually possessed, such that the law cannot not be constitutionally applied to him.

However, because domestic abusers frequently use the weapon nearest at hand,[197] the presence of an accessible firearm

194. *See supra* note 158.

195. Although the Louisiana Supreme Court has yet to rule on this issue since the 2012 amendment, prior jurisprudence held that possession for purposes of Louisiana's ban on firearm possession for felons may be actual or constructive. *See* State v. Johnson, 2003-1228, pp. 5–6 (La. 4/14/04); 870 So. 2d 995, 998–99 (collecting cases).

196. *Cf.* Martel v. Town of Chichester, Civil No. 12-cv-74-JD, 2013 WL 3786134, at *1 (D.N.H. July 18, 2013) (describing a situation in which all the firearms in a family home were initially seized pursuant to New Hampshire law even though a protective order had only been issued against one of the residents).

197. *See* United States v. Tooley, 717 F. Supp. 2d 580, 596 (S.D.W. Va. 2010)

anywhere on the premises is dangerous, regardless of who technically owns the weapon. Thus, if the abuser could access the firearm, then the court should deem the abuser to have constructive possession of the firearm. To prevent unfair application of this principle, a court should accept actual ignorance of the firearm's existence as a defense.[198] Moreover, if a firearm were stored in a manner such that the abuser could not access it—such as in a safe to which the abuser did not know the combination—then the danger posed by the abuser's access to the firearm has been neutralized. In this case, a court should deem the abuser not to have constructive possession of the firearm. Thus, a theory of constructive possession can be narrowly tailored to apply only to those firearms of which the defendant has knowledge and to which he has access, thereby satisfying the strict scrutiny mandate of the Louisiana constitution.

Second, the Louisiana batterers' ban does not require a court finding that the misdemeanant poses a continuing risk of violence before imposing the firearms disability; it only requires a prior conviction for domestic abuse battery.[199] Thus, a defendant could raise an as-applied challenge that he did not pose a risk of violence that would justify depriving him of his fundamental right to bear arms. At least one federal court has held when responding to an as-applied challenge to the Lautenberg Amendment that "an avenue must be left open for the protection of Second Amendment rights in cases where there is no prospective risk of violence."[200] For this reason, some courts initially found that the Lautenberg Amendment could only apply when violent conduct supported the battery charge, reasoning that past violence could predict future violence and so justify the firearms disability.[201] The United States Supreme Court finally addressed this issue in *United States v. Castleman*.[202] The Court

(citing Arthur L. Kellerman & Donald T. Reay, *Protection or Peril?: An Analysis of Firearm-Related Deaths in the Home*, 314 NEW ENG. J. MED. 1557, 1559 (1986)).

198. Because ignorance of the existence of the firearm would be most similar to a mistake of fact, LA. STAT. ANN. § 14:16 (2007), and a mistake a fact once raised must be countered by the prosecution beyond a reasonable doubt, State v. Cheatwood, 458 So. 2d 907, 910 n.4 (La. 1984), this arrangement would appropriately require the state to prove beyond a reasonable doubt that the defendant was aware of the firearm.

199. LA. STAT. ANN. § 14:95.10(A) (Supp. 2015).

200. United States v. Engstrum, 609 F. Supp. 2d 1227, 1234 (D. Utah 2009).

201. *See, e.g.*, United States v. Staten, 666 F.3d 154, 162–63 (4th Cir. 2011) (finding that force needed to be such as to be "capable of causing physical pain").

202. United States v. Castleman, 134 S. Ct. 1405 (2014).

found that when offensive touching is sufficient to support a conviction for battery in state court, offensive touching is also sufficient to support an application of the Lautenberg Amendment.[203]

Given that strict scrutiny applies to constitutional challenges to the Louisiana batterers' ban, a challenger is likely to question whether offensive touching as part of a predicate offense of domestic abuse battery is sufficiently tailored to support the firearms disability. In Louisiana, battery merely requires "physical contact whether injurious or merely offensive."[204] Because a batterer convicted for offensively touching his victim has not committed an act of physical violence (even if he has used force), he would argue that the firearms disability sweeps too broadly when applied to him. However, because domestic abuse increases in intensity over time,[205] a person who has offensively touched his partner is more likely to later strike her or kill her. Hence, the distinction between offensive touching and violence does not necessarily indicate a difference in the potential for future violence. As a result, applying a firearms disability to a person convicted of domestic abuse battery because of an offensive touching is not overbroad.

