

Restraining Orders Out of Control

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One day in December of 2005, Colleen Nestler came to Santa Fe County District Court in New Mexico with a bizarre seven-page typed statement and requested a domestic-abuse restraining order against late-night TV host David Letterman. She stated, under oath, that Letterman seriously abused her by causing her bankruptcy, mental cruelty, and sleep deprivation since 1994. Nestler also alleged that he sent her secret signals “in code words” through his television program for many years and that he “responded to my thoughts of love” by expressing that he wanted to marry her.

Judge Daniel Sanchez issued a restraining order against Letterman based on those allegations. By doing so, it put Letterman on a national list of domestic abusers, gave him a criminal record, took away several of his constitutionally protected rights, and subjected him to criminal prosecution if he contacted Nestler directly or indirectly, or possessed a firearm.

Letterman had never met Colleen Nestler, and this all happened without his knowledge. Nonetheless, she requested that the order include an injunction requiring him not to “think of me, and release me from his mental harassment and hammering.” Asked to explain why he had issued a restraining order on the basis of such an unusual complaint, Judge Sanchez answered that Nestler had filled out the restraining-order request form correctly. After much national ridicule, the judge finally dismissed the order against Letterman. Those who don’t have a TV program and deep pockets are rarely so fortunate.

Is This American Justice?

Letterman’s experience is replicated in state courts around the country thousands of times daily. Consider what happened to Todd, whose estranged wife went to court secretly and obtained a restraining order against him. She swore that three men dressed in purple Fathers for Justice camouflage uniforms broke into her apartment, pushed her violently onto her couch, choked her severely, and threatened her, telling her that she better not go back to court. She complained that these were agents of the husband, as he belonged to that group. She did not call the police, but decided to go to work. Later she collapsed near the entrance of a hospital emergency room in a dramatic flourish.

As Todd’s lawyer, I provided evidence that her story was as phony as the one about David Letterman. The wife lived in a large apartment building on a main road with a busy lobby and a nosy superintendent across



Entertainer David Letterman was the defendant in a secret domestic-abuse restraining order proceeding in New Mexico, where a judge issued an order to a woman who claimed Letterman had sent secret marriage signals to her over his late-night TV program.

the hall from her. However, no one saw or heard the three strangely dressed intruders enter or leave during rush hour. The hospital records showed no bruises or evidence of physical assault. The court vacated the order against Todd.

Courts are easily manipulated by those pretending to seek protection from abuse because the political climate reinforces that men are abusers, and there is no penalty for false claims. Thus, they embolden applicants to use them for ulterior motives, such as to gain an advantage in divorce, to get custody of children easily without a family court hearing, or as a quick eviction process. Sometimes the motive is revenge or worse. For example, an order was issued against Brendan, father of two daughters, because he brought flowers to his child's home for her 10th birthday right after he sought enforcement of a custody order that the mother was routinely violating. Brendan was literally accused of "sneaking" into the yard to deliver flowers, nothing more, yet a restraining order was filed against him. This order was later vacated by a court.

An applicant can get a domestic-abuse restraining order for just about any reason. A report from an organization called Respecting Accuracy in Domestic Abuse Reporting (RADAR) suggests that it is as easy to obtain a restraining order as a hunting or fishing license. You fill out the forms and tell the judge you are afraid, and you get an order almost automatically. RADAR states: "The law defines almost any interpersonal maladjustment as 'domestic violence,' the courts then establish procedures to expedite the issuance of these orders."

The restraining-order laws of the several states are remarkably similar in their wording, as though an invisible hand were guiding them. They allow a woman to come to court secretly and claim that she feels fearful of "abuse" from a family member or person she lives with. The accused person is not there, and there is no requirement to notify him. There are no traditional rules of evidence, no opportunity for cross examination, no burden of proof beyond a reasonable doubt, no jury, nor even a necessity to have a story that makes sense.

The definition of "abuse" set forth in these state laws is always subjective, rather than requiring an injury or genuine threat. They all include a clause that expands abuse to include "fear of harm," often including even "emotional harm." Courts routinely issue orders on sworn statements like, "I just don't know what he may do," or, "he has a long history of verbal and emotional abuse."

A week after the initial secret hearing, a "return" hearing is held, where the defendant gets to tell his side of the story. He is usually allowed to present evidence and testimony, but it is often difficult to assemble needed documents and witnesses in that short period. Most of the temporary orders are extended for a year, regardless of the evidence, alibi, or witnesses offered.

To some judges, evidence is irrelevant; they just issue orders. Professor Stephen Baskerville, in his book *Taken Into Custody*, quotes Judge Richard Russell of Ocean City, New Jersey, at a restraining-order training seminar:

Throw him out on the street, give him the clothes on his back and tell him, "See ya around."... The woman needs this protection because the statute granted her that protection.... They have declared domestic violence to be an evil in our society. So we don't have to worry about the rights. Grant every order. That is the safest thing to do.

