Violence and Contact: Interpreting "Physical Force" in the Lautenberg Amendment

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INTRODUCTION

In 1996, Congress passed the Lautenberg Amendment to prevent domestic violence shooting deaths.[1] The Lautenberg Amendment works the same way as the felon-in-possession law: any individual who has previously been convicted of a qualifying predicate crime is prohibited from possessing a gun. For the felon-in-possession law, any felony is a predicate offense.[2] For the Lautenberg Amendment, "misdemeanor crimes of domestic violence" are predicate offenses;[3] any crime that "has, as an element, the use ... of physical force" qualifies as a misdemeanor crime of domestic violence.[4]

A circuit split has recently developed over what conduct constitutes the use of "physical force" for the purposes of the Lautenberg Amendment. The First, Eighth, and Eleventh Circuits (the "Contact courts") have interpreted "physical force" to include de minimis physical contact.[5] The Ninth Circuit (the "Violence court") has interpreted "physical force" to require violence, which can be understood as anything more forceful than de minimis contact.[6] Stated differently, the Contact courts have held that making bare physical contact with another is a use of "physical force" against that person, whereas the Violence court has held that it is possible to make mere contact without using

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1 See Omnibus Consolidated Appropriations Act of 1997, Pub L No 104-208, 110 Stat 3009, codified at 18 USC §§ 921(a)(33)(A)(ii), 922(g)(9) (2000). The statute amended the Gun Control Act of 1968, Pub L No 90-618, 82 Stat 1213.

2 See 18 USC § 922(g)(1) (2000). Technically, § 922(g)(1) prohibits possession of a firearm by any individual who has been convicted of "a crime punishable by imprisonment for a term exceeding one year." The purpose of this language is to include predicate offenses based on their severity, as measured by the punishment, rather than based on labels that vary across states. Thus, even if a particular offense is labeled a felony in one state and a misdemeanor in another, if it is punishable by imprisonment of more than one year in both states, convictions for both offenses qualify as "felonies" for the purpose of the felon-in-possession law.

3 18 USC § 922(g)(9).

4 18 USC § 921(a)(33)(A)(ii).

5 See *United States v Griffith*, 455 F3d 1339 (11th Cir 2006); *United States v Nason*, 269 F3d 10 (1st Cir 2001); *United States v Smith*, 171 F3d 617 (8th Cir 1999).

6 See *United States v Belless*, 338 F3d 1063 (9th Cir 2003). For a more detailed explanation of the difference between violence and contact as used in this Comment, see note 34.

"physical force." The meaning of "physical force" determines whether misdemeanor assault and battery crimes that have, as an element, causing "physical contact" qualify as Lautenberg predicates: under the Contact courts' view, such crimes do qualify; under the Violence court's view, they do not.

This Comment seeks to resolve the split. Part I explains the statutory scheme in greater detail and provides additional context by describing 18 USC § 16, a similar provision that was likely the model for the Lautenberg Amendment. Part II surveys both sides' arguments. Part III argues that "physical force" should be interpreted to require violence and exclude de minimis contact. It presents several arguments that have not been considered by either side of the split and analyzes flaws in the Contact courts' arguments. Admittedly, interpreting "physical force" to require violence undermines the Lautenberg Amendment's policy rationale by disqualifying key predicate crimes and may lead to arbitrary application of the Amendment's prohibition on gun possession. Nevertheless, these consequences do not outweigh the strong arguments in favor of this interpretation, particularly because the Amendment's formalistic scheme already causes these effects.

I. STATUTES

The Lautenberg Amendment expands the general federal ban on gun possession by convicted felons to include individuals convicted of misdemeanors because of domestic violence.[7] Senator Frank R. Lautenberg proposed the Amendment because he believed that the felon-in-possession law did not adequately address domestic violence shootings. Senator Lautenberg argued that because domestic violence is treated as less serious than other violence, many domestic abusers are never convicted of a felony.[8] As a result, dangerous repeat abusers are

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[7] Although convicted felons are the main class of individuals banned from possessing guns under federal law, several other groups of individuals are covered by the ban, including "fugitive[s] from justice," 18 USC § 922(g)(2) (2000), any individual who is "an unlawful user of or addicted to any controlled substance," 18 USC § 922(g)(3) (2000), and individuals who have renounced their US citizenship, 18 USC § 922(g)(7) (2000). This Comment ignores these classes of individuals.

[8] See Interstate Stalking Punishment and Prevention Act of 1996, S 1632, 104th Cong, 2d Sess (July 25 1996), in 142 Cong Rec S 8831 (July 25, 1996) (Sen Lautenberg):

> [M]any people who engage in serious spousal or child abuse ultimately are not charged with or convicted [of] felonies. At the end of the day, due to outdated thinking, or perhaps after a plea bargain, they are—at most—convicted of a misdemeanor. . . . When [abusers are prosecuted], one-third of the cases that would be considered felonies if committed by strangers are, instead, filed as misdemeanors. The fact is, in many places today, domestic violence is not taken as seriously as other forms of criminal behavior. Often, acts of serious spouse abuse are not even considered felonies.

allowed to possess guns despite the felon-in-possession law, and, too often, the escalating cycle of domestic violence culminates in shooting deaths.[9] Because "the only difference between a battered woman and a dead woman is the presence of a gun," Senator Lautenberg sought to ban gun possession by proven abusers.[10]

To achieve this goal, Congress adopted a formalistic statutory scheme. The most important feature of this scheme is that the facts are irrelevant. The Amendment requires analysis of the *statutory* elements of a proposed predicate offense in the abstract, *not* of the *facts* that underlay the conviction. Thus, whether an individual is actually a dangerous abuser is irrelevant; if he was not convicted of a qualifying crime, the Amendment does not apply to him. Part I.A explains the details of the Lautenberg Amendment's text and statutory scheme, and Part I.B provides additional context by examining § 16, a related provision.

A. The Lautenberg Amendment

The Lautenberg Amendment is codified in two sections of Title 18. Section 922(g)(9) prohibits possession[11] of a gun by any individual who has previously been convicted of an offense that qualifies as a "misdemeanor crime of domestic violence." Section 921(a)(33)(A)(ii) states the two requirements for predicate offenses to qualify as misdemeanor crimes of domestic violence: first, the offense must have "as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon"; second, the offense must have been "committed by a [domestic intimate] of the victim."[12] This Comment

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9 See S 1632, 104th Cong, 2d Sess (Mar 21, 1996), in 142 Cong Rec S 2646 (Mar 21, 1996) (Sen Lautenberg) ("The statistics and data are clear. Domestic violence, no matter how it is labeled, leads to more domestic violence. And guns in the hand of convicted spouse abusers lead to death."). See also id ("[I]n households with a history of battering, a gun in the home increases the likelihood that a woman will be murdered fivefold.").

10 Id.

11 Technically, covered individuals are not allowed "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 USC § 922(g)(9). This language is a jurisdictional hook. Because all guns travel in or affect interstate commerce, they are subject to Congress's power under the Commerce Clause and all covered individuals are effectively prohibited from possessing any gun. See *United States v Stewart*, 451 F3d 1071, 1077–78 (9th Cir 2006) (holding that Congress has the power to criminalize possession of a homemade machine gun whose parts have not traveled in interstate commerce because the existence of even one such gun affects the interstate market in machine guns), citing *Gonzales v Raich*, 545 US 1, 17 (2005).

12 This Comment uses "domestic intimate" as shorthand for:

> a current or former spouse, parent, or guardian of the victim, [ ] a person with whom the victim shares a child in common, [ ] a person who is cohabiting with or has cohabited with the victim as a spouse, parent, guardian, or [ ] a person similarly situated to a spouse, parent, or guardian of the victim.

focuses on the first prong of the definition, specifically those predicate offenses that have, as an element, the use[13] of "physical force."[14]

In a Lautenberg Amendment case, § 921(a)(33)(A)(ii) requires the court to examine the conceptual elements of the proposed predicate to determine if the offense "has, as an element" the use of "physical force."[15] This "categorical," or "element-by-element," approach requires two steps: first, the court must establish the elements of the proposed predicate offense; second, the court must determine whether one of those elements is "the use . . . of physical force."[16]

The first step in applying the categorical approach is to establish the specific set of elements of the crime of which the defendant was convicted. This step is easy if the proposed predicate has only one set of elements that constitutes the crime; however, almost all crimes have multiple sets of elements. For example, common law battery can be committed by (1) making physical contact[17] with someone; or (2) caus-

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18 USC § 921(a)(33)(A)(ii).