Third, a defendant whose domestic abuse battery conviction pre-dates the new law may claim that the law is unconstitutional as applied to him because he lacked notice that his possession of a firearm was illegal. Given that the Louisiana batterers' ban is not a "longstanding prohibition"[206] and that it came into being after the recent constitutional amendment that is so protective of gun rights, a defendant can plausibly argue that without notice he had no reason to suspect that exercise of his fundamental right was illegal.[207] Such a defendant would request that the court

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203. United States v. Castleman, 134 S. Ct. 1405, 1410 (2014). However, because this decision was made on statutory rather than constitutional grounds, *id.* at 1416, it is not precisely analogous to the reasoning necessary to sustain an application of the Louisiana batterers' ban against a constitutional challenge.

204. State v. Schenck, 513 So. 2d 1159, 1165 (La. 1987) (quoting State v. Dauzat, 392 So.2d 393, 396 (La.1980)).

205. KATHLEEN R. ARNOLD, WHY DON'T YOU JUST TALK TO HIM: THE POLITICS OF DOMESTIC ABUSE 15–17, 127–28 (2015).

206. Dist. of Columbia v. Heller, 554 U.S. 570, 626 (2008).

207. *Cf.* United States v. Ficke, 58 F. Supp. 2d 1071, 1074–75 (D. Neb. 1999) (holding that the absence of actual notice to the defendant that the Lautenberg Amendment prohibited firearms possession warranted dismissal of the indictment). *But see* United States v. Murray, 663 F. Supp. 2d 709, 711–12 (W.D. Wis. 2009) (holding that the government need not show that the defendant knew that his

impose an actual knowledge requirement for a violation of the Louisiana batterers' ban, despite the fact that this would frustrate enforcement for a number of years until judges could be trained to include the prohibition among their admonitions at sentencing.[208]

The Louisiana Supreme Court should reject this argument because notice is not a requirement before a criminal statute may be lawfully applied. The Criminal Code explicitly rejects ignorance of the law as a defense.[209] The code does provide two exceptions: when a court of last resort has declared the law unconstitutional or when the offender reasonably relied on a legislative act "purporting to make the offender's conduct lawful."[210] The first exception does not apply, because no court has found the Louisiana batterers' ban unconstitutional. Because the second exception describes the legislative act in conjunction with an act of repeal,[211] the structure of the statute strongly suggests that the exception applies only when the legislature's purported act occurs *after* the enactment of the relevant criminal statute. Hence, even if a constitutional amendment can be construed as a legislative act, the constitutional amendment protecting gun rights predated the Louisiana batterers' ban and so the legislature cannot be said to have made the possession of a firearm by a person convicted of domestic abuse battery lawful by means of the 2012 constitutional amendment. Thus, the Louisiana Supreme Court should refuse to require actual notice as an element of the Louisiana batterers' ban.[212]

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possession of firearms was illegal).

208. Orleans Parish has taken proactive steps to address this problem by providing parole and probation officers with materials they can distribute to parolees and probationers describing the various firearms disabilities that attach to their offenses. *See* CITY OF NEW ORLEANS, THE NEW ORLEANS BLUEPRINT FOR SAFETY ch. 9, at 36–39 (2014), http://www.nola.gov/health-department/domestic-violence-prevention/domestic-violence-documents/blueprint-for-safety-chapter-nine/.

209. LA. STAT. ANN. § 14:17 (2007); *see* State v. Morvan, 31,511, p. 3 (La. App. 2 Cir. 12/9/98); 725 So. 2d 515, 518 (upholding conviction for being a felon in possession of a firearm even though the defendant argued that he believed the length of the ban was seven years not ten years).

210. LA. STAT. ANN. § 14:17 (2007).

211. *Id.* (carving out an exception "[w]here the offender reasonably relied on the act of the legislature in repealing an existing criminal provision, or in otherwise purporting to make the offender's conduct lawful").