My client Mr. L's experience is a perfect example of this. I filed a motion to vacate the restraining order his ex-wife had against him, and she filed one to extend it, so the judge held a hearing to consider both motions — sort of. Here is the pertinent part of the actual transcript of the hearing to vacate the order:

Mr. Hession: Can you please state your name and your address for the record? [The Court argues with counsel as to whether Mr. L can testify.]

The Court: I don't believe I need to hear any evidence from your client. I'm going to deny your request to vacate the restraining order.

The hearing on whether to extend the order was no better:

The Court: Mrs. L _____, do you remain fearful of your husband?

Mrs. L _____: Yes. [Weeping]

The Court: Thank you.

The judge then extended the restraining order for a year, without Mr. L uttering his name on the witness stand, and with one generalized question to the wife about "fear." Judges who conduct hearings like this violate their oath to apply the law impartially and encourage the filing a false complaints — which is an enormous problem.

According to professor of accountancy Benjamin P. Foster, Ph.D, CPA, CMA, of the 4,796 emergency protective-order petitions issued in West Virginia in 2006, an estimated 80.6 percent "are false or unnecessary." Foster acknowledges the duplicitous nature of many of the complaints: "In divorce and child custody cases, a party generally obtains favorable treatment when the other party has engaged in domestic violence." In West Virginia, one incident of domestic violence, "which includes 'reasonable apprehension of physical harm' and 'creating fear of physical harm by harassment, psychological abuse,' ... could impact the Parenting plan approved by the Family Court." On the other hand, a "parent must have *repeatedly* made fraudulent reports of domestic violence or child abuse" to lose favor with a court. (Emphasis added.) Just the "identifiable costs" — the cost for the state, not the victims — for these false reports was in excess of \$18,200,000 in 2006.

Drastic Punishment

Falsely issued restraining orders are of great concern because the punishment that is meted out to defendants is so drastic. After an initial secret restraining order is issued, the clerk faxes it to the local police, who then serve it on the defendant. Since most orders contain a "no contact" provision, the first thing the police do is remove the man from his home, with little more than the shirt on his back, just as Judge Richard Russell urged in his judicial training. Utterly taken by surprise, the man usually has no idea that the hearing took place, that the order was granted, or what he may have done to deserve it. The police are rarely sympathetic.

Most restraining orders require that the defendant may not contact the plaintiff directly or indirectly or get within some distance, usually 100 yards, of the alleged "victim." Often, wives place the children as "co-victims" on these orders, so the defendant cannot contact his children either. "No contact" means no phone calls, cards, letters, or even incidentally running into the person.

No reconciliation is possible once an order is issued because any contact is a crime and subjects the violator to immediate arrest and jail. Even indirect contact is a crime, such as asking a relative to help work things out. Many men have sent flowers to a spouse or a birthday card to a child, only to end up in prison. Once an order is in place, the state becomes the father in the family, pushing out the real one.

Most district attorneys, prompted by feminist political pressure, have a "no-drop" policy on prosecuting all violations of restraining orders, no matter how minor. Joseph found that out the hard way. His wife obtained a restraining order after telling the judge he had kicked a plastic cooler and slammed the door while leaving his house. She omitted the part about telling him she had found another man.

No abuse or threat had occurred, but an order was issued against Joseph anyway. While it was in place, the wife made 14 false criminal complaints about violations of the order, which resulted in some arrests. I had to go to court with Joseph again and again, and we somehow managed to beat every case. Only a dysfunctional system allows a complainant to continue to make such false allegations without any accountability whatsoever.

Restraining orders also interfere with Second Amendment rights. Each state's laws require that a defendant surrender all guns and ammunition, and violation of this provision is not only a state crime, but a federal one, under the Violence Against Women Act of 1994.

"Mike" was an Air Force officer in charge of a military police unit on base. When his ex-wife got a restraining order against him, he lost his right to carry a weapon and had to take a desk job. He had custody of their child, which the mother resented. She came to a child's doctor appointment and attempted to create an incident, but was unsuccessful. However, the mother went to the local police to help her get an order. She told the police that there was no abuse and no history of abuse, so they wouldn't get involved. She then went to the court in the adjoining state where she lived and claimed that there was abuse, and obtained a restraining order. Then, to cover her tracks, she went back to the police in the husband's state and requested that they change her statement about no abuse. Eventually, he was able to remove the order, after hiring an expensive lawyer in the wife's state.

Many police officers and military personnel who carry firearms are not so lucky, and have had careers permanently ruined by false allegations on restraining orders. In many places, once an order issues, even if it is eventually vacated, it is often impossible to get a gun license back.

Restraining orders especially impact the children. These orders are frequently used as a quick and dirty custody hearing, without the trouble of going to family court. In one minute, the father can lose the right to see his children for a year or longer. Children often get used as pawns in these situations, without any rebuke from a judge. While judges certainly know that falsely obtained orders are pervasive, they care little for the well-being of the children who are harmed by losing their father for long periods. The children often have no understanding of why they are being kept from their father because the father cannot even speak to them.

If dad works from home, as more people are now doing, additional problems arise. Under any order, he will be summarily evicted, and thus lose access to phones, business records, and equipment, without recourse. As a RADAR report puts it: "The man, now homeless and distraught, has only a few days to find a lawyer and prepare a defense." When a home business is involved, he now cannot earn income, although he may be ordered to pay child support, needs alternate living quarters, and may have had his bank account emptied by his wife.

