



SPECIAL REPORT

An Assault Upon Our 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

The United States Constitution is the wellspring of civil rights of American citizens. The Constitution, along with the Bill of Rights, subsequent Amendments, and Supreme Court interpretations, 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:

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 for the 14th Amendment was to protect the rights of Blacks newly freed from slavery by President Lincoln’s Emancipation Proclamation. Nonetheless, 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 end of the infamous Jim Crow era.

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

Historical Background

Over the years, activists have worked assiduously 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 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.

That legal 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: issuance and enforcement of civil restraining orders, arrest, prosecution, judicial education, and more.

Evolving Position of the American Civil Liberties Union

It is instructive to chart the evolving views of the American Civil Liberties Union, a preeminent civil rights organization, regarding the Violence Against Women Act.

Originally the ACLU expressed serious reservations about various provisions of the proposed law. 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.³

In subsequent years the ACLU's position changed dramatically, and by 2005 the ACLU expressed only positive comments about the proposed VAWA reauthorization:⁴

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.

But two months later the ACLU became alarmed by a mandatory DNA testing measure recently added to the bill, and warned the Senate Judiciary Committee:⁵

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 press releases reveals consistently favorable views on the Violence Against Women Act.⁶

Ten Civil Rights

Following are the 10 civil rights that are affected by domestic violence laws:

1. Right to be free from libel and slander
2. Freedom of speech
3. Protection from governmental intrusion
4. Right to due process
5. Freedom to marry and the right to privacy in family matters

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6. Right to parent one’s own children
7. Right to bear arms
8. Equal treatment under the law
9. Right to be secure in their persons
10. Right to a fair trial

For each of these rights, the following two tables identify the relevant Constitutional Amendment(s), cites illustrative Supreme Court rulings, documents offending domestic violence laws and policies, and estimates the number of persons whose rights are compromised each year. These 10 rights can be classified as those generally defined under civil law (Table I), and those generally defined under criminal law (Table II):

Table I: Rights Generally Defined Under Civil Law

Civil Right	Amendments that Protect the Civil Right	Supreme Court Rulings	How Domestic Violence Laws and Policies Violate Civil Rights	Number of Persons Whose Rights Are Violated Each Year
1. Right to be free from libel and slander	Fifth and Fourteenth Amendments: <i>No person shall be deprived of life, liberty, or property “without due process of law.”</i> <i>Many legal scholars classify reputation as a form of one’s property.</i>	“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>	<ul style="list-style-type: none"> • Training, education, and public awareness programs sponsored by domestic violence organizations routinely misrepresent the nature of domestic violence, categorizing the male as the offender and the female as the victim.⁷ 	<p>Although sex stereotypes are often employed as part of appeals to justify the implementation of new domestic violence policies -- policies that infringe on men’s other civil rights -- the number of persons who are directly harmed by such stereotypes is unknown.</p> <p>Such stereotypes can give rise to false allegations. A national survey found 8% of Americans, representing over 20 million persons, report being falsely accused of domestic violence, sexual assault, child abuse, or other forms of abuse.⁸</p>
2. Freedom of speech	First Amendment: <i>“Congress shall make no law... abridging the freedom of speech.”</i>	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, 1992)</i>	<ul style="list-style-type: none"> • State-level civil law definitions of domestic violence commonly include “annoyance,” “emotional distress,” and “harassment.” Such psychological states are typically caused by speech that is viewed as offensive.⁹ 	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.

