

SPECIAL REPORT

An Assault Upon Our Civil Rights



P.O. Box 1221
Rockville, MD 20849
www.saveservices.org

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

The term “civil rights” refers to the fundamental freedoms of the individual. These rights are rooted in the 14th Amendment to the Constitution, ratified in 1868:

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 original purpose behind the 14th Amendment was to protect the rights of Blacks newly freed from slavery by President Lincoln’s Emancipation Proclamation. Lamentably, southern states passed a series of so-called Jim Crow laws during the following decades that promoted racial segregation and discrimination, all 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 close of the infamous Jim Crow era.

Once again, Americans’ fundamental liberties are being challenged. This time, the justification emanates from a social mandate to curb intimate partner aggression, commonly referred to as “domestic violence.” This Special Report enumerates and analyzes the far-reaching impacts of domestic violence laws on Americans’ 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 Background

Over the past three decades, representatives of the domestic violence field have worked to expand the scope and effect of our nation’s domestic violence laws.

Beginning in the 1980s, 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 provides funding to abuse shelters. Ten years later, the federal government enacted the Violence Against Women Act, designed to strengthen the response of the criminal justice system to domestic violence. The American Civil Liberties Union has also played an active role at the federal level (see Appendix).

The passage of VAWA set the stage for a dramatic expansion and re-working 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: restraining orders, arrest, prosecution, training of criminal justice personnel, and more.

Civil Rights

Following are the 12 civil rights that have been undermined by domestic violence laws. The first five pertain to due process protections for persons accused of intimate partner abuse; the second group applies to other civil rights:

Rights to Due Process (Table 1)

1. Right to be secure in their persons
2. Right to confront one’s accuser
3. Right to a fair trial
4. Issuance of restraining orders
5. Punishment of restraining order violations

Other Civil Rights (Table 2)

6. Equal treatment under the law
7. Freedom of speech
8. Right to bear arms
9. Freedom to marry and the right to privacy in family matters
10. Right to parent one’s own children
11. Right to be free from libel and slander
12. Right to be free of undue interference by the government

For each of the civil rights, the two following tables identify the relevant Constitutional Amendment(s) (Column A), cite illustrative Supreme Court rulings (Column B), document problematic domestic violence policies (Column C), and estimate the number of persons whose rights are compromised each year (Column D).

Table 1: Rights to Due Process

A. Amendments that Protect the Civil Right	B. Supreme Court Rulings	C. How Domestic Violence Laws and Policies Violate Rights	D. Number of Persons Whose Rights Are Violated
<i>1. Right to be secure in their persons</i>			
The Fourth Amendment states: <i>Citizens must be “secure in their persons,</i>	Probable cause means that if the circumstances would “warrant a man of reasonable caution in the belief” a crime had been	<ul style="list-style-type: none"> • Twenty-two jurisdictions have implemented mandatory arrest laws for allegations of domestic violence assault.³ Such mandatory arrest 	Each year about one million persons are arrested for allegations of domestic violence, of whom 77% are male. ⁶ But

<p>houses, papers, and effects.” There must exist “probable cause” before a person can be “seized.”</p>	<p>committed. (<i>Dumbra v. United States</i> (1925))</p>	<p>policies override constitutional guarantees of probable cause.</p> <ul style="list-style-type: none"> • Twenty-three states have predominant aggressor policies, of which 19 employ criteria that constitute gender-profiling.⁴ • VAWA funds the training of law enforcement personnel. Such training has been shown to be biased, thus predisposing law enforcement personnel to arrest the male.⁵ 	<p>only 33% of arrests result in a conviction,⁷ indicating that many arrests do not meet the “probable” cause standard. Using the most conservative definition of “probable” (meaning that at least 51% of defendants charged with domestic violence are convicted), it is estimated that 180,000 persons are wrongfully arrested each year.* The 180,000 number is subsumed within the 462,000 persons cited under Civil Right #3 below.</p>
<p>2. Right to confront one’s accuser</p>			
<p>The Sixth Amendment’s Confrontation Clause states: “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.”</p> <p>The Fourteenth Amendment extends the Confrontation Clause to proceedings of state governments.</p>	<p>The Sixth Amendment was designed to frustrate “any attempt to employ our courts as instruments of persecution.” (<i>In re Oliver</i>, (1948))</p> <p>The Supreme Court has ruled against the admissibility of testimony by a witness who did not appear at trial, unless the witness was unavailable to testify at the trial and the defendant had a prior opportunity for cross-examination. (<i>Crawford v. Washington</i> (2004))</p>	<ul style="list-style-type: none"> • In many domestic violence cases the complainant refuses to testify. In such cases, the District Attorney may attempt to introduce prior statements by the complaining witness, even though <i>Crawford v. Washington</i> would disallow such a practice.⁸ • Under VAWA’s immigration provisions (Section 817), the alleged abuser is not informed that the allegations were made. In addition, the alleged abuser is classified as a “prohibited source,” which precludes the Citizenship and Immigration Service from accepting documentation from that person that might substantiate the petitioner’s illegal behavior (Immigration and Naturalization Act, Section 1367(a)). 	<p>During the period 2004-2009, an average of 8,327 VAWA self-petition applications were filed each year.⁹ In each case, the accused person was denied the right to confront the accuser.</p>