212. In a related argument, a defendant may claim that the law is an ex post facto law, forbidden by the United States and Louisiana constitutions. U.S. CONST. art. I, § 10; LA. CONST. ANN. art. I, § 23 (2014); *see* State *ex rel.* Olivieri v. State, 2000-0172, p. 16 (La. 2/21/01); 779 So. 2d 735, 744 (defining an ex post facto law as one that "alters the definition of criminal conduct or increases the penalty"). However, both

C. LIKELY CHALLENGES TO LOUISIANA'S BAN ON FIREARMS POSSESSION BY PERSONS SUBJECT TO PROTECTIVE ORDERS

As with the Louisiana batterers' ban, the Louisiana protective order ban will also give rise to a number of legal challenges.[213] In addition to a likely facial challenge, defendants will also challenge the statute as violating procedural due process. Plus, the statute will likely face as-applied challenges from defendants who have remained in intimate relationships with their victims and from defendants made subject to an indefinite ban as a result of a protective order of indefinite duration.

1. FACIAL CHALLENGE

A possible model for defending the law against a facial challenge can be found in the reasoning of those federal courts that have subjected the federal protective order ban to strict scrutiny.[214] These courts all agree, though generally without much comment, that reducing domestic violence is a compelling interest.[215] Similarly, these courts have found the statute narrowly tailored when protective orders are of limited duration[216] and when a judge finds that the person subject to the order poses a credible threat.[217]

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federal and Louisiana courts have held that so long as the actual criminal conduct (here, the possession of a firearm) occurs after the passage of the new law, then the ex post facto clause does not prevent application of the law. *See, e.g.*, United States v. Pfeifer, 371 F.3d 430, 436 (8th Cir. 2004) (collecting cases); State v. Williams, 358 So. 2d 943, 946 (La. 1978) (holding that Louisiana's felon-in-possession ban was constitutional even when the predicate felony occurred prior to the law's enactment). Thus, the Louisiana Supreme Court should refuse to require actual notice as an element of the Louisiana batterers' ban.

213. *See generally* Peter Slocum, Comment, *Biting the D.V. Bullet: Are Domestic-Violence Restraining Orders Trampling on Second Amendment Rights?*, 40 SETON HALL L. REV. 639 (2010) (identifying the mandatory imposition of the firearms disability, the possibility of perpetual restraining orders, the preponderance of the evidence standard of proof, and the lack of penalties for plaintiffs who raise frivolous claims as potential problems with statutes that impose firearms disabilities on persons subject to protective orders).

214. *See* United States v. Sanchez, No. CR 09-1125-FRZ-GEE, 2009 WL 4898122 (D. Ariz. Dec. 11, 2009), *rev'd*, 639 F.3d 1201 (9th Cir. 2011); United States v. Erwin, No. 1:07-CR-556 (LEK), 2008 WL 4534058 (N.D.N.Y. Oct. 6, 2008); United States v. Knight, 574 F. Supp. 2d 224 (D. Me. 2008).

215. *See, e.g.*, *Knight*, 574 F. Supp. 2d at 226 ("Reducing domestic violence is a compelling government interest . . . .").

216. *See Sanchez*, 2009 WL 4898122, at *3; *Erwin*, 2008 WL 4534058, *at 2; *Knight*, 574 F. Supp. 2d at 226.

217. United States v. Bena, No. 10-CR-07-LRR, 2010 WL 1418389, at *4 (N.D.

Louisiana jurisprudence clearly indicates that protecting public safety is a compelling interest.[218] The state also has a compelling interest in giving effect to its judicial orders. Since the effect of a protective order is to create a zone of protection around an abuse victim, removing possible obstacles to that protection furthers that purpose. Abusers routinely violate protective orders.[219] In fact, a quarter of women who have obtained a protective order report subsequent physical violence,[220] suggesting that protective orders by themselves do not protect victims from their abusers. Moreover, victims typically obtain protective orders when they decide to separate from their abusers. The period immediately following separation is also the moment when victims are at the greatest risk of retaliatory or retributive violence from their abusers.[221] Given the significant risk that a protective order taken out at the moment of separation will be violated, removing the weapon most likely to be used to inflict deadly harm is reasonably necessary to promote the objectives of the Louisiana protective order ban.