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<p>3. Protection from governmental intrusion</p>	<p>Fourth Amendment: <i>Citizens must be "secure in their persons, houses, papers, and effects."</i></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>Section 102 of the Violence Against Women Act, Grants to Encourage Arrest and Enforce Restraining Orders, provided funds to state-level law enforcement, judges, and prosecutors to recommend, issue, and enforce restraining orders.</p>	<p>An estimated 2–3 million restraining orders are issued each year.¹⁰ A Massachusetts study found that 76% of restraining orders did not allege actual injury or harm,¹¹ and a West Virginia study concluded that 81% of such orders were unnecessary or false. 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>4. Right to due process (see also #10. Right to a fair trial)</p>	<p>Fifth and Fourteenth Amendments: <i>No person shall be deprived of life, liberty, or property "without due process of law."</i></p>	<p>Due process requires the opportunity to be heard "at a meaningful time and in a meaningful manner" before the government burdens 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</i>, 118 US 356 (1886))</p>	<p>In most states, civil law definitions of domestic violence are overly broad and vague, to the point that it is very difficult to disprove an allegation of abuse.¹² Thus, the presumption of innocence has been removed.</p>	<p>See above.</p>
<p>5. Freedom to marry and the</p>	<p>First Amendment: <i>"Congress shall make no</i></p>	<p>"Choices about marriage, family life, ... are among associational rights</p>	<p>Restraining orders bar couples from associating together, and thus prevent them from marrying or</p>	<p>An estimated 2–3 million restraining orders are issued each year.¹³ It has been estimated that one-quarter of</p>

* 2 million x 0.76 = 1.52 million

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<p>right to privacy in family matters</p>	<p><i>law...abridging ...the right of the people to peaceably assemble."</i></p> <p>Fourth Amendment: <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>Also, by extension, the Third, Fifth, and Ninth Amendments.</p>	<p>[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 First, Third, Fourth, Fifth, and Ninth Amendments afford "zones of privacy" to married couples. (<i>Griswold v. Connecticut</i> (1965))</p>	<p>continuing a marriage. This represents an infringement on citizens' fundamental right to privacy.</p>	<p>divorces involve an allegation of intimate partner violence.¹⁴ The number of persons who are prevented from marrying or continuing their marriage as a result of such orders is unknown.</p>
<p>6. Right to parent one's own children, sometimes referred to as the Parental Liberty Doctrine</p>	<p>First Amendment: <i>"Congress shall make no law... abridging ... the right of the people to peaceably assemble."</i></p> <p>Fourth Amendment: <i>Citizens must be "secure in their persons, houses, papers, and effects."</i></p> <p>Fourteenth Amendment: <i>No person shall be deprived of life, liberty, or property "without due process of law."</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 parents, 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.¹⁵</p>	<p>Each year, about 175,000 children are involved in a divorce with a false allegation of domestic violence.¹⁶ 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 #3 above.</p>

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<p>7. Right to bear arms</p>	<p>Second Amendment: The “<i>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 federal 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. According to the Gallup poll, 49% of American men and 33% of women report gun ownership.¹⁷ An estimated 860,000 final restraining orders are issued each year.¹⁸ 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>
<p>8. Equal treatment under the law</p>	<p>Fourteenth Amendment: “<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</i></p>	<ul style="list-style-type: none"> • VAWA classifies persons so as to prevent the exercise of fundamental rights on equal terms: (1) males v. females, and (2) U.S. citizens v. non-permanent aliens (a number of provisions under Title VIII of VAWA accord greater rights to the immigrant-accuser than to the citizen-accused). • The Family Violence Prevention and Services Act openly condones sex discrimination: “Nothing in this chapter 	<p>An estimated 275,000 men are subjected to severe domestic violence each year and need treatment or rehabilitation.²⁰ But less than 1% of persons who receive assistance from abuse shelters are male.²¹ Thus, more than 272,000 male victims of domestic violence are unable to access needed services.[†]</p>

† 275,000 x 0.99 = 272,250

		<i>Women v. Hogan</i> (1982))	<p>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))</p> <ul style="list-style-type: none"> • The widespread discrimination of abuse shelters against male victims of domestic violence has been documented.¹⁹ 	
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Table II: Rights Generally Defined Under Criminal Law