The Supreme Court has recently granted certiorari to resolve a circuit split over whether the victim's status as a domestic intimate must also be an element of the predicate crime. See *United States v Hayes*, 128 S Ct 1702 (2008), granting certiorari to 482 F3d 749 (4th Cir 2007). Nine circuits have held that the victim's status as a domestic intimate need not be an element of the predicate crime. See *United States v Heckenliable*, 446 F3d 1048, 1049 (10th Cir 2006); *United States v Belless*, 338 F3d 1063, 1067 (9th Cir 2003); *White v DOJ*, 328 F3d 1361, 1364–67 (Fed Cir 2003); *United States v Shelton*, 325 F3d 553, 562 (5th Cir 2003); *United States v Kavoukian*, 315 F3d 139, 142–44 (2d Cir 2002); *United States v Barnes*, 295 F3d 1354, 1358–61 (DC Cir 2002); *United States v Chavez*, 204 F3d 1305, 1313–14 (11th Cir 2000); *United States v Meade*, 175 F3d 215, 218–21 (1st Cir 1999); *United States v Smith*, 171 F3d 617, 619–21 (8th Cir 1999). One circuit has disagreed. See *Hayes*, 482 F3d at 759.

13 For brevity, this Comment generally refers only to the "use" of "physical force," rather than the full formulation of the "use or attempted use" of "physical force."

14 Much of the Lautenberg Amendment has been the subject of litigation. For a brief summary and list of cases, see Amy Karan and Helen Stampalia, *Domestic Violence and Firearms: A Deadly Combination*, 79 Fla Bar J 79, 81 & n 23–28 (2005). See also note 12. Furthermore, the problem of interpreting "physical force" is not limited to the Lautenberg Amendment. As Parts I.B and III.B will make evident, "physical force" is used throughout the US Code, most notably in 18 USC § 16 and the Sentencing Guidelines. Although the interpretation of "physical force" in one statute is inextricably intertwined with is interpretation in other statutes, see Part III.B, this Comment seeks only to interpret "physical force" as it is used in the Lautenberg Amendment.

15 See *Leocal v Ashcroft*, 543 US 1 (2004) (explaining that in 18 USC § 16, the language, "*an offense* that has *as an element*," "requires us to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime").

16 *United States v Griffith*, 455 F3d 1339, 1341 (11th Cir 2006); *Dickson v Ashcroft*, 346 F3d 44, 48–49 (2d Cir 2003). The complexity of the categorical approach is largely the result of the federal-state balance in criminal law. Because of the constitutional limits on federal power, state—not federal—criminal law generally regulates primary conduct such as domestic violence. As a result, the Lautenberg Amendment must piggyback on state criminal law to reach the full scope of domestic violence conduct.

17 Most jurisdictions require that the contact be "'offensive,' 'insulting or provoking,' or done 'in a rude, insolent, or angry manner.'" Wayne R. LaFave, *Criminal Law* 738 (West 3d ed 2000). This "offensiveness" requirement is contextual and does not concern the actual conduct that constitutes physical contact—even the slightest touching may be offensive and thus techni-

ing bodily injury to someone.[18] When confronted with such multi-pronged crimes, the court must examine the record of conviction[19] to determine of which set of elements the defendant was convicted.[20] When faced with a battery conviction, for example, the court might examine the charging papers. If the charging papers indicate that the defendant was charged with "making [physical] contact [with the victim] ... by hitting her," the court could conclude that he was convicted under the contact prong rather than the bodily injury prong.[21] Of course, the charged conduct—hitting the victim—almost certainly caused bodily injury. Nonetheless, the categorical approach is formalistic and requires courts to determine the specific prong under which the defendant was convicted, even if the actual conduct would satisfy

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cally constitute battery. See id at 737–38 (listing as an example a "man put[ting] his hands upon a girl's body"); William Blackstone, 3 *Commentaries on the Law of England* *120 (Chicago 1979) ("The least touching of another's person willfully, or in anger, is a battery."). For an example of such a statute, see 17-A Me Rev Stat Ann § 207 (West 2006) (criminalizing "offensive physical contact"); *United States v Nason*, 269 F3d 10, 12 (1st Cir 2001) (citing Maine state case law to explain that the only difference between "mere touchings" and "offensive physical contacts" is a "mens rea requirement ... and the application of a 'reasonable person' standard to determine whether a contact is offensive").

18 See LaFave, *Criminal Law* at 737–38 (cited in note 17). This Comment focuses on physical contact and bodily injury because they are the only elements of common law battery that might require the use of "physical force." However, this ignores the complication introduced by mens rea. As a general matter, battery can be committed intentionally, knowingly, recklessly, or with criminal negligence. Id at 739. Each possible mental state creates a new set of elements that constitutes battery. Thus, contact battery can be committed in four ways: (1) by intentionally making physical contact; (2) by knowingly making physical contact; (3) by recklessly making physical contact; and (4) by making physical contact with criminal negligence. A consequence of this complication is addressed in Part III.D.

19 The record of conviction includes "the charging document, a plea agreement, a verdict or judgment of conviction, a record of the sentence, or a plea colloquy transcript." *James v Mukasey*, 522 F3d 250, 254 (2d Cir 2008).

20 See *Dickson*, 346 F3d at 48–49:

> Where, however, a criminal statute encompasses diverse classes of criminal acts—some of which would categorically be grounds for removal and others of which would not—we have held that such statutes can be considered 'divisible' statutes. In reviewing a conviction under a divisible statute, the categorical approach permits reference to the record of conviction for the limited purpose of determining whether the [defendant's] conviction was under the branch of the statute that [qualifies as a predicate offense].

This is sometimes called the "modified" categorical approach. See, for example, *United States v Nobriga*, 474 F3d 561, 564 (9th Cir 2006) (using the "modified categorical approach" to determine, by examining the charging papers and judgment of conviction, that the defendant was convicted under the "physically abus[ing] a family or household member" prong of a Hawaii domestic violence statute, rather than the "refus[ing] compliance with a lawful order of a police officer" prong).

21 This example is taken from *Griffith*, 455 F3d at 1341. For another example of this approach, see *Smith*, 171 F3d at 621 (noting that the defendant pled guilty to assault and examining the state court complaint to determine that by grabbing his wife "'by the throat, and [pushing] her down,'" the defendant violated the contact prong of Iowa's simple assault crime).

both.[22] Once the court determines the precise elements of the prior conviction, it must ignore any underlying facts that it learned from the record of conviction and consider only the abstract elements.[23]

The second step is to determine whether the specific set of elements of which the defendant was convicted includes the use of "physical force." Misdemeanor crimes generally do not list "physical force" as an element.[24] As a result, the court must determine if "physical force" is an implicit element of the proposed predicate offense. To be an implicit element, "physical force" must be "a constituent part of the offense which must be proved by the prosecution *in every case* to sustain a conviction under a given statute."[25] Thus, if it is *impossible* to commit the proposed predicate without using "physical force," then "physical force" is an element of the crime. Conversely, if it is *theoretically possible* to commit the proposed predicate crime without using "physical force," then "physical force" is not an element—even if the vast majority of convictions actually involve physically forcible conduct.[26] Thus the question is whether the proposed predicate crime can ever be committed without using "physical force."

To better understand the Lautenberg Amendment, the categorical approach, and the arguments presented in Parts II and III, it is useful to examine § 16 briefly.