* (51% – 33%) x 1,000,000 = 180,000

3. Right to a fair trial

<p>The Fifth and Fourteenth Amendments state: <i>No person shall be deprived of life, liberty, or property “without due process of law.”</i></p>	<p>“[W]here fundamental rights and liberties are asserted under ... Equal Protection ... classifications which might invade or restrain them must be closely scrutinized and carefully confined.” (<i>Harper v. Virginia State Bd. of Elections</i>, 383 U.S. 663, 670, 1966; <i>Zablocki v. Redhail</i>, 434 U.S. 374, 388 (1978))</p>	<ul style="list-style-type: none"> • The Violence Against Women Act includes the Legal Assistance for Victims (LAV) program. In practice, the accuser is not required to provide any proof of injury or harm in order to receive legal representation. But defendants are not qualified to receive free legal assistance from VAWA. The LAV provides assistance under both criminal and civil cases. • VAWA funds the training of prosecutors and judges. Such training programs have been shown to present one-sided information, thus biasing the criminal justice system against males.¹⁰ • Sex bias has been documented to affect the decision whether to prosecute the case, jury selection, and sentencing.¹¹ • Two-thirds of prosecutors’ offices have implemented no-drop policies.¹² As a result, weak cases are prosecuted, and the resulting conviction rate is only 35%,¹³ suggesting that many innocent persons are being subjected to unnecessary prosecution. • Perjury is believed to be widespread in domestic violence cases, but prosecutors are reluctant to punish these persons.¹⁴ 	<p>Each year about 1 million persons are arrested on allegations of domestic violence, of whom 77% are male.¹⁵ About three-fifths of such cases result in the filing of charges and subsequent prosecution.¹⁶ Thus, an estimated 462,000 men are subjected to biased criminal justice procedures each year.[†]</p>
--	---	--	---

4. Issuance of restraining orders

<p>The Fifth and Fourteenth Amendments state: <i>No person shall be deprived</i></p>	<p>Due process requires the opportunity to be heard “at a meaningful time and in a meaningful manner” before the government burdens</p>	<p>In most states, civil law definitions of domestic violence are overbroad and vague, to the point that it is difficult to disprove a false allegation of abuse.¹⁷ Thus, the</p>	<p>An estimated 2–3 million restraining orders are issued each year.¹⁸ A Massachusetts study found that 76% of</p>
--	---	--	---

† 1,000,000 x 0.77 x 0.6 = 462,000

<p><i>of life, liberty, or property</i> <i>“without due process of law.”</i></p>	<p>life, liberty or property. <i>(Armstrong v. Manzo,</i> 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965))</p> <p>Law and court procedures that may be “fair on their faces” but administered “with an evil eye or a heavy hand” are discriminatory. <i>(Yick Wo v. Hopkins, 118 US</i> 356 (1886))</p>	<p>presumption of innocence has been removed.</p>	<p>restraining orders did not allege actual injury or harm,¹⁹ and a West Virginia study concluded that 81% of such orders were unnecessary or false.</p> <p>It is conservatively estimated that 1.5 million restraining orders are unnecessary or false.[‡] For this analysis, it is assumed that these orders were issued against 1.5 million persons.</p>
<p>5. Punishment of restraining order violations – criminal contempt</p>			
<p>The Fifth and Fourteenth Amendments state: <i>No person shall be deprived of life, liberty, or property</i> <i>“without due process of law.”</i></p>	<p>Two Supreme Court rulings have addressed the over- use of contempt charges:</p> <p>“The contempt power may be abused.” <i>(Pounders v.</i> <i>Watson, 521 U.S. 982, 988</i> <i>(1997))</i></p> <p>“[T]he contempt power also uniquely is liable to abuse.” <i>(Bagwell, supra, 512 U.S. at</i> <i>831 (1994))</i></p> <p>In the context of restraining order violations, the District of Columbia Court of Appeals opined, “We further hold that trial judges must be scrupulously aware of due process considerations in these types of criminal contempt cases and afford a defendant due process and other protections, including a disinterested prosecutor, an impartial decision maker, an attorney, and confrontation of witnesses.” <i>(In re: Kevin V. Jackson and</i> <i>Victor S. Rogers. Decided</i> <i>Sept. 6, 2012)</i></p>	<p>In many states, violation of a restraining order is deemed a criminal contempt offense.</p>	<p>Unknown.</p>

