

SPECIAL REPORT

Are Domestic Violence Policies Respecting Our Fundamental Freedoms?



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SAVE: STOP ABUSIVE AND VIOLENT ENVIRONMENTS

The United States Constitution represents the wellspring of civil liberties for American citizens. The Constitution, along with the Bill of Rights and subsequent Amendments, enumerate our fundamental freedoms and outline our unique system of law that, in the words of Founding Father John Adams, assures that American democracy remains a “government of laws and not of men.”

“Civil rights” refer to the fundamental freedoms of the individual. In particular, these rights are rooted in the 14th Amendment to the Constitution:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any persons of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The 14th Amendment was ratified in 1868 to protect the rights of Blacks newly freed from slavery by President Abraham Lincoln’s Emancipation Proclamation. Nonetheless, southern states passed a series of “Jim Crow” laws during the following decades that promoted racial segregation and discrimination under the guise of “separate but equal.”

Beginning in 1917, the U.S. Supreme Court began to strike down these laws.¹ Passage of the Civil Rights Act of 1964 marked the end of the infamous Jim Crow era.

Once again our fundamental liberties have come under siege. This time, the justification arises from a social and political mandate to curb intimate partner aggression, often referred to as “domestic violence.” Our Constitutional rights have become abridged by a series of federal and state laws designed to rein in partner aggression.

This Special Report traces the historical development of domestic violence laws and analyzes their impact on civil rights.

“We must scrupulously guard the civil rights and civil liberties of all citizens, whatever their background. We must remember that any oppression, any injustice, any hatred, is a wedge designed to attack our civilization.” —Franklin Delano Roosevelt

Historical Development

Over the years, representatives of the domestic violence field have worked tirelessly to expand the legal scope and effect of our nation’s domestic violence laws.

The process began in the 1980s when the first state-level laws were enacted to permit the issuance of restraining orders for partner abuse. In 1984, the federal government passed the Family Violence Prevention and Services Act, which provided funding to abuse shelters and state domestic violence coalitions. Ten years later, the federal government enacted the Violence Against Women Act.

That milestone set the stage for a dramatic expansion of state domestic violence laws. From 1997 to 2003, states enacted an estimated 1,500 domestic violence laws.² These laws encompass all facets of the criminal justice system: response to 911 calls, issuance of civil restraining orders, arrest, prosecution, and judicial education.

Analysis of Effects on Civil Rights

This Special Report identifies nine fundamental civil liberties that are affected by domestic violence laws. For each of the civil rights, the relevant Constitutional Amendment(s) are identified, illustrative Supreme Court rulings cited, offending domestic violence laws and policies documented, and the number of persons whose rights are compromised each year estimated.

This information is summarized in the Analysis of Civil Rights and Domestic Violence Policies, which is found in the Appendix.³ The findings are presented here:

Civil Restraining Orders

1. Freedom of speech
2. Protection from governmental intrusion
3. Due process
4. Freedom to marry and the right to privacy in family matters
5. Right to parent one's own children
6. Right to bear arms

*Estimated number of persons whose rights are harmed each year by restraining orders:
1.5 million*

Criminal Justice System

7. Right to be secure in their persons
8. Right to a fair trial

Estimated number of persons whose rights are harmed each year by biased criminal justice procedures: 462,000

Treatment Services

9. Equal treatment under the law

Estimated number of persons whose rights are harmed each year by discriminatory treatment services: 272,000

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These numbers add up to an estimated 2.2 million persons. Since some individuals experience repeated violations of their civil liberties in a given year, a more likely number is 2 million persons whose constitutionally protected rights are compromised each year by domestic violence laws and policies.

This number underestimates the true figure because it does not account for the many persons whose freedom to speak openly with their intimate partners is curtailed by broadly worded domestic violence codes. As the Supreme Court has ruled, free speech cannot be infringed because it may “arouse anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender.”⁴

While it is true that Constitutional protections do not fully apply in civil law cases, the framers of the Constitution did not intend that persons’ fundamental rights could be eviscerated simply by enacting a law directing that certain offenses be heard in a civil court. Indeed, the Supreme Court has repeatedly ruled that a “compelling interest” must be satisfied in order to overturn a fundamental right. A restraining order issued without hard evidence and lacking notice to the respondent or a hearing does not approach the “compelling interest” standard.