B. Section 16

Section 16 of Title 18 is perhaps the most important categorical statute in the US Code. It provides a general definition of the term "crime of violence," which is used throughout federal law to define predicate crimes for various statutory schemes,[27] including other federal domestic violence laws.[28] The similarity of the Lautenberg Amend-

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22 Of course, the court could obviate the need for this determination by holding that both the contact and bodily injury prongs require the use of "physical force." For an example of this approach, see *Nason*, 269 F3d at 20–21.

23 See *Griffith*, 455 F3d at 1341; *Smith*, 171 F3d at 621.

24 This author surveyed the penal codes of all fifty states. The only misdemeanor crime that appears to come close to listing "physical force" as an element is battery in California, which is defined as "any willful and unlawful use of force or violence upon the person of another." Cal Penal Code § 242 (West 2008).

25 *Singh v Ashcroft*, 386 F3d 1228, 1231 (9th Cir 2004).

26 For an application of this type of analysis, see Part I.B, discussing whether battery convictions under the bodily injury prong qualify as predicates for § 16.

27 See *Leocal*, 543 US at 7 & n 4. See also note 90.

28 For example, the federal domestic violence statute criminalizes "crimes of violence" committed against domestic intimates during, as a result of, or with the purpose of facilitating interstate travel. 18 USC § 2261(a)(1)–(2) (2000). See also, for example, 8 USC § 1227(a)(2)(E)(i) (2000) (providing that domestic violence by aliens is grounds for deportation, and defining domestic violence as a "crime of violence" under § 16).

ment to § 16 is immediately apparent. The Lautenberg Amendment defines the term "misdemeanor crime of domestic violence" as "an offense that has, as an element, the use or attempted use of physical force";[29] § 16 defines the term "crime of violence" to include "offense[s] that ha[ve], as an element the use, attempted use, or threatened use of physical force against the person or property of another."[30]

This similarity provides a strong basis for comparison, as will become evident in Part III. For current purposes, § 16 provides an illustration of the categorical approach. Some courts have stated that battery convictions under the bodily injury prong are not predicate offenses for § 16 because "human experience suggests numerous examples of intentionally causing physical injury without the use of force," for example by "guile, deceit, or even deliberate omission."[31] One might use poison or withhold medicine from a sick person. Because it is theoretically possible to cause bodily injury—and thus to be convicted of bodily injury battery—without using "physical force," "physical force" is not an element of bodily injury battery. This example illustrates the formalistic nature of the categorical approach: the fact that most battery convictions for causing bodily injury almost certainly result from the use of "physical force" does not matter so long as there is even one way to cause bodily injury without using "physical force."

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29 18 USC § 921(a)(33)(A)(ii).

30 18 USC § 16 (2000). Section 16 has two prongs. Subsection (a) is quoted above and includes misdemeanors as possible predicates. Subsection (b) loosens the requirements for felonies to qualify as "crimes of violence": "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense" qualifies.

31 *Chrzanoski v Ashcroft*, 327 F3d 188, 195–96 (2d Cir 2003):

> In sum, while there are undoubtedly many ways in which force could be used to commit third degree assault under Connecticut law, the plain language of the statute does not make use of force an explicit or implicit element of the crime. Rather, its language is broad enough to cover myriad other schemes, not involving force, whereby physical injury can be caused intentionally.

See also *United States v Villegas-Hernandez*, 468 F3d 874, 879 n 6 (5th Cir 2006) (stating, in the context of § 16(a), that "bodily injury need not result from a violent physical contact between the defendant and the victims; subtle or indirect means would do, whether by tricking a person into consuming poison, or luring him to walk off a cliff," and therefore the use of "physical force" is not necessary to causing bodily injury); *United States v Perez-Vargas*, 414 F3d 1282, 1286 (10th Cir 2005) (explaining that bodily injury could be caused without using physical force by "recklessly shooting a gun in the air to celebrate, intentionally placing a barrier in front of a car causing an accident, or intentionally exposing someone to hazardous chemicals. One can imagine a number of other hypotheticals."). But see *United States v Rodriguez-Enriquez*, 518 F3d 1191, 1193 (10th Cir 2008) (holding, in the context of the similar definition of "crime of violence" from the Sentencing Guidelines, that "physical force" includes the use of poison and anthrax). This example is used only for illustrative purposes, and resolution of the question is beyond the scope of this Comment. See also Part III.D.

II. SPLIT

Four circuit courts of appeals have interpreted "physical force" in the Lautenberg Amendment. The First, Eighth, and Eleventh Circuits have held that "physical force" includes physical contact. Under this interpretation of "physical force," a defendant *can never* make physical contact with someone without using "physical force." Therefore, the Contact courts have ruled, convictions under the contact prong of common law assault and battery "ha[ve], as an element" the use of "physical force" and so qualify as predicate offenses for the Lautenberg Amendment.[32] The Ninth Circuit, on the other hand, has held that "physical force" requires violence and excludes de minimis contact. Under this interpretation, a defendant *can* make physical contact with someone without using "physical force." As a result, the Violence court has ruled that convictions under the contact prong of common law assault and battery *do not* "ha[ve], as an element" the use of "physical force" and therefore *do not* qualify as predicate offenses for the Lautenberg Amendment.[33] This comparison of the majority and minority positions illustrates how "violence" is used simply to mean anything more than physical contact.[34] This Part explores the arguments each side has offered: Part II.A describes the arguments offered by the various Contact courts, and Part II.B examines the Violence court's argument.

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32 The First Circuit held that convictions under Maine's "general-purpose assault" statute for "caus[ing] . . . offensive physical contact to another" qualify as predicate crimes. *United States v Nason*, 269 F3d 10, 12 (1st Cir 2001), quoting 17-A Me Rev Stat Ann § 207. The Eighth Circuit held that convictions under Iowa's "simple misdemeanor assault" statute for "placing another in fear of imminent physical contact" qualify as predicate offenses. *United States v Smith*, 171 F3d 617, 620 (8th Cir 1999), quoting Iowa Code Ann § 708.1(2) (West 2003). (Interestingly, this offense should not have been a predicate regardless of the definition of "physical force" because the Lautenberg Amendment covers only "the use or attempted use" of "physical force," not threatening to use "physical force" or placing another in fear of its use. See Part III.D.) The Eleventh Circuit held that convictions under Georgia's "simple battery" statute for "[i]ntentionally making physical contact of an insulting or provoking nature with the person of another" qualify as misdemeanor crimes of domestic violence. *United States v Griffith*, 455 F3d 1339, 1440 (11th Cir 2006), quoting Ga Code Ann § 16-5-23(a)(1) (Michie 2007).

33 The Ninth Circuit held that convictions under Wyoming's battery statute for "unlawfully touch[ing] another in a rude, insolent or angry manner" do not qualify as misdemeanor crimes of domestic violence. *United States v Belless*, 338 F3d 1063, 1067–68 (9th Cir 2003), quoting Wyo Stat Ann § 6-2-501(b) (Michie 2007).

34 See *Belless*, 338 F3d at 1068 (holding that because "physical force" requires "the violent use of force against the body of another individual," mere touching does not constitute "physical force"); *Griffith*, 455 F3d at 1343–44 (noting that interpreting "physical force" to exclude contact would "effectively insert[] the word 'violent' into the [Amendment's] operative definition"). This Comment, like the courts, considers "violence" and "contact" as a simple dichotomy because if "physical force" requires anything more than contact—regardless of what that is—assault and battery convictions for making contact do not qualify as misdemeanor crimes of domestic violence because of the formalism of the categorical approach. Rigorously defining "violence" is therefore unnecessary to resolve the question addressed by this Comment.