To trigger the Louisiana protective order ban, the victim must take initiative to seek the protective order. Because only ten percent of domestic violence incidents are reported, let alone result in any sort of legal action,[222] many persons who pose an immediate threat to their partners or children will still remain armed. Nevertheless, the reluctance of victims to avail themselves of the protections of the law by reporting their abusers is not attributable to any flaw in the law itself and so the law itself is not under-inclusive. Moreover, with proper publicity of the new laws and their benefits to victims of domestic violence, more victims will hopefully use the system, thereby reducing

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Iowa Apr. 6, 2010), *aff'd*, 664 F.3d 1180 (8th Cir. 2011). The *Bena* court actually misinterpreted the statute as requiring such a finding (since an explicit prohibition on abuse also satisfies the statute) and held that the requirement produces narrow tailoring. *Id.*

218. State v. Eberhardt, 2013-2306, 2014-0209, p. 11 (La. 7/1/14); 145 So. 3d 377, 385.

219. KLEIN, *supra* note 70, at 57–58.

220. Matthew J. Carlson et al., *Protective Orders and Domestic Violence: Risk Factors for Re-Abuse*, 14 J. FAM. VIOLENCE 205, 214–15 (1999).

221. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 71–72 & 72 n.309 (1991); *see also* LA. STAT. ANN. § 9:361 (2008) (finding that "violence often escalates" when an abused woman seeks divorce or separation); Lininger, *supra* note 71, at 567; Blodgett-Ford, *supra* note 23, at 529–31 (discussing the likelihood of retaliatory violence once a battered woman seeks judicial protection).

222. Hench, *supra* note 18, at 37–38.

under-inclusiveness.

The Louisiana protective order ban avoids over-inclusiveness because it removes guns only from already-violent households. A judge may only impose a firearms disability after finding that the person subject to the order poses a credible threat to the safety of the protected person. This tailoring excludes those persons who are to be kept away from their former partners but who do not pose a safety threat. Because the Louisiana protective order ban is narrowly tailored to serve a compelling interest, the Louisiana Supreme Court should uphold it against a facial challenge.

2. PROCEDURAL DUE PROCESS CHALLENGE

Since the Louisiana protective order ban does not explicitly require counsel or the opportunity to appear before a judge, a defendant may claim that this restriction on his right to bear arms violates his right to procedural due process. In procedural due process cases, courts use the balancing test articulated in *Mathews v. Eldridge*.[223] Thus, a challenger must show that his interests in greater process outweigh those of the state in providing the current amount of process.[224] Courts consider the importance of the private interest affected, the risk of erroneous deprivation under the current procedures, and any potential value in additional or alternative procedures, as well as the government's interest, including "the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[225] However, Louisiana protective orders require notice and an opportunity to be heard;[226] hence, a person subject to a protective order has already had the opportunity to contest the predicate order.[227] No

223. Mathews v. Eldridge, 424 U.S. 319, 335 (1976); *see also In re* Adoption of B.G.S., 556 So. 2d 545, 552 (La. 1990) ("[W]e have employed this balancing test [from *Mathews*] in deciding what procedure is due under the state due process clause . . . , and we will continue to do so as long as its application promotes the goals of that safeguard.").

224. *Mathews*, 424 U.S. at 335; *see also* Goldberg v. Kelly, 397 U.S. 254, 263 (1970) (holding that the amount of process required before discontinuing public assistance "depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication").

225. *Mathews*, 424 U.S. at 335.

226. LA. STAT. ANN. § 46:2136(B)(2) (2015).

227. The opportunity must be taken. A defendant cannot use a prosecution under the federal protective order ban in order to collaterally attack the predicate protective order. *See* United States v. Emerson, 270 F.3d 203, 263–64 (5th Cir. 2001) (rejecting a collateral attack when a predicate order is not "transparently invalid");

purpose would be served by reiterating the requirement in the Louisiana protective order ban.