[‡] 2 million x 0.76 = 1.52 million

Table 2: Other Civil Rights

A. Amendments that Protect the Civil Right	B. Supreme Court Rulings	C. How Domestic Violence Laws and Policies Violate Rights	D. Number of Persons Whose Rights Are Violated
6. Equal treatment under the law			
<p>The Fourteenth Amendment states: <i>“No State shall make or enforce any law which...den[ies] to any person within its jurisdiction the equal protection of the laws.”</i></p>	<p>The Supreme Court ruled “separate educational facilities are inherently unequal.” (<i>Brown v. Board of Education of Topeka, Kansas</i> (1954))</p> <p>The Court ruled that an all-female nursing school violated the equal protection rights of men. (<i>Mississippi University for Women v. Hogan</i> (1982))</p>	<ul style="list-style-type: none"> • VAWA defines classes of persons that serve to prevent the equal exercise of individual rights: (1) males v. females, and (2) U.S. citizens v. non-permanent aliens (a number of provisions under VAWA’s Title VIII afford greater legal rights to the immigrant-accuser than to the citizen-accused). • The Family Violence Prevention and Services Act condones sex discrimination: “Nothing in this chapter shall require any such program or activity to include any individual in any program or activity without taking into consideration that individual’s sex in those certain instances where sex is a bona fide occupational qualification or programmatic factor reasonably necessary to the normal operation of that particular program or activity.” (Section 10406(a)(2)) • The systematic discrimination of abuse shelters against male victims of domestic violence has been documented.²⁰ 	<p>An estimated 275,000 men are subjected to severe domestic violence each year and need treatment or rehabilitation.²¹ But less than 1% of persons who receive assistance from abuse shelters are male.²² Thus, more than 272,000 male victims of domestic violence are unable to access needed services.[§]</p>

§ 275,000 x 0.99 = 272,250

7. Freedom of speech			
<p>The First Amendment states: <i>“Congress shall make no law... abridging the freedom of speech.”</i></p>	<p>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.” (<i>R.A.V. v. St. Paul</i>, 1992)</p>	<ul style="list-style-type: none"> • Some VAWA-funded organizations assert that any verbal statement that minimizes, denies, or blames the “victim” constitutes domestic violence.²³ • State-level civil law definitions of domestic violence commonly include “annoyance,” “emotional distress,” and “harassment.” Such psychological states are often caused by speech that is viewed as offensive.²⁴ 	<p>It is not known how many persons refrain from making certain statements to their partners because they fear the legal consequences of uttering such a statement.</p>
8. Right to bear arms			
<p>The Second Amendment states: <i>“The right of the people to keep and bear Arms, shall not be infringed.”</i></p>	<p>The U.S. Supreme Court has ruled that gun ownership is an individual right, and does not pertain solely to the use of guns by members of the National Guard. (<i>McDonald et al v. City of Chicago, Illinois</i> (2010))</p>	<p>The Domestic Violence Offender Gun Ban of 1996, often referred to as the Lautenberg Amendment, bans the ownership and use of guns by individuals who are under a final restraining order for domestic violence.</p>	<p>The right to bear arms is a fundamental right that cannot be revoked merely on the preponderance of evidence standard, which is the evidentiary requirement for restraining orders in most states.</p> <p>According to the Gallup poll, 49% of American men and 33% of women report gun ownership.²⁵</p> <p>An estimated 860,000 final restraining orders are issued each year.²⁶ About 85% of these are issued against men.²⁷</p> <p>Conservatively assuming that 40% of persons under a final restraining order possess guns, then 344,000 persons lose their right to bear arms each year as a result of domestic violence laws. The 344,000 number is subsumed within the 1.5 million persons cited under Civil Right #3 above.</p>