Despite the fact that men and women are equally likely to aggress against their partners,^{5,6} the great majority of persons whose rights are compromised by such laws are men:

- About 85% of restraining orders are issued against men.⁷
- 77% of domestic violence arrestees are male.⁸
- Less than 1 percent of persons receiving abuse shelter services are male.⁹

In particular, African-American men have been disproportionately harmed by these civil rights infringements.¹⁰

Using 1994—the year when VAWA was enacted—as the baseline year, and recognizing that some persons have experienced repeated civil rights violations over that period of time, it is concluded that some 25 million Americans have seen their fundamental civil liberties erode severely since that date.

To place these numbers in historical perspective, tens of thousands of persons were falsely arrested during the Alien and Sedition Laws of the 1920s.¹¹ During World War II, some 110,000 Japanese-Americans were relocated to internment camps.¹² Indeed, one must go back to the infamous Reconstruction era following the Civil War to find violations of rights on a similar scale. *We therefore conclude that the Violence Against Women Act and associated domestic violence laws represent the largest roll-back in civil rights since the era of Jim Crow.*

Thus, the 25 million figure represents one of the most serious civil rights violations recorded in the annals of American history. In the name of stopping partner aggression, VAWA and other laws have served to vitiate many of the most fundamental freedoms of American citizens.

These civil rights violations have been, in at least some cases, intentional. At one New Jersey training program, a sitting judge dispensed this advice to other jurists: “*Your job is not to*

*become concerned about all the constitutional rights of the man that you're violating as you grant a restraining order. Throw him out on the street, give him the clothes on his back, and tell him, 'See ya' around.'"*¹³ [emphasis added]

*"Don't call 911 unless you are bleeding and she still has a weapon in her hand. Too many men who have called 911 for help have ended up being arrested for DV."*¹⁴
—Family law attorney Lisa Scott

Impact on the Parent-Child Relationship

About one-fourth of divorces involve an allegation of intimate partner violence.¹⁵ In most cases, the accusation turns out to be unnecessary or false.^{16,17} As the former president of the Massachusetts Bar Association once revealed, "Everyone knows that restraining orders and orders to vacate are granted to virtually all who apply...In many cases, allegations of abuse are now used for tactical advantage."¹⁸

The effect of such allegations on the parent-child relationship can be far-reaching. In all but two states, divorce judges are required to consider allegations or findings of intimate partner violence in the award of child custody.¹⁹ The end result is often the attenuation or complete severing of the child's relationship with the accused parent, *even though no hard evidence of abuse was ever presented.*

Thus, domestic violence laws represent an end-run on a person's fundamental right to parent one's own children, even though this principle has been upheld in numerous decisions of state appellate and federal district courts, and up to the U.S. Supreme Court as well.²⁰

Not during the darkest periods of Jim Crow was the family targeted for dissolution, nor were children capriciously removed from their parents.

Revamping the Definition of a Civil and Just Society?

Rule of law is considered a prerequisite to ordered democracy because it promotes fairness and justice. It rests on the time-honored notion that legal offenses should be defined by concrete actions and verifiable harms, and are amenable to subsequent refutation in a court of law.

The effect of domestic violence civil rights encroachments is sweeping:

- In their dealings with law enforcement, innocent citizens may discover that Fourth Amendment standards of probable cause have been discarded and in some cases, claims of innocence are interpreted in Kafkaesque manner as evidence of guilt.
- In civil court, broad definitions of abuse, absence of meaningful evidentiary requirements, and biased judicial training shortchange even the most basic notions of due process.

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- In criminal court, inadequate public defender resources and pressures to agree to a plea bargain may compromise fairness.
- In their routine family interactions, Americans are bound by a vaguely defined yet legally enforceable speech code.