A. The Contact Courts

The Contact courts—the First Circuit in *United States v Nason*,[35] the Eleventh Circuit in *United States v Griffith*,[36] and the Eighth Circuit in *United States v Smith*[37]—have cumulatively made three arguments for interpreting "physical force" to include de minimis contact, although the courts did not all offer the same arguments. The First Circuit made all three arguments described in this Part; the Eleventh Circuit only made the first two. The Eighth Circuit did not offer any arguments, instead conclusorily asserting in a footnote that "physical contact, by necessity, requires physical force to complete."[38]

The first argument offered by the Contact courts is that the plain meaning of "physical force" includes de minimis contact. The First Circuit explained:

> In scrutinizing the language, we presume, absent evidence to the contrary, that Congress knew and adopted the widely accepted legal definitions of meanings associated with the specific words enshrined in the statute. Predictably, we turn to *Black's Law Dictionary* to glean the most widely accepted legal meaning of "physical force."[39]

Relying on the seventh and eighth editions of *Black's Law Dictionary*, the Contact courts defined "physical force" as "power, violence, or pressure directed against another person's body."[40] They reasoned that physical contact invariably requires "some quantum of physical force, that is, physical pressure exerted against a victim. Therefore, offensive physical contacts with another person's body categorically involve the use of physical force."[41]

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35 269 F3d 10 (1st Cir 2001).

36 455 F3d 1339 (11th Cir 2006).

37 171 F3d 617 (8th Cir 1999).

38 Id at 621 n 2 ("Smith argues that [Iowa's assault statute] contains, as an element, physical contact that is merely insulting or offensive. However, such physical contact, by necessity, requires physical force to complete. Thus, we find little merit to this argument.").

39 *Nason*, 269 F3d at 16.

40 Id, citing *Black's Law Dictionary* 656 (West 7th ed 1999). The *Griffith* court used the eighth edition, which is almost identical to the seventh. See *Griffith*, 455 F3d at 1342, citing *Black's Law Dictionary* 673 (West 8th ed 2004) and *Nason*, 269 F3d at 16.

41 *Nason*, 269 F3d at 20. See also *Griffith*, 455 F3d at 1342 ("A person cannot make physical contact—particularly of an insulting or provoking nature—with another without exerting some level of physical force."). Several courts have come to the opposite conclusion based on the same definition in *Black's*, interpreting "physical force" in § 16 to require violence. See, for example, *United States v Ceron-Sanchez*, 222 F3d 1169, 1172 (9th Cir 2000), overruled on other grounds by *Fernandez-Ruiz v Gonzales*, 466 F3d 1121, 1132–34 (9th Cir 2006) (en banc); *Solorzano-Patlan v INS*, 207 F3d 869, 875 n 10 (7th Cir 2000).

The second argument is that the use of the phrase "physical force" in another statute suggests that de minimis contact constitutes "physical force." Section 922(g)(8)(C)(ii) of Title 18 (the "restraining order provision") prohibits possession of a firearm by any individual subject to a restraining order that "by its terms explicitly prohibits the use, attempted use, or threatened use of physical force that would reasonably be expected to cause bodily injury [to a domestic intimate]."[42] Interpreting the qualifying clause "reasonably [ ] expected to cause bodily injury" to require violence,[43] the courts reasoned that the restraining order provision demonstrates that "Congress knew how to require more than [mere contact] if it had wanted to do so."[44]

The third argument, made only by the First Circuit, is that the Amendment's legislative history suggests an intent to include contact as "physical force." The original bill defined the class of predicate offenses as "crimes of violence."[45] A last-minute compromise between Senator Lautenberg and opponents of the Amendment changed this language, however, and defined the class of predicate crimes in terms of having "physical force" as an element.[46] The First Circuit concluded that this change "broaden[ed] the spectrum of predicate offenses covered by the statute" because the "plain meaning" of "physical force" is broader than that of "crimes of violence."[47] The court reasoned that by removing "violence," which it defined as "essentially a subset of physical force involving injury or risk of harm," Congress expanded the coverage of the Amendment to include predicate offenses whose formal statutory definitions contemplated "the use of any physical force, regardless of whether that force [was violent]."[48]

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42 18 USC § 922(g)(8)(C)(ii) (2000).

43 *Nason*, 269 F3d at 17.

44 *Griffith*, 455 F3d at 1342. See also *Nason*, 269 F3d at 16–17 ("[W]e must read the unqualified use of the term 'physical force' in [the Lautenberg Amendment] as a clear signal of Congress's intent that [the Amendment] encompass misdemeanor crimes involving *all* types of physical force, [including contact,] regardless of whether they could reasonably be expected to cause bodily injury.").

45 See S 1632, 104th Cong, 2d Sess (Mar 21, 1996), reprinted in 142 Cong Rec S 2646.

46 See 142 Cong Rec S 11877 (Sept 30, 1996) (Sen Lautenberg):

> [T]he revised language includes a new definition of the crimes for which the gun ban will be imposed. Under the original version, these were defined as crimes of violence against certain individuals, essentially family members. Some argued that the term crime of violence was too broad, and could be interpreted to include an act such as cutting up a credit card with a pair of scissors. Although this concern seemed far-fetched to me, I did agree to a new definition of covered crimes that is more precise, and probably broader.

47 *Nason*, 269 F3d at 17–18.

48 Id.

B. The Violence Court

The other side of the split—the Ninth Circuit in *United States v Belless*[49]—has held that "physical force" does not include mere contact. The sole argument in *Belless* is based on the canon of interpretation *noscitur a sociis*, that "the meaning of doubtful words may be determined by reference to associated words and phrases."[50] In the definition of a misdemeanor crime of domestic violence, the phrase "threatened use of a deadly weapon" is associated with "physical force."[51] The court reasoned that threatening someone with a deadly weapon is a "gravely serious threat to apply physical force," and therefore "physical force" should be interpreted to require a serious threat—violence—as well.[52]

To illustrate this point, the *Belless* court recounted an anecdote:

> In 1959, when Vice President Richard Nixon took Soviet Premier Nikita Khrushchev around an American exhibit of an $11,000 American tract house, the Soviet leader fulminated about the foolishness of having different brands of washing machines and the unlikelihood that American workers could afford such a "Taj Mahal," as the Soviets called the house. Nixon angrily told Khrushchev just how wrong he was, jabbing the Soviet Premier's chest with his pointed finger as he expostulated with his face inches away. Had Richard Nixon been in Wyoming instead of the Soviet Union, he might have been charged with the same crime as Belless. The ungentlemanly act of hollering in anyone's face, much less a chief of state's, may be characterized as "insolent," and pointing a finger at someone, much less touching him with the finger, may fairly be characterized as "rude," and both men, though perhaps exaggerating their affect for the crowd, looked "angry."[53]

Such conduct, the court reasoned, does not constitute the "violent use of force against the body of another individual" necessary to constitute "physical force." As a result, convictions under the contact prong of common law battery—which criminalizes "conduct that is minimally forcible, though ungentlemanly"—cannot serve as predicates for Lau-

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49 338 F3d 1063 (9th Cir 2003). This decision was recently cited approvingly in *United States v Nobriga*, 474 F3d 561, 564 (9th Cir 2006).

50 338 F3d at 1068.

51 See 18 USC § 921(a)(33)(A)(ii) ("[A misdemeanor crime of domestic violence must] ha[ve], as an element the use or attempted use of physical force or the threatened use of a deadly weapon.").

52 *Belless*, 338 F3d at 1068.

53 Id, citing Richard Nixon, *The Memoirs of Richard Nixon* 208–09 (Grosset & Dunlap 1978), and William Safire, *Before the Fall* 3–6 (Doubleday 1975). The court noted that Safire, "who set up the exhibit as a press agent for the tract house developer, says both men, after the cameras were turned off, made it clear that they had enjoyed themselves immensely." *Belless*, 338 F3d at 1068 n 15, citing Safire, *Before the Fall* at 3–6.

tenberg Amendment liability.[54] The court recognized that the "impolite behavior" technically covered by such statutes "too often[] lead[s] to the more serious violence necessary as a predicate for the federal statute."[55] Nonetheless, what matters is the range of conduct that can theoretically violate the proposed predicate, not the actual conduct that usually does.[56]

III. RESOLUTION

At first glance, the Contact courts' arguments appear persuasive, particularly compared to the Violence court's single canon of interpretation.[57] This initial conclusion is strengthened by the fact that interpreting "physical force" to require violence would undermine the Lautenberg Amendment's goal of keeping guns out of the hands of proven abusers. If mere contact does not constitute "physical force," then convictions under the contact prong of assault or battery would not qualify as predicate offenses. As a result, many dangerous abusers who were, in fact, convicted of a misdemeanor crime because of domestic

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54 *Belless*, 338 F3d at 1068. Interestingly, the Ninth Circuit claimed that its holding did not conflict with the First Circuit's decision in *Nason* because the statute at issue there "require[d] more than a mere touching of another." Id. The court did not mention the Eighth Circuit's decision in *Smith*, which was the only other Contact court that had ruled at that time; the Eleventh Circuit joined the fray after *Belless*.