SAVE: STOP ABUSIVE AND VIOLENT ENVIRONMENTS

<p>9. Freedom to marry and the right to privacy in family matters</p>			
<p>The First Amendment states: <i>“Congress shall make no law...abridging ...the right of the people to peaceably assemble.”</i></p> <p>The Fourth Amendment states: <i>“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”</i></p> <p>It has been argued that by extension, the Third, Fifth, and Ninth Amendments also apply.</p>	<p>“Choices about marriage, family life, ... are among associational rights [the Supreme] Court has ranked as ‘of basic importance in our society.’” (<i>M.L.B. v. S.L.J.</i>, 519 U.S. 102, 116, (1996))</p> <p>The right to privacy protects one’s private life from government intrusion. (<i>Olmstead v. United States</i>, 277 U.S. 438, 478–79 (1928))</p> <p>The First, Third, Fourth, Fifth, and Ninth Amendments afford “zones of privacy” to married couples. (<i>Griswold v. Connecticut</i> (1965))</p>	<p>Section 102 of the Violence Against Women Act, Grants to Encourage Arrest and Enforce Restraining Orders, provides funds to state-level law enforcement, judges, and prosecutors to recommend, issue, and enforce restraining orders.</p> <p>Restraining orders bar couples from associating together, and thus prevent them from marrying or continuing a marriage. This represents an infringement on citizens’ fundamental right to privacy.</p>	<p>See Civil Right #4 above.</p>
<p>10. Right to parent one’s own children, sometimes referred to as the Parental Liberty Doctrine</p>			
<p>The First Amendment states: <i>“Congress shall make no law... abridging ... the right of the people to peaceably assemble.”</i></p> <p>The Fourth Amendment states: <i>Citizens must be “secure in their persons, houses, papers, and effects.”</i></p>	<p>“The Fourteenth Amendment guarantees the right of the individual ... to establish a home and bring up children” (<i>Meyer v. Nebraska</i>, 262 U.S. 390 at 403 (1923))</p> <p>“It is cardinal with us that the custody, care, and nurture of the child reside first in the <i>parents</i>, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder.” (<i>Prince v. Massachusetts</i>, 321 U.S. 158 at 166 (1944))</p>	<p>In all but two states, divorce judges are required to consider allegations or findings of intimate partner violence in the award of child custody.²⁸</p>	<p>Each year, about 175,000 children are involved in a divorce with a false allegation of domestic violence.²⁹</p> <p>Assuming 2.0 children per divorce, it is estimated that, annually, 87,500 parents are deprived of their right to parent their children on a routine basis. The 87,500 number is subsumed within the 1.5 million persons cited under Civil Right #5 above.</p>

<p>The Fourteenth Amendment states: <i>No person shall be deprived of life, liberty, or property “without due process of law.”</i></p>			
<p>11. Right to be free from libel and slander</p>			
<p>The Fifth and Fourteenth Amendments state: <i>No person shall be deprived of life, liberty, or property “without due process of law.”</i></p> <p>Many legal scholars classify reputation as a form of one’s property.</p>	<p>“The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty.” <i>(Rosenblatt v. Baer, 383 U.S. 75, 92 (1966))</i></p>	<p>VAWA-funded training, education, and public awareness programs often misrepresent the nature of domestic violence, categorizing the male as the offender and the female as the victim.³⁰</p>	<p>Although negative sex stereotypes are often employed as part of appeals to justify the passage of new domestic violence laws, the number of persons who are directly harmed by such stereotypes is unknown.</p>
<p>12. Right to be free of undue interference by the federal government (principle of federalism)</p>			
<p>The Tenth Amendment states that powers not explicitly granted to the national government are “reserved to the States.”</p>	<p>Numerous Supreme Court cases have addressed the scope and limits of the Commerce Clause, which gives Congress the right to regulate commerce “among the several States.”</p>	<p>Regarding the proposed 2012 reauthorization of VAWA, Senators Tom Coburn (R-OK) and Mike Lee (R-UT) opined, “In particular, we believe this legislation violates the principles of federalism outlined in the Constitution... nowhere in the Constitution is the federal government tasked with providing basic funding to states, localities, and private organizations to operate programs aimed at victims of state crimes such as domestic violence. Far too often, Congress infringes upon the rights of the people and the states by overreaching in its legislative efforts.”³¹</p>	<p>Unknown.</p>

Estimate of Number of Persons Affected

Despite the fact that men and women are equally likely to aggress against their partners,³² men represent the majority of persons whose rights are compromised by such laws:

- About 85% of restraining orders are issued against men.³³
- 77% of domestic violence arrestees are male.³⁴
- Three-quarters of persons falsely accused of abuse are male.³⁵
- Less than 1 percent of persons receiving abuse shelter services are male.³⁶

In particular, African-American men have been disproportionately affected by these civil rights infringements.³⁷

Totaling the numbers in Column D of the table yields an estimated 2.2 million persons whose rights are compromised each year. Since it is known that a single individual may experience multiple violations of his or her civil liberties, a more conservative number is 2.0 million persons whose fundamental rights are compromised annually by domestic violence laws and policies.

Yet 2.0 million is an underestimate because it does not account for the persons who experience reputational and dignitary harm as a result of biased educational programs, or the persons whose freedom to speak candidly with their intimate partners is curtailed by broadly worded domestic violence codes.

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 30 million Americans have seen their fundamental civil liberties eroded during the period 1994 to 2010.

To place the 30 million in historical perspective, tens of thousands of persons were wrongfully arrested as a result of the enactment of the infamous Alien and Sedition Laws of the 1920s.³⁸ During World War II, some 110,000 Japanese-Americans were relocated to internment camps.³⁹

Indeed, one must go back to the infamous Reconstruction era following the Civil War to find human rights violations on a similar scale.