Applying the *Eldridge* analysis to the question of whether representation by counsel is necessary at the protective order hearing, the liberty interest in bearing arms is "fundamental."[228] However, the interest is not equivalent to a deprivation of personal liberty, the context in which the United States Supreme Court has determined counsel is required.[229] Though a defendant might point out that the Louisiana batterers' ban requires representation by counsel or a knowing and intelligent waiver of the right,[230] the mere fact that the Louisiana batterers' ban provides for greater process than the Louisiana protective order ban does not render the latter unconstitutional. The predicate offense for the Louisiana batterers' ban is criminal, and criminal offenses warrant a greater amount of process than do civil offenses.[231] Thus, the Louisiana Supreme Court should reject any procedural due process challenge to the Louisiana protective order ban. Because the defendant has the opportunity at the protective order hearing to contest the allegations made against him in person, the risk of erroneous deprivation is much lower than in *ex parte* or written proceedings.[232] Moreover, the provision of attorneys at government expense would impose significant burdens upon the already-strained family justice system.[233] Finally, no authority supports "the proposition that counsel, a jury trial, and/or proof beyond a reasonable doubt are

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United States v. Grote, No. CR-08-6057-LRS, 2009 WL 853974, at *6 (E.D. Wash. Mar. 26, 2009) (rejecting the argument that strict scrutiny allows a collateral attack on a predicate protective order), *aff'd* 408 Fed. App'x 90 (9th Cir. 2011).

228. This is true under both the state constitution, LA. CONST. ANN. art. 1, § 11 (Supp. 2015), and the federal constitution, McDonald v. City of Chicago, 561 U.S. 742 (2010).

229. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 25 (1981) ("[I]t is the defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth Amendment rights to counsel in criminal cases, which triggers the right to appointed counsel.").

230. LA. STAT. ANN. § 14:95.10 (Supp. 2015).

231. *See, e.g.*, Speiser v. Randall, 357 U.S. 513, 525 (1958) ("[W]here a person is to suffer a penalty for a crime he is entitled to greater procedural safeguards than when only the amount of his tax liability is in issue.").

232. *See* Califano v. Yamasaki, 442 U.S. 682, 697 (1979) (noting that oral hearings as contrasted with a review of written evidence enable a hearing officer to make a more accurate determination).

233. Even though counsel is not constitutionally required, the Louisiana legislature could choose to mandate it in the future because it is free to offer greater procedural protections. Moreover, a person facing a firearms disability is always free to provide his own attorney or to seek pro bono representation.

always required before a person may be stripped of a constitutional right."[234]

3. AS-APPLIED CHALLENGES

The first as-applied challenge will likely arise if a victim continues her relationship with the person subject to the protective order.[235] If the victim does not return to court to have the protective order lifted, her partner is still subject to the order and thus to the firearms disability. While the existence of the continuing relationship may suggest reconciliation and the end of the "credible threat" that justifies restricting a fundamental right, the continuing relationship could just as easily represent a capitulation through fear or economic desperation.[236] In this situation, the firearms disability would be more appropriate, not less. Moreover, even if reconciliation has taken place, that relationship could later end. Given that abuse of one partner is a significant indicator of abuse of subsequent partners,[237] an abuser's future partners also deserve protection. Hence, a relationship that continues in spite of a protective order provides no ground for the Louisiana Supreme Court to find the imposition of a firearms disability unconstitutional as applied.

Second, because a court may grant a protective order for an indefinite period of time,[238] a person subject to such an order could challenge the law as applied to him since it amounts to a perpetual firearms disability. Although only portions of a protective order prohibiting a defendant from abusing or harassing the petitioner may be made indefinite,[239] these are precisely the portions of a protective order that most justify a firearms disability. Nevertheless, the Louisiana legislature

234. United States v. Luedtke, 589 F. Supp. 2d 1018, 1023 (E.D. Wis. 2008). *But see* Slocum, *supra* note 213, at 683–85 (arguing that courts should apply a clear and convincing evidence standard to any portion of the plaintiff's case that threatens to deprive the defendant of his weapons).

235. *See* United States v. Elkins, 495 F. App'x 330, 332 (4th Cir. 2012) (rejecting the defendant's argument that the federal protective order ban is overbroad as applied to him because the victim continued her relationship with him after the protective order was issued).