The *Belless* court's apparent belief that the statute in *Nason* required more forcible conduct than de minimis touching is incorrect. The statute in *Nason* requires "more than a mere touching" because the touching must be offensive, not because it must be more than minimally forcible. See 269 F3d at 16. See also note 17. Thus, the statute in *Nason* is functionally identical to the Wyoming statute in *Belless*; the former requires an "offensive" touching, *Nason*, 269 F3d at 16, and the latter requires a "rude, insolent or angry" touching, *Belless*, 338 F3d at 1065. See LaFave, *Criminal Law* at 737–38 (cited in note 17). Furthermore, the conflict between *Belless* and *Nason* was explicitly recognized by the Eleventh Circuit. See *Griffith*, 455 F3d at 1340 ("The underlying issue of statutory interpretation about what qualifies as 'physical force' for § 922(g)(9) purposes has been decided by three other circuits, which have split two-to-one against Griffith's position. Our decision will make it three-to-one."); id at 1343–44 (discussing *Belless* and "disagree[ing] with it").

This misreading by the *Belless* court may suggest why its analysis is so limited. The court did not even cite precedent in its own circuit such as *Ceron-Sanchez*, 222 F3d at 1172, which defined "physical force" to require violence in § 16. Unfortunately, the Ninth Circuit has persisted in claiming it is not in conflict with the First Circuit. See *Nobriga*, 474 F3d at 564–65 (citing *Griffith* and *Nason* as supporting the "violence" approach to physical force in the Lautenberg Amendment context because their definitions of "physical force" include the word "violence").

55 *Belless*, 338 F3d at 1068.

56 See text accompanying notes 25–26.

57 Canons of interpretation are sometimes considered weak interpretive arguments because they can be selectively used to support almost any result. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 Vand L Rev 395, 401–06 (1950) (characterizing each canon of construction as a "thrust" that can be "parried" by an opposing canon of construction).

violence would not be covered by the Amendment, a result the *Griffith* court termed "at war with common sense."[58]

Nonetheless, further analysis suggests that "physical force" in the Lautenberg Amendment is better interpreted to require violence. This Part significantly expands on the Violence court's analysis by pointing out flaws in the Contact courts' arguments, making several new arguments in favor of interpreting "physical force" to require violence, and considering the effects of this interpretation of "physical force." Part III.A criticizes the Contact courts' interpretation of *Black's* definition of "physical force." Part III.B examines the implications of other statutory language for interpreting "physical force," both from the Lautenberg Amendment and other areas of the US Code. Part III.C points out a flaw in the First Circuit's understanding of the legislative history. Part III.D considers the consequences of interpreting "physical force" to require violence and places those consequences in context with other limitations on Lautenberg predicates.

A. Plain Meaning

Contrary to the Contact courts' assertion, *Black's* does not provide strong support for defining "physical force" to include contact. Based on the seventh and eighth editions, the Contact courts defined "physical force" as "power, violence, or pressure directed against another person's body."[59] The courts then asserted that contact requires "physical force" because making contact exerts "pressure."[60] This understanding of "pressure" in *Black's* definition is strained. For mere touching to constitute "pressure," "pressure" must be understood in the Newtonian physics sense of the word.[61] But when associated with the words "power" and "violence," "pressure" is best understood in

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58 See 455 F3d at 1345. See also Part I and the Introduction.

59 *Nason*, 269 F3d at 16. See also *Griffith*, 455 F3d at 1342.

60 See *Nason*, 269 F3d at 20. The courts appear to have recognized that neither "power" nor "violence" can reasonably be read to include de minimis contact.

61 Compare *Belless*, 338 F3d at 1067–68 ("Any touching constitutes 'physical force' in the sense of Newtonian mechanics. Mass is accelerated, and atoms are displaced. Our purpose in this statutory construction exercise, though, is to assign criminal responsibility, not to do physics."); *Flores v Ashcroft*, 350 F3d 666, 672 (7th Cir 2003):

> Every battery involves "force" in the sense of physics .... A dyne is the amount of force needed to accelerate one gram of mass by one centimeter per second per second. That's a tiny amount; a paper airplane conveys more.... Perhaps one *could* read the word "force" in § 16(a) to mean one dyne or more, but that would make hash of the effort to distinguish ordinary crimes from violent ones. How is it possible to commit *any* offense without applying a dyne of force? ...To avoid collapsing the distinction between violent and non-violent offenses, we must treat the word "force" as having a meaning in the legal community that differs from its meaning in the physics community. The way to do that is to insist that the force be violent in nature.

the ordinary sense of reasonably forceful conduct, not in the Newtonian sense of slight or incidental touching.[62] Recall that the issue is not that most physical contact will exert pressure, but that the element of "physical contact" in assault and battery can theoretically be satisfied by de minimis contact such as lightly resting one's hand on another's arm.[63] Because such contact should not be characterized as "power, violence, or pressure," it is not "physical force" according to the Contact courts' definition.

Three other points further undermine the Contact courts' argument by associating "physical force" with violence. First, the Contact courts left out the seventh and eighth editions' qualification that "physical force" is "esp[ecially] a violent act directed against a robbery victim."[64] Second, the eighth edition defines "violence" as "[t]he use of physical force."[65] Third, the sixth edition of *Black's* defines "physical force" as "[f]orce applied to the body; actual violence."[66] The sixth edition was current at the time the Lautenberg Amendment was passed and thus reflects the meaning of "physical force" at the time Congress used the phrase.[67] These three points, although not individually determinative, strengthen the conclusion that the plain meaning of "physical force," according to *Black's*, requires more than de minimis physical contact.

B. Textual Analysis

Analysis of other statutory text, both within the Lautenberg Amendment itself and elsewhere in the US Code, strongly suggests that

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62 This argument is essentially an application of the canon of interpretation *noscitur a sociis*, that "the meaning of doubtful words may be determined by reference to associated words and phrases." See *Belless*, 338 F3d at 1068. This approach is particularly appropriate when interpreting definitions because the terms used are specifically intended to convey essentially the same meaning.

63 See note 17.

64 See *Black's Law Dictionary* at 656 (7th ed); *Black's Law Dictionary* at 673 (8th ed). Compare *Singh v Ashcroft*, 386 F3d 1228, 1233 (9th Cir 2004) (relying on this part of *Black's* definition to hold that "physical force" requires violence).

65 *Black's Law Dictionary* at 1601 (8th ed). The seventh edition defines "violent" as "characterized by unlawful physical force." *Black's Law Dictionary* at 1564 (7th ed).

66 *Black's Law Dictionary* 1147 (West 6th ed 1990). At least two courts have relied on the sixth edition to hold that "physical force" in § 16 requires violence. See *United States v Ceron-Sanchez*, 222 F3d 1169, 1172 (9th Cir 2000), overruled on other grounds, *Fernandez-Ruiz v Gonzales*, 466 F3d 1121, 1132–34 (9th Cir 2006); *Solorzano-Patlan v INS*, 207 F3d 869, 875 n 10 (7th Cir 2000).

67 See *Nason*, 269 F3d at 16:

> In scrutinizing the language, we presume, absent evidence to the contrary, that Congress knew and adopted the widely accepted legal definitions of meanings associated with the specific words enshrined in the statute. Predictably, we turn to *Black's Law Dictionary* to glean the most widely accepted legal meaning of "physical force."