Supreme Court Rulings

Given the range of constitutional concerns, it is not surprising that several cases related to the Violence Against Women Act, or its application under state law, have been brought before the U.S. Supreme Court:

1. *United States v. Morrison* (2000): The Court held that Congress lacked authority, under either the Commerce Clause or the Fourteenth Amendment, to give domestic violence victims the right to sue their attackers in federal court, thus voiding 42 U. S. C. §13981.⁴⁰

2. *Crawford v. Washington* (2004): The Court held that the use of a spouse's recorded statement made during a police interrogation violated the defendant's Sixth Amendment right to be confronted with the witnesses against the defendant where the spouse, because of marital law privilege, did not testify at the trial.⁴¹ The ruling weakens the use of so-called "evidence-based" prosecutions in which the prosecutor pursues a domestic violence case even though the complainant refuses to testify.
3. *Town of Castle Rock, Colo. v. Gonzales* (2005): The Court ruled that Jessica Gonzales did not have a constitutional right (property interest) to police enforcement of the court-ordered restraining order against her husband.⁴²
4. *Giles v. California* (2008): In a domestic violence homicide case, the Court held that statements made by a woman to her girlfriend regarding a prior domestic violence incident were not admissible during a trial, thus re-affirming the Sixth Amendment's Confrontation Clause.⁴³

Changes to Rape Laws

Originally the Violence Against Women Act focused on violence by intimate partners. Over the years, however, the focus of the law expanded to also include sexual assault, whether committed by a stranger, acquaintance, or intimate partner. An analysis by legal scholar Richard Klein documents how changes to state rape laws have fundamentally revamped due process protections for the accused:⁴⁴

1. Definition of Rape. In the past, the definition of rape included the forcible genital penetration of a person without her (or his) consent. Now, a directive from the U.S. Department of Education defines rape in terms of genital penetration in which either person has consumed any alcohol or drugs, thus rendering the person unable to give consent.⁴⁵
2. Statute of Limitations: For most felonies such as rape, the statute of limitations is five years. But as of 2004, only three states required prompt reporting of the allegation, and several states have abolished the statute of limitations for rape cases altogether.
3. Courtroom Terminology: During courtroom trials, it is not uncommon for the complainant to be referred to as the "victim," even though that fact has not been established.
4. Shielding the Identify of the Accuser: Our system of justice requires that the court process be open to the public, and the First Amendment allows the press to report the names of parties to a case. But many states now have statutes that specifically prohibit the identification of a woman alleging rape.

5. Right to Confront One's Accuser: In the past, defense attorneys were allowed to ask detailed, often intrusive questions about the accuser's prior sexual history. Now under Federal Rules of Evidence 412, such questions generally may not be posed.

6. Guilty Mind ("mens rea"): Criminal law has long held that if a man believed in good faith that the woman was consenting to intercourse, then he could not be found to have committed rape. Now, that requirement has been largely removed.

7. Affirmative Consent: In the past, a man could reasonably infer that a woman was consenting to intercourse based on her behavior. Now, the woman must give affirmative permission through "words or overt actions" – although there is a lack of consensus regarding which specific overt actions constitute consent.

8. Corroborating Evidence: The 1962 Model Penal Code stated there should be no conviction for sexual offenses "upon the uncorroborated testimony of the alleged victim." Now the situation has been completely reversed, and not a single state generally requires an alleged victim of rape to provide corroborating evidence.

9. Reasonable Resistance: In 1951 the Oregon Supreme Court ruled, "The woman must resist by more than mere words. Her resistance must be reasonable proportionate to her strength and her opportunities." Now, only half of all states require there to have been physical resistance.

10. Admission of Evidence of Prior Sexual Assaults: A basic tenet of our criminal justice system is that jurors generally are not informed of any prior criminal record of the defendant in order to preclude bias. But under Federal Rule of Evidence 413, in a "criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible." Note that the rule allows admission not only of prior convictions, but of any evidence including arrests or mere allegations. Evidence of the complainant's prior false allegations may not be introduced as evidence, however.

11. Rape Trauma Syndrome: In some states, the prosecutor may have an expert witness testify that the alleged victim is suffering from "rape trauma syndrome" -- even though the validity of the syndrome has been questioned and the expert witness may have never spoken with the alleged victim to evaluate her mental state.

The overall effect of these changes has been to shift the burden of proof to the defendant and diminish the presumption of innocence. In Washington state, for example, juries receive the following instruction: "The burden is on the defendant to prove by a preponderance of the evidence that the sexual intercourse was consensual."

Re-Classifying Criminal Wrongs as a Civil Offense

In its Universal Definitions, VAWA defines domestic violence as felony or misdemeanor “crimes.” But many provisions of the law are expressly intended to be applied in the civil law context. This has the effect of depriving defendants of the due process protections that would normally be afforded to persons charged with criminal misconduct.