236. *See generally* Sarah M. Buel, *Fifty Obstacles to Leaving, a.k.a., Why Abuse Victims Stay*, COL. LAW., Oct. 1999, at 19, 20, http://www.sdcedsv.org/media/sdcedsv factor360com/uploads/Articles/50Obstacles.pdf.

237. HART & KLEIN, *supra* note 25, at 74.

238. LA. STAT. ANN. § 46:2136(F)(2)(a) (Supp. 2015).

239. *Id.*

limited the length of the firearms prohibitions for felons[240] and domestic violence misdemeanants.[241] Louisiana courts have identified these limitations as important indicators of narrow tailoring,[242] suggesting that an indefinite ban may not survive strict scrutiny.

Rather than reject any application of the Louisiana protective order ban when a defendant has been made subject to an indefinite protective order, the Louisiana Supreme Court could instead apply the ten-year time period of the criminal firearms statutes.[243] Hence, the court should find that the Louisiana protective order ban can extend for up to ten years from the issuing of the protective order because that is the length of time that the court has previously found appropriate when restricting the fundamental right to bear arms as a result of previous criminal conduct.[244] Although this solution imports a time period from a criminal statute into a civil proceeding, the reason for doing so is to comport with a constitutional requirement of strict scrutiny that applies with equal force to both civil and criminal contexts.[245]

While not perfect, such a solution would prevent the truly unfortunate result of immediately lifting a firearms prohibition from the subset of abusers for whom it is most important—those found by a court to be so dangerous that their victims must be protected indefinitely.

D. EFFECTIVE IMPLEMENTATION OF LOUISIANA'S FIREARMS BANS

There is a need for legal education to ensure that officers of the court understand their role in giving effect to legislative will. To effectively disarm batterers, prosecutors must charge abusers either with a felony or with domestic abuse battery because simple battery is only a misdemeanor that does not trigger a state firearms disability.[246] For the Louisiana protective order ban to

240. LA. STAT. ANN. § 14:95.1(C) (2007).

241. LA. STAT. ANN. § 14:95.10(E) (Supp. 2015).

242. State v. Eberhardt, 2013-2306, 2014-0209, p. 12 (La. 7/1/14); 145 So. 3d 377, 385; State v. Wiggins, 2013-0649, p. 10 (La. App. 1 Cir. 1/31/14); 139 So. 3d 1, 8.

243. *See* LA. STAT. ANN. § 14:95.1 (2007); LA. STAT. ANN. § 14:95.10 (Supp. 2015).

244. *Eberhardt*, 2013-2306, 2014-0209, p. 12; 145 So. 3d at 385.

245. LA. CONST. ANN. art. 1, § 11 (Supp. 2015) ("*Any* restriction on this right [to bear arms] shall be subject to strict scrutiny." (emphasis added)).

246. *See infra* note 54.

apply, judges must explicitly find that the person subject to the protective order poses a credible threat.[247] Additionally, a defendant whose attorney did not advise him that a firearms disability is a consequence of a guilty plea to domestic abuse battery may have a colorable Sixth Amendment claim for ineffective assistance of counsel if he is later caught with a gun.[248] Likewise, a *pro se* defendant (as many misdemeanor defendants are) could argue that his ignorance of the firearms disability as a consequence of a guilty plea rendered that plea invalid. The most straightforward solution to both problems is to incorporate the disability as an additional point in the plea colloquy.[249]

Although the Louisiana legislature rejected the approach, some critics have argued that firearms disabilities attached to protective orders should be discretionary.[250] However, allowing judicial discretion defeats the goal of consistent implementation of consequences for domestic abuse,[251] exposes victims to the risk that judges will fail to apply the law in a manner that prioritizes their safety, and "precipitate[s] victims' frustration with the court system, reluctance to seek public source[s] of support, and psychological devastation."[252] Some judges may be tempted to misapply the law by giving vent to a belief that a firearms prohibition "unreasonably and harshly punish[es]" a defendant.[253]

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247. LA. STAT. ANN. § 46:2136.3(A)(1) (Supp. 2015); *see* Lisa D. May, *The Backfiring of the Domestic Violence Firearms Bans*, 14 COLUM. J. GENDER & L. 1, 27 (2005) (arguing that because judges may give effect to explicit or implicit bias against victims, "the only way to bring courts in line with the legislature is through judicial education"). *But see* Slocum, *supra* note 213, at 686–87 (arguing that legal education for judges in the context of domestic violence restraining order that impose firearms bans "should be modified to bring the constitutional rights of the defendant to the direct consideration of the court").