"physical force" should be interpreted to require violence. The Contact courts made one textual argument: they compared the text of the Lautenberg Amendment to a neighboring provision restricting gun possession by individuals subject to qualifying restraining orders. The phrasing of that provision—covering restraining orders prohibiting the use of "physical force that would reasonably be expected to cause bodily injury"—suggests that "physical force" itself does not require an expectation of bodily injury, which, the courts claimed, is the same as violence.[68] Thus, the courts reasoned, the modifying clause was only necessary because "physical force" includes more than violence.

The comparison of these two statutes, however, is not entirely apt. Each uses "physical force" in a different way: the restraining order provision uses "physical force" to refer to the actual conduct prohibited by a restraining order, whereas the Lautenberg Amendment uses "physical force" to refer to the statutory elements of potential predicate crimes. The Violence court failed to point out this difference in usage. It merely argued that "physical force" must be "serious" (and thus exclude de minimis contact) because the Lautenberg Amendment pairs "the use ... of physical force" with the "serious" danger of "the threatened use of a deadly weapon."[69] This Part supplements that analysis by making three new textual arguments in favor of interpreting "physical force" to exclude de minimis contact.

First, the text of the Lautenberg Amendment suggests that conduct qualifying as "physical force" must constitute domestic *violence*: "physical force" is used to define what qualifies as a "misdemeanor crime of domestic *violence*."[70] Although "misdemeanor crime of domestic violence" is a defined term that could be defined to mean anything, the Supreme Court has endorsed this style of reasoning. In *Leocal v Ashcroft*,[71] the Court noted that "[i]n construing ... § 16, we cannot forget that we ultimately are determining the meaning of the term 'crime of violence.' The ordinary meaning of this term, combined with § 16's emphasis on the use of physical force against another person ... suggests a category of *violent*, active crimes."[72]

Second, Congress has used the phrase "physical contact" to define the elements of predicate crimes in other statutes, just as it used

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68 See id at 17–18.

69 See Part II.B.

70 See 18 USC § 921(a)(33)(A)(ii) (emphasis added).

71 543 US 1 (2004).

72 Id at 11 (emphasis added). See also, for example, *Flores*, 350 F3d at 672 (holding that "physical force" in § 16 "must require violence to avoid collapsing the distinction between violent and nonviolent offenses"); *United States v Rodriguez-Guzman*, 56 F3d 18, 20 n 8 (5th Cir 1995) (holding that "[t]he clear import of defining a 'crime of violence' [in § 16] is that 'force' as used in [§ 16] is synonymous with destructive or violent force").

"physical force" in the Lautenberg Amendment. For example, 18 USC § 3559(c)(2)(A) defines the term "assault with intent to commit rape" as "an offense that has as its elements engaging in *physical contact* with another person or using or brandishing a weapon against another person with intent to commit aggravated sexual abuse or sexual abuse."[73] This suggests that "physical contact" is different from "physical force." Had Congress intended to include crimes that have, as an element, the use of "physical contact" as Lautenberg Amendment predicates, it knew how to do so.[74] "That it did not speaks loudly and clearly."[75]

Third, "physical force" in the Lautenberg Amendment should be interpreted to require violence to be consistent with courts' interpretation of "physical force" as it is used in § 16. The circuit courts of appeals appear to have unanimously interpreted "physical force" in § 16 to require violence,[76] and the Supreme Court has supported this interpretation, noting in dicta that § 16 encompasses a class of "violent [ ] crimes."[77] Interpreting "physical force" to require violence in both the

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73 18 USC § 3559(c)(2)(A) (2000) (emphasis added). See also, for example, 42 USC § 14071(a)(3)(B) (2000) ("The term 'sexually violent offense' means any criminal offense ... that has as its elements engaging in *physical contact* with another person with intent to commit aggravated sexual abuse or sexual abuse.") (emphasis added).

74 Compare *Griffith*, 455 F3d at 1343 ("We know from the language it included [elsewhere] that Congress knew how to require more than simple 'physical force' if it had wanted to do so. The legislative branch does not require the help of the judicial branch for that simple drafting task."). See also *Burlington Northern & Santa Fe Railway Co v White*, 548 US 53, 63 (2006) ("We normally presume that, where words differ ... Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *DirecTV, Inc v Brown*, 371 F3d 814, 818 (11th Cir 2004) ("As we have previously stated, when Congress uses different language in similar sections, it intends different meanings.") (quotation marks omitted).

75 *Griffith*, 455 F3d at 1342.

76 As of January 1, 2008, the Second, Fifth, Seventh, Ninth, and Tenth Circuits have interpreted "physical force" in § 16 to require violence. See *Jobson v Ashcroft*, 326 F3d 367, 373 (2d Cir 2003); *Rodriguez-Guzman*, 56 F3d at 20 n 8 (5th Cir); *Flores*, 350 F3d at 672 (7th Cir); *Singh*, 386 F3d at 1233 (9th Cir); *United States v Venegas-Ornelas*, 348 F3d 1273, 1275 (10th Cir 2003). It may be no surprise that the three Contact courts come from the First, Eighth, and Eleventh Circuits, which have not addressed the meaning of "physical force" in § 16.

The courts have stated three justifications for interpreting "physical force" to require violence. First, they have cited the "plain meaning" of "physical force" as evidenced by various editions of *Black's*. See, for example, *Solorzano-Patlan*, 207 F3d at 875 n 10 (sixth edition); *Singh*, 386 F3d at 1228 (eighth edition). Compare Part III.A. Second, the courts have argued that "physical force" must require violence because that term defines what constitutes a "crime of *violence*." See, for example, *Rodriguez-Guzman*, 56 F3d at 20 n 8; *Flores*, 350 F3d at 672. Compare the text accompanying notes 72–73. Third, courts have simply cited precedent from sister circuits. See, for example, *Jobson*, 326 F3d at 373 (citing *Bazan-Reyes v INS*, 256 F3d 600, 610 (7th Cir 2001), for the proposition that "the term 'physical force' in [§ 16] refers to actual violent force"); *Sareang Ye v INS*, 214 F3d 1128, 1133 (9th Cir 2000) ("Like the Seventh Circuit, we believe that 'the force necessary to constitute a crime of violence [ ] must actually be violent in nature.'"), quoting *Solorzano-Patlan*, 207 F3d at 875 n 10.

77 See *Leocal*, 543 US at 11. If § 16's predicate crimes are limited to "violent [ ] crimes," that limit must be implemented through the meaning of "physical force."

Lautenberg Amendment and § 16 satisfies the general preference for "linguistic consistency" in the US Code.[78] There are no significant contextual differences between the two statutes: they have nearly identical language[79] and titles,[80] they both define classes of predicate crimes, and they both apply to misdemeanors.[81] Furthermore, the legislative history suggests that Congress modeled the Amendment on § 16 and thus intended "physical force" to have the same meaning in both statutes.[82]

Because of the strong similarities between the two provisions, consistency with courts' interpretation of "physical force" in § 16 provides an independent reason to interpret the Lautenberg Amendment to require violence: the same words should have the same meaning when used similarly.[83] Courts have implicitly followed this reasoning when defining "physical force" in other statutes. For example, courts have relied on § 16 precedent to construe "physical force" in the Sentencing Guidelines,[84] which use the phrase the same way that § 16 and the Lautenberg Amendment do.[85] Nothing suggests that the same should not be done for the Lautenberg Amendment.

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78 See *Christianson v Colt Industries Operating Corp*, 486 US 800, 808–09 (1988). See also *Maloney v Social Security Administration*, 517 F3d 70, 75 (2d Cir 2008); *Sherman v United States Parole Commission*, 502 F3d 869, 874–75 (9th Cir 2007) (noting "the general principle of statutory construction that the same language should be given a consistent interpretation across different statutes," but recognizing that this "presumption is rebuttable and therefore requires consideration of the statutory context and the surrounding terms").

79 Compare 18 USC § 16(a) ("an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another"), with 18 USC § 921(a)(33)(A)(ii) ("an offense that has, as an element, the use or attempted use of physical force"). The absence of "threatened use" or "person or property of another" in the Lautenberg Amendment does not suggest that "physical force" should have a different meaning.