Constitutional protections do not fully apply in civil law cases. But the framers of the Constitution did not intend that persons’ fundamental rights could be removed by arbitrarily re-classifying presumably criminal offenses as civil in nature. This was indeed the ruling in two U.S. Supreme Court cases involving the civil-law detention of sex offenders, *Baxstrom v. Herold, State Hospital Director*⁴⁶ and *Specht v. Patterson*.⁴⁷

The problem is particularly vexing for restraining orders.

State civil definitions of domestic violence typically define actionable offenses in terms that are broad and vague. As a result, “men of common intelligence must necessarily guess at [their] meaning[s] and differ as to [their] applications,” as one Supreme Court decision expressed the problem.⁴⁸

Restraining orders are often requested in the context of the dissolution of an intimate partner relationship.⁴⁹ In most cases, these requests are granted: “Everyone knows that restraining orders and orders to vacate are granted to virtually all who apply,” according to the former president of the Massachusetts Bar Association.⁵⁰ But the accusation of abuse often turns out to be unnecessary or false.^{51,52}

So without being afforded the opportunity to confront his accuser or refute the charge, a man can be ordered out of his house under the weakest preponderance of evidence standard. Then relying on a temporary restraining order as “proof,” the woman can petition for a divorce, temporary custody of the children, and a ban on paternal contact. This can initiate a cascade of calamitous events, eventually leading to a father losing a meaningful relationship with his children.

At a minimum, revoking the fundamental rights guaranteed under the Parental Liberty Doctrine should entail the same due process protections as those afforded to persons charged with a crime. But they do not, engendering a constitutional quagmire and civil rights travesty.⁵³

Redefining Justice

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

The effects of the encroachments documented in this report are far-reaching:

- In civil court, broad definitions of abuse, weak evidentiary requirements, and biased judicial training shortchange basic notions of due process.
- Innocent citizens may discover that Fourth Amendment standards of probable cause have been discarded.
- Men find their reputations and dignity are adversely affected by every-day portrayals of males as abusers.
- In Kafkaesque manner, criminal justice representatives may interpret claims of innocence as evidence of guilt.

This Special Report documents how the Violence Against Women Act and its implementation at the state level, as well changes to state rape statutes, violate a broad range of fundamental civil rights. These policies are registering a profound effect on the lives of at least two million Americans each year.

The Washington (State) Council on Civil Rights has declared that domestic violence laws represent the “Biggest civil rights roll-back since [the] Jim Crow era.”⁵⁴ The constitutional violations that emanate from domestic violence laws are threatening to rework fundamental notions of a civil and just society. As due process diminishes and the rule of law ebbs, we might ask, Does the Violence Against Women Act represent the most unconstitutional law in the United States?

“History is full of atrocities carried out in the service of a moral agenda.” – Family violence researcher Murray Straus, PhD⁵⁵

Positions of the American Civil Rights Union Regarding the Violence Against Women Act

The American Civil Liberties Union (ACLU) originally expressed reservations about various provisions of the proposed Violence Against Women Act. In 1994 the ACLU noted in its report, "Analysis of Major Civil Liberties Abuses in the Crime Bill Conference Report," that the increased penalties were excessive, the mandatory arrest measures were "repugnant" to the Constitution, the mandatory HIV testing of the accused represented an infringement of privacy rights, and the requirement for payment of full restitution was non-judicious.⁵⁶

In subsequent years the ACLU's position began to evolve. By 2005 the ACLU was espousing generally positive views about the proposed reauthorization bill:

VAWA is one of the most effective pieces of legislation enacted to end domestic violence, dating violence, sexual assault, and stalking. It has dramatically improved the law enforcement response to violence against women and has provided critical services necessary to support women and children in their struggle to overcome abusive situations.⁵⁷

But two months later the ACLU became alarmed by a mandatory DNA testing measure recently added to the bill. The ACLU warned the Senate Judiciary Committee:⁵⁸

As currently drafted, the DNA amendment would allow for the DNA of federal arrestees as well as of those being detained by any government agency to be included in the federal (CODIS) DNA database. States that collect the DNA of arrestees would be allowed to include those DNA profiles in the federal database. An arrestee's DNA could only be taken out of the CODIS database if the charges were dismissed or the person was acquitted. Thus, if a person is arrested and ultimately not charged with a crime his or her DNA will remain in the federal database.