248. *See, e.g.*, State v. Agathis, 34 A.3d 1266, 1270 (N.J. Super. Ct. App. Div. 2012) (holding that a "trial counsel's performance fell below that standard expected of an attorney licensed to practice law" when the attorney failed to inform his client that a firearms disability would result from a guilty plea to a misdemeanor crime of domestic violence).

249. Before accepting a guilty plea, the court must ascertain that a defendant's guilty plea is voluntary and intelligent as well as that the defendant understands the nature of the charge and possible sentencing consequences; this conversation between the court and the defendant is the colloquy. LA. CODE CRIM. PROC. ANN. art. 556 (2003).

250. *See, e.g.*, Slocum, *supra* note 213, at 680–82.

251. *See, e.g.,* CITY OF NEW ORLEANS, *supra* note 20, ch. 1, at 13.

252. May, *supra* note 247, at 30.

253. Porter Parsons v. Parsons, 2009-2120, p. 3 (La. App. 1 Cir. 6/11/10); 2010 WL 2342759 (Hughes, J., dissenting) (arguing that the evidence presented at trial was insufficient to justify a protective order which, under the federal protective order

For instance, a judge may render the firearms disabilities inoperative by electing to convict an abuser of a lesser and included offense like simple battery[254] or by neglecting to make the requisite findings in a protective order.[255] One judge even treated a firearms prohibition as a matter of equity, awarding a greater share of the marital assets to a husband who lost his job as a result of being made subject to a protective order.[256] Judges have also historically doubted victims' credibility and given effect to stereotypes regarding the proper role of the victim.[257] Finally, some judges import their own priorities into domestic abuse cases, failing to correctly apply the law in order to preserve the employment of an abuser[258] and thus the income stream of a

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ban, imposed a deprivation of a constitutional right); *see* May, *supra* note 247, at 2 (reporting on a judge who "cited the approach of quail hunting season in open court as one reason not to issue another protective order"); Sack, *supra* note 83, at 8 (suggesting that failure to apply the law correctly may be more common in jurisdictions where hunting is popular); Deutchman, *supra* note 17, at 209 (quoting a domestic violence attorney who reports that judges "don't want people's guns taken away from them so they are doing sneaky things").

254. *See* LA. STAT. ANN. § 14:35 (Supp. 2015) (defining simple battery); LA. CODE CRIM. PROC. ANN. art. 815 (2013) (defining Louisiana's responsive verdict scheme).

255. *See* May, *supra* note 247, at 23–30.

256. *See In re* Marriage of Muhammad, 79 P.3d 483, 486–87 (Wash. App. Ct. 2003) (affirming trial court's award of greater portion of the marital property to husband who lost his job as sheriff as a result of a firearms disability attached to a protective order), *rev'd*, 108 P.3d 779 (Wash. 2005) (holding that the trial court abused its discretion).

257. Jennifer L. Vainik, Note, *Kiss, Kiss, Bang, Bang: How Current Approaches to Guns and Domestic Violence Fail to Save Women's Lives*, 91 MINN. L. REV. 1113, 1141–42 (2007). Such stereotypes include the notion that a victim is somehow responsible for continuing abuse because she stayed in the abusive relationship. *Id.*