80 Compare 18 USC § 16 ("crime of violence"), with 18 USC § 921(a)(33)(A) ("misdemeanor crime of domestic violence").

81 Although § 16(b) is limited to felonies, § 16(a) encompasses misdemeanor predicates.

82 See Part III.C.

83 Note that this argument is different from claiming that "physical force" should have the same meaning in both statutes simply because the same interpretive arguments, such as plain meaning, apply to both provisions.

84 Although the analogy between the Sentencing Guidelines provisions and § 16 is more complicated outside the definition of "physical force," courts have been comfortable cross-referencing § 16 for the proposition that physical force requires violence. See, for example, *United States v Lopez-Montanez*, 421 F3d 926, 929 (9th Cir 2005); *United States v Sanchez-Torres*, 136 Fed Appx 644, 647 (5th Cir 2005).

85 Compare USSG § 4B1.2 ("The term 'crime of violence' means any offense . . . that [ ] has as an element the use, attempted use, or threatened use of physical force against the person of another."); USSG § 2L1.2 (2003) ("'Crime of violence' [ ] means an offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another."), with 18 USC § 16(a) ("The term crime of violence means [ ] an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another."), and with 18 USC § 921(a)(33)(A)(ii) ("[A misdemeanor crime of domestic violence must] ha[ve], as an element the use or attempted use of physical force or the threatened use of a deadly weapon.").

Thus, the statutory language of the Amendment, both in isolation and compared with similar provisions in the US Code, suggests that to use "physical force," one must do more than make de minimis contact.

C. Legislative History

Contrary to the First Circuit's argument, the Lautenberg Amendment's legislative history does not support interpreting "physical force" to include de minimis contact. The original draft of the Amendment defined the class of predicate crimes as "crimes of violence," but this language was changed to the now-familiar "physical force" formulation.[86] The First Circuit inferred that by removing "violence," Congress sought to "broaden the spectrum of predicate offenses" to include nonviolent crimes.[87]

This argument is flawed for two related reasons. First, the conclusion that the change in language significantly broadened the scope of the Amendment is not consistent with the Amendment's history in the Senate: the change was demanded by the Amendment's opponents, who believed that the original phrasing was too broad.[88] Interpreting the change to signal a significant expansion of the Amendment to include nonviolent offenses ignores the reason for the change.

Second, the First Circuit's conclusion is based on the mistaken premise that "crime of violence" in the original draft was a plain-text phrase. In fact, "crime of violence" is a distinctive statutory term defined in § 16, and it has been used throughout the US Code since at least 1984.[89] As the Supreme Court recently noted, § 16 provides the general definition of the phrase "crime of violence" for the entire US Code—including statutes that explicitly reference § 16 and those that merely use the phrase "crime of violence" without referencing § 16.[90] Therefore, the phrase "crime of violence" in the original bill would have incorporated § 16 to define the class of predicate offenses. Because "crime of vi-

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86 See notes 45–46 and accompanying text.

87 See *Nason*, 269 F3d at 17. See also Part II.A.

88 See 142 Cong Rec S 11877 (Sen Lautenberg).

89 See Comprehensive Crime Control Act of 1984 (CCCA) § 1001, Pub L No 98-473, 98 Stat 1976, 2136, codified at 18 USC § 16 (2000) (creating § 16). The CCCA created numerous references to "crime of violence" and thus to § 16. See, for example, CCCA § 203, 98 Stat at 1979, codified at 18 USC § 3142 (2000); CCCA § 217, 98 Stat at 2021, codified at 18 USC § 994 (2000); CCCA § 1002, 98 Stat at 2137, codified at 18 USC § 1952B (2000).

90 See *Leocal*, 543 US at 7 & n 4 (citing 18 USC § 842(p)(2) as an example of a statute that, by using the phrase "crime of violence," incorporates § 16 even though the statute does not explicitly cross-reference § 16). See also *United States v Page*, 167 F3d 325, 331 (6th Cir 1999) (defining "crime of violence" in 18 USC § 2261, the federal interstate domestic violence statute, by incorporating § 16, even though § 2261 does not explicitly reference § 16); note 28. Furthermore, the statute that created § 16 included numerous references to "crime of violence" without explicitly referring to § 16. See note 89.

olence" is a defined term with a specific meaning, the change in language does not support the First Circuit's conclusion. Rather, comparison of the Amendment's final language to the operative language of the original bill taken from § 16 suggests that Congress merely tweaked the language of § 16 to satisfy the Amendment's opponents.[91]

This understanding of the legislative history explains an otherwise puzzling remark by Senator Lautenberg. Although the change was made because opponents of the Amendment feared the original language was too broad, Senator Lautenberg characterized the new definition as "more precise, and probably broader."[92] This statement only makes sense once "crime of violence" is understood to reference § 16: the Lautenberg Amendment is broader than § 16 in some ways and narrower in others. It is broader because it specifically includes predicate offenses that have, as an element, the "threatened use of a deadly weapon." The Lautenberg Amendment is narrower than § 16, however, because it does not cover threats of "physical force" or the use of "physical force" against property.[93] The narrowing effect of the new language dominated the expansion because eliminating threats and offenses against property significantly limited the scope of potential predicates, whereas adding threats with a deadly weapon likely did nothing—threats made with a deadly weapon are typically felonies, not misdemeanors.

D. The Consequences of Interpreting "Physical Force" to Require Violence

The weight of the arguments above lead to the conclusion that "physical force" should be interpreted to require violence. Therefore, because it is possible to make de minimis physical contact with someone without being violent—and thus without using "physical force"—the use of "physical force" is not an element of any assault or battery crime that has, as an element, making physical contact. As a result, no conviction for such crimes qualifies as a misdemeanor crime of domes-

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91 Compare 18 USC § 16(a) ("The term crime of violence means [ ] an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another."), with 18 USC § 921(a)(33)(A)(ii) ("[A misdemeanor crime of domestic violence must] ha[ve], as an element the use or attempted use of physical force or the threatened use of a deadly weapon.").

92 See 142 Cong Rec S 11877 (Sen Lautenberg).

93 Compare 18 USC § 16(a) ("an offense that has, as an element the use, attempted use, or *threatened use* of physical force *against the person or property of another*") (emphasis added), with 18 USC § 921(a)(33)(A)(ii) ("an offense that has, as an element the use or attempted use of physical force"). See *Nason*, 269 F3d at 17 ("[W]hen Congress inserts limiting language in one section of a statute but abjures that language in another, closely related section, the usual presumption is that Congress acted deliberately and purposefully in the disparate omission.").

tic violence. Unfortunately, excluding the contact prong of assault and battery as predicate crimes has two results: first, the exclusion undermines the Amendment's effectiveness; second, the exclusion may cause the statute's prohibition on gun possession to be applied arbitrarily.

The Amendment is based on the idea that individuals convicted of a misdemeanor because of domestic violence have proven themselves dangerous and cannot be trusted with guns.[94] Assault and battery are the core predicate crimes necessary to implement this idea—if abusers are convicted of a misdemeanor, as a matter of common sense it is likely to be assault or battery.[95] And as a practical matter, it is likely that actual violence, not mere touching, is the basis of almost all assault and battery convictions for making physical contact with a domestic intimate. Therefore, excluding convictions under the contact prong of assault and battery makes the Lautenberg Amendment underinclusive—many, if not all, abusers convicted under the contact prong of assault or battery fit within the policy rationale of the Amendment.

Interpreting "physical force" to require violence also may lead to arbitrary application of the Amendment's prohibition on gun possession. Some states' assault and battery statutes do not have contact prongs because they have adopted the Model Penal Code (MPC), which synthesizes common law assault and battery into one crime, assault, with one operative element, bodily injury.[96] And in common law states, most conduct that results in assault or battery convictions could be charged under either the contact prong or the bodily injury prong. For example, a punch both makes contact and causes bodily injury. Therefore, an individual convicted under the contact prong of battery would not fall under the prohibition, whereas one convicted under the MPC version of assault or the bodily injury prong of com-

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94 See Part I. Compare *United States v Rogers*, 371 F3d 1225, 1228–29 (10th Cir 2004) ("A defendant whose background includes domestic violence which advances to [ ] a criminal conviction ... has a demonstrated propensity for the use of physical violence against others.").