A review of subsequent ACLU letters reveals consistently favorable views regarding the Violence Against Women Act.⁵⁹

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 Miller N. Domestic violence: A review of state legislation defining police and prosecution duties and powers. Alexandria, VA: Institute for Law and Justice, 2004. http://www.ilj.org/publications/DV_Legislation-3.pdf.
- ⁴ Stop Abusive and Violent Environments. Predominant aggressor policies: Leaving the abuser unaccountable? Rockville, MD. 2011. <http://www.saveservices.org/downloads/Predominant-Aggressor-Policies>
- ⁵ Stop Abusive and Violent Environments. Most DV educational programs lack accuracy, balance, and truthfulness. Rockville, MD. 2011. <http://www.saveservices.org/downloads/SAVE-DV-Educational-Programs>
- ⁶ Stop Abusive and Violent Environments. Arrest policies for domestic violence. Rockville, MD. 2010. p. 6. <http://www.saveservices.org/downloads/Justice-Denied-DV-Arrest-Policies>
- ⁷ Garner JH, Maxwell CD. Prosecution and conviction rates for intimate partner violence. *Criminal Justice Review* Vol 34, No. 1, 2009.
- ⁸ McElroy W. Supreme Court Ruling May Impact Domestic Violence Cases. *Fox News*. March 31, 2004. <http://www.foxnews.com/story/0,2933,115672,00.html>
- ⁹ Voice of American Immigration Fraud Victims. <http://www.immigrationfraudvictims.com/research.html>. Accessed July 20, 2012.
- ¹⁰ Stop Abusive and Violent Environments. Most DV educational programs lack accuracy, balance, and truthfulness. Rockville, MD. 2011. <http://www.saveservices.org/downloads/SAVE-DV-Educational-Programs>
- ¹¹ Stop Abusive and Violent Environments. Unequal justice in the criminal justice system. Rockville, MD. 2011. <http://www.saveservices.org/downloads/Bias-In-The-Judiciary>.
- ¹² Rebovich D. Prosecution response to domestic violence: Results of a survey of large jurisdictions. In Buzawa E and Buzawa C (eds.): *Do Arrests and Restraining Orders Work?* Thousand Oaks, CA: Sage Publications, 1996.
- ¹³ Garner JH, Maxwell CD. Prosecution and conviction rates for intimate partner violence. *Criminal Justice Review*, Vol. 34, No. 1, March 2009.
- ¹⁴ Atty. Casey Gwinn, part 2 admits Perjury not Prosecuted. <http://www.youtube.com/watch?v=UOCIDr5DviU&feature=related>.
- ¹⁵ Stop Abusive and Violent Environments. Arrest policies for domestic violence. Rockville, MD. 2010, p. 6. <http://www.saveservices.org/downloads/Justice-Denied-DV-Arrest-Policies>.
- ¹⁶ Garner JH, Maxwell CD. Prosecution and conviction rates for intimate partner violence. *Criminal Justice Review*, Vol. 34, No. 1, 2009.
- ¹⁷ Stop Abusive and Violent Environments. Expanding definitions of domestic violence. Rockville, MD. 2010. <http://www.saveservices.org/downloads/Vanishing-Rule-of-Law>.
- ¹⁸ Stop Abusive and Violent Environments. The use and abuse of restraining orders. Rockville, MD. 2011, p. 9. <http://www.saveservices.org/downloads/VAWA-Restraining-Orders>.
- ¹⁹ Basile S. Comparison of abuse alleged by same- and opposite-gender litigants as cited in requests for abuse prevention orders. *Journal of Family Violence*, Vol. 19, February 2004, pp. 59–68.
- ²⁰ Stop Abusive and Violent Environments. Domestic violence programs discriminate against male victims. Rockville, MD. 2011. <http://www.saveservices.org/downloads/VAWA-Discriminates-Against-Males>.
- ²¹ Gelles RJ. *Intimate Violence in Families*. Thousand Oaks, CA: Sage Publications, 1997.