Arguably, the worst civil rights violations stem from the over-use of civil restraining orders. State civil statutes typically define actionable offenses in broad terms. As a result, “men of common intelligence must necessarily guess at [their] meaning[s] and differ as to [their] applications.”²¹

Some might aver that these rights violations, while regrettable, represent necessary “collateral damage” in the broader effort to stem partner violence. Here again, the argument falls short, given the lack of scientific evidence regarding the effectiveness of violence-reduction strategies, and the fact that mandatory arrest laws likely *increase* the risk of partner homicide.²²

The pervasive civil rights violations that emanate from domestic violence laws are now challenging us to recast our notion of a civil and just society.

References

- ¹ *Buchanan v. Warley*, 1917.
- ² Miller N. What does research and evaluation say about domestic violence laws? A compendium of justice system laws and related research assessments. Alexandria, VA: Institute for Law and Justice, 2005, footnote 28. <http://www.ilj.org/publications/dv/DomesticViolenceLegislationEvaluation.pdf>.
- ³ Stop Abusive and Violent Environments. Analysis of Civil Rights and Domestic Violence Policies. Rockville, MD. 2010. <http://www.saveservices.org/downloads/SAVE-Assault-Civil-Rights-Appendix>
<http://www.saveservices.org/downloads/SAVE-Assault-Civil-Rights-Appendix>
- ⁴ *R.A.V. v. St. Paul*, 1992.
- ⁵ Centers for Disease Control and Prevention. Physical dating violence among high school students – United States, 2003. *Morbidity and Mortality Weekly Report*, Vol. 55, No. 19, May 19, 2006. <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5519a3.htm>.
- ⁶ Gelles RJ. The hidden side of domestic violence: Male victims. *Women's Quarterly*, 1999.
- ⁷ Young C. Domestic violence: An in-depth analysis. Washington, DC: Independent Women's Forum, 2005, p. 25.
- ⁸ Durose MR et al. Family Violence Statistics. Washington, DC: Department of Justice. NCJ 207846, 2005. <http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf>
- ⁹ Lyon E, Lane S, Menard A. Meeting Survivors Needs: A Multi-State Study of Domestic Violence Shelter Experiences. October 2008. Prepared for the National Institute of Justice. Page 94. <http://www.ncjrs.gov/pdffiles1/nij/grants/225025.pdf>
- ¹⁰ Durose MR et al. Family Violence Statistics. Washington, DC: Department of Justice. NCJ 207846, 2005. Table 5.9. <http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf>
- ¹¹ Swisher CB. Civil liberties in war time. *Political Science Quarterly*, Vol. 55, No. 3, September 1940.
- ¹² Daniels R, Taylor SC, Kitano HHL. *Japanese Americans, From Relocation to Redress*. University of Washington Press, 1991.
- ¹³ Bleemer R. N.J. judges told to ignore rights in abuse TROs. *New Jersey Law Journal*, April 24, 1995. http://www.ancpr.org/amazing_nj_legal_journal_article.htm.
- ¹⁴ Scott L. What to do before the restraining order comes. *Real Family Law*, August 4, 2004. www.realfamilylaw.com.
- ¹⁵ Allen DW and Brinig M. Anticipated and unanticipated legal changes: The case of joint parenting. unpublished manuscript, February 2007, Table 7, Column 2.
- ¹⁶ Johnston J et al. Allegations and substantiations of abuse in custody-disputing families. *Family Court Review*, Vol. 43, No. 2, 2005.
- ¹⁷ Foster BP. Analyzing the cost and effectiveness of governmental policies. *Cost Management*, Vol. 22, No. 3, 2008.
- ¹⁸ Epstein E. Speaking the unspeakable. *Massachusetts Bar Association Newsletter*, 1993.
- ¹⁹ American Bar Association. Custody decisions in cases with domestic violence allegations, 2004. http://www.abanet.org/legalservices/probono/childcustody/domestic_violence_chart1.pdf.
- ²⁰ Center for Children's Justice. The constitutional right to be a parent. Accessed April 6, 2010. <http://www.childrensjustice.org/cases1.htm>.
- ²¹ *Connolly v. General Constr. Co.*, 269 U.S. 385, 391 (1926).
- ²² Stop Abusive and Violent Environments. How Effective are Domestic Violence Programs in Stopping Partner Abuse? Rockville, MD. 2010. <http://www.saveservices.org/downloads/Why-DV-Programs-Fail-to-Stop-Abuse>