95 This is also evidenced by, for example, DOJ, *Criminal Resource Manual* 1117 (1997) (listing "simple assault, assault and battery" as the predicate offenses for the Lautenberg Amendment).

An argument can be made that state assault and battery statutes are effectively the *only* predicate offenses for the Lautenberg Amendment. Proving the negative (that there are no other predicates) is beyond the scope of this Comment. It is enough to note that assault and battery are the core predicates.

96 See MPC § 211.1(1) ("A person is guilty of assault if he: (a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or (b) negligently causes bodily injury to another with a deadly weapon; or (c) attempts by physical menace to put another in fear of imminent serious bodily injury."). Many states have adopted this general formulation. See, for example, Conn Gen Stat Ann § 53a-59 (West 2007); Md Crim Law Code Ann § 3-202(a)(1) (2002); NY Penal Law § 120.00 (McKinney 2004); Ohio Rev Code Ann § 2903.13 (West 2006).

mon law battery would be prohibited from possessing guns, even if the same conduct was involved in both cases.[97]

Although these are significant consequences, they do not justify disregarding the weight of the interpretive arguments discussed above, which strongly favor interpreting "physical force" to require violence. The consequences, while undesirable, are not absurd: interpreting "physical force" to require violence makes the Amendment underinclusive, but that is not irrational in the criminal context.[98] Additionally, legislative purpose is a function of both ends and means. A means that imperfectly achieves an end may be the deliberate result of the legislative process, and courts should be careful of disregarding strong interpretive arguments in order to fix a "flawed" means.

Furthermore, regardless of the interpretation of "physical force," the categorical scheme adopted by Congress undermines the goal of the Amendment and creates arbitrary applications of its prohibition on gun possession in other ways. There are at least two other, admittedly smaller, limitations on the assault and battery convictions that can serve as Lautenberg predicates, as well as potentially one more significant limitation. First, no assault or battery conviction for making threats qualifies as a predicate offense. Misdemeanor assault generally prohibits attempted or threatened battery.[99] Convictions under the threat prong of assault do not qualify as predicate offenses because the Lautenberg Amendment requires that the "use or attempted use of physical force" be an element; the Amendment does not include the "threatened use of physical force."[100]

Second, no assault or battery conviction for reckless or negligent conduct can serve as a predicate offense. Many state assault and battery statutes criminalize actions done intentionally, knowingly, reck-

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97 However, this arbitrary application would not occur if the bodily injury prong does not qualify as a predicate either. See notes 104–10 and Part I.B. If that is the case, then no assault or battery conviction would qualify as a Lautenberg predicate.

98 If convictions for making physical contact qualified as predicate offenses, it *is* possible that someone who merely touched, say, an ex-wife in an offensive way could be prohibited from possessing a gun even though he is not an abuser and likely does not pose a threat to anyone. As the saying goes, better a dozen guilty people go free than one innocent one go to jail.

99 See LaFave, *Criminal Law* at 736 (cited in note 17). See also, for example, Tex Penal Code Ann § 22.01(a)(2) (West 2003) (criminalizing "intentionally or knowingly threaten[ing] another with imminent bodily injury"). Sometimes this prohibition is phrased in terms of causing fear of battery, which can be done by attempts or threats. See, for example, Ark Code Ann § 5-13-207 (Michie 2007) (prohibiting "purposely creat[ing] apprehension of imminent physical injury in another person").

100 Compare 18 USC § 16(a) (including explicitly "the use, attempted use, or the *threatened* use of physical force") (emphasis added). Furthermore, by including "threatened use of a deadly weapon," the text of the Amendment raises the inference that no other threats are included. See 18 USC § 921(a)(33)(A)(ii).

lessly, or with criminal negligence.[101] However, convictions under the recklessness or negligence prongs[102] cannot serve as Lautenberg predicates because the Supreme Court has recently held that to "use" physical force, one must act intentionally or knowingly, not recklessly or with criminal negligence.[103]

Third, and perhaps most significantly, assault and battery statutes that have bodily injury as an element may not qualify as predicate offenses. As discussed above,[104] there is a strong argument that bodily injury can be caused without using "physical force."[105] For example one can cause bodily injury "by guile, deceit, or even deliberate omission."[106] This argument is based on the conceptual distinction between "bodily injury" as an end and "physical force" as a means; "physical force" is not the only means that can cause "bodily injury."[107] If bodily injury can be caused without using "physical force," then crimes with bodily injury as an element do not qualify as Lautenberg predicates. Although several courts have disagreed with this claim,[108] it implicates every assault and battery conviction other than those under the common law contact prong, which are directly addressed by this Comment: bodily injury is the operative element in the other prong of common law assault and battery[109] and in assault under the MPC.[110]

Determining whether "bodily injury" can be caused without "physical force" is beyond the scope of this Comment. But the issue shows

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101 See LaFave, *Criminal Law* at 738–39 (cited in note 17). See also, for example, NY Penal Law § 120.00(2)–(3) (McKinney 2004); Ohio Rev Code Ann § 2903.13(B) (West 1995); Tex Penal Code Ann § 22.01(a)(1) (West 2003).

102 The mental state of which the defendant was convicted can be determined through the categorical approach. See Part I.A.

103 See *Leocal*, 543 US at 8–10. Although *Leocal* interpreted "use" in § 16, its analysis almost certainly carries over to the Lautenberg Amendment given the almost identical phrasing and use of the word "use," as well as the other similarities identified in Part III.B.

104 See Part I.B.

105 See, for example, *Leocal*, 543 US at 10–11 (distinguishing between the "risk of bodily injury" and the "risk of physical force," and stating that "bodily injury" is broader than "physical force" because "physical force need not actually be applied" to cause "bodily injury"); *United States v Villegas-Hernandez*, 468 F3d 874, 879 (5th Cir 2006) (noting that bodily injury "could result from any number of acts without the use of destructive or violent force").

106 *Chrzanoski v Ashcroft*, 327 F3d 188, 195 (2d Cir 2003).

107 See *United States v Gracia-Cantu*, 302 F3d 308, 311–12 (5th Cir 2002) (noting, in the context of a federal statute relying on predicate crimes that have, as an element, "[the] use, attempt[ed] [ ] use, or threaten[ed] [ ] use of physical force against a child" that a state statute that criminalizes bodily injury of a child is results-oriented, and as a result can be violated by omissions, such as leaving the child with an abusive caretaker, rather than requiring the intentional use of force, and therefore cannot serve as a predicate).

108 See, for example, *United States v Shelton*, 325 F3d 553 (5th Cir 2003), overruled by *Villegas-Hernandez*, 468 F3d at 874; *Nason*, 269 F3d at 20 (noting that "to cause *physical* injury, force necessarily must be *physical* in nature"); *Smith*, 171 F3d at 621 n 2.

109 See LaFave, *Criminal Law* at 738 (cited in note 17).

110 See note 96.

that there are other significant concerns about the class of Lautenberg predicates. Given these certain and potential limitations on assault and battery convictions qualifying as predicates, excluding convictions for making "physical contact" is not a unique result and should not outweigh the strong arguments in favor of interpreting "physical force" to require violence.

CONCLUSION

Although finding only the most limited (and somewhat arbitrary) application for the Lautenberg Amendment is undesirable, there are larger problems with the statute that cannot be fixed merely by bending the interpretive analysis in this case.[111] But perhaps what observers perceive as flaws are merely the result of legislative compromise. Regardless, one must hope that the impact of this result becomes less significant with time as attitudes about domestic abuse change and abusers are increasingly charged with felonies rather than misdemeanors.

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[111] One sensible proposal for reform can be found in Tom Lininger, *A Better Way to Disarm Batterers*, 54 Hastings L J 525, 599–600 (2003) (suggesting that Congress amend the Lautenberg Amendment to list assault and battery as predicate offenses).