-
- ²² 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>
- ²³ Stop Abusive and Violent Environments. Domestic violence-related immigration fraud. Rockville, MD. 2010. <http://www.saveservices.org/downloads/VAWA-Funded-Immigration-Fraud>.
- ²⁴ Stop Abusive and Violent Environments. Without restraint: The use and abuse of restraining orders. Rockville, MD, 2011. <http://www.saveservices.org/downloads/VAWA-Restraining-Orders>.
- ²⁵ Carlson DK. Americans and Guns: Danger or Defense? Gallup, January 4, 2005. <http://www.gallup.com/poll/14509/americans-guns-danger-defense.aspx>.
- ²⁶ 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, 2006, pp. 39–40. <http://www.ilj.org/publications/dv/DomesticViolenceLegislationEvaluation.pdf>.
- ²⁷ Young C. Domestic violence: An in-depth analysis. Washington, DC: Independent Women’s Forum, 2005. p. 25.
- ²⁸ American Bar Association. Custody decisions in cases with domestic violence allegations, 2004. http://www.abanet.org/legalservices/probono/childcustody/domestic_violence_chart1.pdf.
- ²⁹ Stop Abusive and Violent Environments. What is the cost of false allegations of domestic violence? Rockville, MD. 2011, p. 7. <http://www.saveservices.org/downloads/False-DV-Allegations-Cost-20-Billion>.
- ³⁰ Stop Abusive and Violent Environments. Most DV educational programs lack accuracy, balance, and truthfulness. Rockville, MD. 2011. <http://www.saveservices.org/downloads/SAVE-DV-Educational-Programs>
- ³¹ Violence Against Women Act Reauthorization of 2011 – Report. March 12, 2012. Page 53. <http://www.gpo.gov/fdsys/pkg/CRPT-112srpt153/pdf/CRPT-112srpt153.pdf>
- ³² Black MC, Basile KC, Breiding MJ, Smith SG, Walters ML, Merrick MT, Chen J, & Stevens MR. The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention. 2011. Tables 4.7 and 4.8. http://www.cdc.gov/ViolencePrevention/pdf/NISVS_Report2010-a.pdf
- ³³ Young C. Domestic violence: An in-depth analysis. Washington, DC: Independent Women’s Forum, 2005, p. 25.
- ³⁴ 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>
- ³⁵ Stop Abusive and Violent Environments. One in 10 has been falsely accused. Rockville, MD. 2011. <http://www.saveservices.org/falsely-accused/survey/>
- ³⁶ 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>
- ³⁷ 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>
- ³⁸ Swisher CB. Civil liberties in war time. *Political Science Quarterly*, Vol. 55, No. 3, September 1940.
- ³⁹ Daniels R, Taylor SC, Kitano HHL. *Japanese Americans, From Relocation to Redress*. University of Washington Press, 1991.
- ⁴⁰ United States v. Morrison. Decided May 15, 2000. <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=529&invol=598>
- ⁴¹ Crawford v. Washington. Decided March 3, 2004. <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=000&invol=02-9410>
- ⁴² Town of Castle Rock, Colo. v. Gonzales. Decided June 27, 2005. <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=000&invol=04-278>
- ⁴³ Giles v. California. Decided June 25, 2008. <http://www.law.cornell.edu/supct/html/07-6053.ZS.html>
- ⁴⁴ Richard Klein: An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fairness. 41 *Akron Law Review* 981 (2008).

-
- ⁴⁵ Department of Education Office for Civil Rights. Dear Colleague Letter. April 4, 2011. <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>
- ⁴⁶ Baxstrom v. Herold, State Hospital Director, 383 U.S. 107 (1966).
- ⁴⁷ Specht v. Patterson, 386 U.S. 605 (1967).
- ⁴⁸ *Connolly v. General Constr. Co.*, 269 U.S. 385, 391 (1926).
- ⁴⁹ Allen DW and Brinig M. Do Joint Parenting Laws Make Any Difference? *Journal of Legal Empirical Studies*. Vol. 8, No. 2. Pp. 304-324. 2011.
- ⁵⁰ Epstein E. Speaking the unspeakable. *Massachusetts Bar Association Newsletter*, 1993.
- ⁵¹ Johnston J et al. Allegations and substantiations of abuse in custody-disputing families. *Family Court Review*, Vol. 43, No. 2, 2005.
- ⁵² Foster BP. Analyzing the cost and effectiveness of governmental policies. *Cost Management*, Vol. 22, No. 3, 2008.
- ⁵³ National Parents Leadership Council. Constitutional Law Summary for Parents. Accessed July 20, 2012. http://www.kids-right.org/const_summary.htm
- ⁵⁴ Mahnkey M. Herald Net. October 13, 2009. www.heraldnet.com/article/20091013/opinion03/710139998
- ⁵⁵ Straus MA. Women's violence toward men is a serious social problem. In Gelles RJ and Loseke DR (eds.): *Current Controversies on Family Violence*. Newbury Park, CA: Sage, 2004.
- ⁵⁶ American Civil Liberties Union. Analysis of Major Civil Liberties Abuses in the Crime Bill Conference Report as Passed by the House and the Senate. September 29, 1994.
- ⁵⁷ American Civil Liberties Union. Letter to the Senate Judiciary Committee Regarding the Violence Against Women Act of 2005, S. 1197. July 27, 2005. <http://www.aclu.org/womens-rights/aclu-letter-senate-judiciary-committee-regarding-violence-against-women-act-2005-s-119>
- ⁵⁸ American Civil Liberties Union. Letter to the Senate Judiciary Committee Regarding the Violence Against Women Act of 2005. September 29, 2005. http://www.aclu.org/racial-justice_prisoners-rights_drug-law-reform_immigrants-rights/aclu-letter-senate-judiciary-commi
- ⁵⁹ Search of the ACLU website using the key word "VAWA," conducted July 20, 2012.