258. *See* May, *supra* note 247, at 8–9 ("Police officers and members of the military, as well as many other people within the classification of those convicted of domestic violence misdemeanors and those subject to protective orders, will lose jobs because of the Domestic Violence Firearms Bans."). Because Louisiana does not provide any employment exemptions for its two new bans, as-applied challenges can be expected from those who would lose their jobs if unable to possess a firearm. However, federal courts have seemed uninterested in carving out exceptions to the Lautenberg Amendment. Gillespie v. City of Indianapolis, 13 F. Supp. 2d 811, 823–25, 827–28 (S.D. Ind. 1998) (upholding the application of the Lautenberg Amendment to a law enforcement officer against Equal Protection and Contract Clause challenges), *aff'd*, 185 F.3d 693 (7th Cir. 1999). Because this issue connects to considerations of contract law and the unique responsibilities of the military and law enforcement, it is beyond the scope of this paper. *See generally* May, *supra* note 247, at 8–22; E. John Gregory, *The Lautenberg Amendment Gun Control in the U.S. Army*, ARMY LAW, Oct. 2000, at 3, 8–10 (discussing negative employment consequences for law enforcement officers and service members as a result of the Lautenberg Amendment); Kerri Fredheim, Comment, *Closing the Loopholes in Domestic Violence Laws: The Constitutionality of 18 U.S.C. 922(g)(9)*, 19 PACE L. REV. 445, 449–82 (1999) (discussing the law enforcement response to the Lautenberg Amendment); Jessica A.

family.[259] For all of these reasons, the legislature appropriately made the firearms disability mandatory.

As promising as these new laws are, they nevertheless leave gaps in their protections for domestic violence victims. Thus, amendments to the laws would improve their effectiveness. For instance, although the laws make possession illegal, they provide no guidance to a person made subject to a protective order or convicted of domestic abuse battery as to what to do with any firearms he already possesses. Such a process might include directions for how to relinquish firearms, limitations on who can receive them, and penalties if firearms are not voluntarily relinquished. Moreover, because the Louisiana protective order ban imposes the firearms disability at the protective order stage rather than the temporary restraining order (TRO) stage, it leaves domestic violence victims vulnerable in the three-week window between filing for a TRO and obtaining a protective order. Imposing the firearms disability along with a TRO, as well as expanding the use of emergency TROs issued after court hours,[260] would remove firearms when victims are most vulnerable. However, the Louisiana Supreme Court has yet to rule on the constitutionality of the Louisiana batterers' ban and the Louisiana protective order ban. As a result, it is premature to elaborate specific solutions until the exact scope of the current laws becomes clear through their application in the courts.

IV. CONCLUSION

Louisiana's firearms bans for persons convicted of domestic abuse battery and persons subject to a protective order are

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Golden, Note, *Examining the Lautenberg Amendment in the Civilian and Military Contexts: Congressional Overreaching, Statutory Vagueness, Ex Post Facto Violations, and Implementational Flaws,* 29 FORDHAM URB. L.J. 427, 449–51, 459–62 (2001) (discussing the military response to the Lautenberg Amendment); Alison J. Nathan, Note, *At the Intersection of Domestic Violence and Guns: The Public Interest Exception and the Lautenberg Amendment*, 85 CORNELL L. REV. 822, 838–57 (2000) (discussing the various responses to the Lautenberg Amendment and legislative solutions to protect it).

259. See May, *supra* note 247, at 31 (discussing how awareness of the firearms prohibition that will flow from issuance of protective orders or domestic violence misdemeanor convictions leads some judges to apply the law incorrectly so as to avoid imposing the disability). As a result, May suggests that a clever abuser might "exploit his employment—or even prospective employment—as an informal defense to a misdemeanor charge of domestic violence and as a practical response to a petition for a protective order against him." *Id.* at 29.

260. LA. STAT. ANN. § 46:2135(F) (2015) (authorizing emergency temporary restraining orders).

substantial steps towards providing better protection for the thousands of victims of domestic violence in this state. Because these laws are narrowly tailored to serve the compelling interest of protecting the lives of domestic abuse victims, they satisfy the strict scrutiny mandated by the Louisiana Constitution. Given the high rate of firearms ownership in Louisiana,[261] it is only a matter of time before a constitutional challenge to these new statutes reaches the Louisiana Supreme Court. When it does, the court should uphold them against both facial and as-applied challenges.

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261. In 2013, 45.6% of Louisiana households owned a gun. Press Release, Violence Policy Center, States with Weak Gun Laws and Higher Gun Ownership Lead Nation in Gun Deaths, New Data for 2013 Confirms (Jan. 29, 2015), http://www.vpc.org/press/states-with-weak-gun-laws-and-higher-gun-ownership-lead-nation-in-gun-deathsnew-data-for-2013-confirms/ (analyzing data from the Centers for Disease Control an Prevention's National Center for Injury Prevention and Control).

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