Civil Right	Amendments that Protect the Civil Right	Supreme Court Rulings	How Domestic Violence Laws and Policies Violate Civil Rights	Number of Persons Whose Rights Are Violated Each Year
9. Right to be secure in their persons	Fourth Amendment: <i>Citizens must be “secure in their persons, houses, papers, and effects.” There must exist “probable cause” before a person can be “seized.”</i>	Probable cause means that if the circumstances would “warrant a man of reasonable caution in the belief” a crime had been committed. (<i>Dumbra v. United States</i> (1925))	<ul style="list-style-type: none"> • Twenty-two jurisdictions have implemented mandatory arrest laws for allegations of domestic violence assault,²² and 33 states have laws that mandate arrest for violation of a restraining order.²³ Such mandatory arrest policies undermine constitutional guarantees of probable cause. • Twenty-three states have predominant aggressor policies, of which 19 employ criteria that constitute gender-profiling.²⁴ 	Each year about one million persons are arrested for allegations of domestic violence, of whom 77% are male. ²⁶ But only 33% of arrests result in a conviction, ²⁷ 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 18,000 persons are wrongfully arrested each year. [‡] The 18,000 number is subsumed within the

‡ (51% – 33%) x 1,000,000 = 18,000

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			<ul style="list-style-type: none"> The Violence Against Women Act funds the training of law enforcement personnel. Such training has often been shown to be biased, thus predisposing law enforcement personnel to arrest the male.²⁵ 	462,000 persons cited under Civil Right #10 below.
10. Right to a fair trial	<p>Fifth and Fourteenth Amendments: <i>No person shall be deprived of life, liberty, or property "without due process of law."</i></p> <p>Sixth Amendment: <i>"In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."</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> <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</p>	<ul style="list-style-type: none"> The Violence Against Women Act includes the Legal Assistance for Victims (LAV) program. In practice, the identified victim (plaintiff) 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 also provides assistance in 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.²⁸ Sex bias has been documented to affect the decision whether to prosecute the case, jury selection, and sentencing.²⁹ Two-thirds of prosecutors' offices have implemented no-drop policies.³⁰ As a result, weak cases are prosecuted, and the resulting conviction rate is only 35%,³¹ indicating that many innocent 	<p>Each year about 1 million persons are arrested on allegations of domestic violence, of whom 77% are male.³⁴ About three-fifths of such cases result in the filing of charges and subsequent prosecution.³⁵ Thus, an estimated 462,000 men are subjected to biased criminal justice procedures each year.⁵</p>

⁵ 1,000,000 x 0.77 x 0.6 = 462,000

		<p>opportunity for cross-examination. (<i>Crawford v. Washington</i> (2004))</p>	<p>persons are being subjected to unnecessary prosecution.</p> <ul style="list-style-type: none"> • Perjury is believed to be widespread in domestic violence cases, but prosecutors are reluctant to punish these persons.³² • 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.³³ 	
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Supreme Court Rulings

Given the range of constitutional concerns documented above, it is not surprising that several cases relating to the Violence Against Women Act have been argued before the U.S. Supreme Court:

1. *United States v. Morrison* (2000): Ruled the Commerce Clause does not allow VAWA to provide a federal civil remedy, thus voiding 42 U. S. C. §13981.³⁶
2. *Crawford v. Washington* (2004): Strengthened the Confrontation Clause of the Sixth Amendment, and cast doubt on the constitutionality of so-called “evidence-based” prosecutions in which the district attorney pursues a domestic violence case even though the complainant refuses to testify.³⁷
3. *Town of Castle Rock, Colo. v. Gonzales* (2005): Found the respondent did not have a property interest in police enforcement of a domestic violence restraining order.³⁸
4. *Giles v. California* (2008): Affirming the Confrontation Clause of the Sixth Amendment in a domestic violence homicide case.³⁹

In all four cases, the Supreme Court reached decisions that overturned a key provision of the Violence Against Women Act or restricted state-level domestic violence policies and practices.

Biggest Civil Rights Roll-Back Since Jim Crow

Despite the fact that each year, men are more likely than women to be victims of domestic violence,⁴⁰ the great majority of persons whose rights are compromised by such laws are men:

- About 85% of restraining orders are issued against men.⁴¹
- 77% of domestic violence arrestees are males.⁴²
- 11% of American men reported being falsely accused of abuse, compared to 6% of women.⁴³
- Less than 1 percent of persons receiving abuse shelter services are male.⁴⁴

In particular, African-American men have been disproportionately affected by these civil rights infringements.⁴⁵

Totaling the numbers in the right-hand column of the tables yields an estimated 2.2 million persons whose rights are compromised each year. Since it is known that some individuals experience multiple violations of their civil liberties, a more conservative number is 2.0 million persons whose constitutionally protected rights are infringed upon each year by domestic violence laws and policies.

But this number 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 estimated that some 52 million Americans have seen their fundamental civil liberties eroded during the period 1994 to 2020.

To place the 52 million figure in historical perspective, tens of thousands of persons were falsely arrested as a result of the infamous Alien and Sedition Laws of the 1920s.⁴⁶ During World War II, some 110,000 Japanese-Americans were relocated to internment camps.⁴⁷ Both of these figures pale in comparison to the 52 million number. Indeed, one must go back to the infamous Reconstruction era following the Civil War to find human rights violations on a similar scale.

Thus, the 52 million figure represents one of the most serious civil rights violations recorded in the annals of American history. This fact compelled the Washington (State) Council on Civil Rights to declare that domestic violence laws represent the “Biggest civil rights roll-back since [the] Jim Crow era.”⁴⁸

In sum, numerous provisions of the Violence Against Women Act are found to violate the Constitution, and these unconstitutional measures are registering a profound effect on the daily lives of millions of Americans.

*“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.”*
—Family law attorney Lisa Scott⁴⁹

Restraining Orders, The Biggest Culprit

The most widespread civil rights violations stem from the issuance of civil restraining orders. Such orders are typically granted without notice to the respondent or hard evidence of violence, but often have life-altering consequences for the accused.

State civil definitions of domestic violence typically define actionable offenses in overly-broad terms. As a result, “men of common intelligence must necessarily guess at [their] meaning[s] and differ as to [their] applications.”⁵⁰

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 by means of a statutory re-classification of certain offenses as civil in nature. Indeed, the Supreme Court has ruled that a “compelling interest” must be satisfied in order to overturn a fundamental right. A temporary restraining order issued to curtail an alleged incident of verbal abuse arguably does not meet the “compelling interest” test.

Downstream Effects: Impact on the Parent-Child Relationship

Restraining orders are often requested in the context of the dissolution of an intimate partner relationship. In most cases, the accusation turns out to be unnecessary or false.^{51,52} 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.”⁵³

About one-fourth of divorces involve an allegation of intimate partner violence.⁵⁴ 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.⁵⁵ 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 existed or was ever presented.*

Thus, the misapplication of domestic violence laws create 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.⁵⁶

Unconstitutional Law with Far-Reaching Effects

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 subsequent refutation in a court of law.

The effect of the civil rights encroachments documented in this report is profound:

- Men find their reputations and dignity are impugned by insistent – and inaccurate -- portrayals of men as abusers and batterers.
- In civil court, broad definitions of abuse, absence of meaningful evidentiary requirements, and biased judicial training shortchange the most basic notions of due process.
- Innocent citizens may discover that Fourth Amendment standards of probable cause have been discarded.
- In criminal court, inadequate public defender resources and pressures to agree to a plea bargain may undermine fairness.

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 VAWA-funded violence-reduction strategies.⁵⁷

And as domestic violence programs seek to strengthen their foothold in our nation’s schools, medical care institutions, and workplaces, the threats to our fundamental freedoms continue to expand.

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⁴ 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>

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