The case of Bob, who worked from home, shows the misuse of orders against self-employed persons. His wife got a restraining order against him, based on "a long history of verbal and emotional abuse," which is not a legal basis for an order. After it was issued, Bob had to leave the home he owned prior to his marriage, in which he had his home-based business. Eventually, he was allowed to do business in one half of the home, while his wife and children lived in the other half. Despite her alleged "fear," the wife came within a few feet of Bob on a regular basis. Meanwhile, the disruption of his business, the stress involved, and support payments destroyed him financially. He could not pay the huge child and spousal support assessments ordered by the court, which totaled triple his net income, and he was jailed twice. His business suffered, and he has still not recovered from the experience.

Skewed View of Abuse

The domestic-abuse industry has become a multi-billion dollar business during the last three decades, fueled by large influxes of government money and bolstered by media hysteria about abuse. Retired Massachusetts Judge Milton Raphaelson has stated, however, that there is not an epidemic of domestic violence, but rather an epidemic of hysteria about domestic violence.

State restraining-order laws suddenly sprang up in every state during the 1970s, at the insistence of radical feminist groups who had gained political ascendancy. Family abuse was indeed a problem. However, the feminists identified the problem wrongly and proposed a solution that made it worse.

Building on the sensationalism of certain well-publicized cases, feminists built an “identity politics” view of abuse. It is true that some men still ascribed to the chauvinist notion that women were chattel and could be maltreated with impunity, but the feminists exploited that fact and got laws that harmed, not just men, but families. They declared that men were abusers and women were victims. Abused women were shown off at legislative hearings to manipulate the mostly male legislators into passing restraining-order laws.

For the first time, we now have laws that penalize people before they are proven to be criminals, for something they only might do. The laws are paradigms of pragmatism over principle, as they jettison centuries of highly developed legal theory and substitute a subjective and weak new legal framework which allows baseless allegations, while making it very difficult to defend against them. They allow a woman to claim “fear” of abuse, even if none has happened, leading to a classic “he said, she said,” where she holds all the cards.

While many persons involved in passing these laws may have been well-meaning, thinking they were going to help stop abuse, the unintended (or perhaps intended) consequences have been to change the very fabric of the legal system, and to decimate millions of families. In my experience, little abuse has been prevented by these laws. Stats back this up. For example, in West Virginia between 1981 and 1992, “domestic violence claims increased 466% from 1,065 to 6,029” and in Puerto Rico after a comprehensive domestic violence law was instituted in 1989, violence claims “did not decline or level off,” according to Professor Foster.

Answer to Domestic Violence?

Domestic-abuse restraining orders came about because a certain number of abusers really do assault and batter their partners. Scores of studies have attempted to understand the problem and find practical solutions, but domestic-abuse restraining orders are a flawed solution that has made the problem worse.

First, they have identified the wrong culprit. Women commit abuse more than men do. The U.S. Centers for Disease Control and Prevention reports, “In nonreciprocally violent relationships, women were the perpetrators in more than 70 percent of the cases. Reciprocity was associated with more frequent violence among women, but not men.” Psychologist John Archer reviewed hundreds of studies and concluded, “Women were slightly more likely than men to use one or more acts of physical aggression and to use such acts more frequently.” While men are more often the victims of abuse, women are injured more often and more severely than men. Moreover, about two-thirds of the reported cases are minor, such as throwing a pillow.

Has anyone vilified Hillary Clinton for throwing household objects at Bill, or singer Amy Winehouse for using her husband as a “punch bag”? We are desensitized to violence against men. In domestic arrest situations, it is almost always the man who is arrested, even if he is the only one injured. None of this is to justify abuse by anyone, only to show the fallacy of focusing solely on the abuse of women. Such unequal application of the law has likely led to more trauma and abuse than it purports to prevent, as well as destroyed respect for the system among fair-minded persons.

Whenever lawmakers respond to political pressure, a bad law is the usual result. Law has the properly limited purpose of insuring restitution to victims of those who intrude on the person or property of others. It has never been preventative, as domestic-abuse restraining-order laws seek to be, nor should it be. If true abuse does occur — a relative or non-relative threatens to batter or kill you or actually does physically attack — you are already able to make a criminal complaint for assault (which is defined as a threat to batter) and battery. And a criminal restraining order will likely be set in place. These new restraining-order laws seek to prevent crime by identifying persons who may commit one, and stop it before it happens. However, this is entirely speculative, and cannot identify perpetrators with any reliability.

In our imperfect world, we settle for an imperfect system that uses fear of punishment, rather than preemption, as its primary deterrent, but look at the alternative. With unjust restraining-order laws, we are creating a legal system that victimizes large groups of innocent people. We need to develop a better system, before we completely lose control of the present one. Thomas Reed, Speaker of the House of Representatives in the late 19th century, said, “One of the greatest delusions in the world is the hope that the evils in this world are to be cured by legislation.” Domestic-abuse restraining-order laws are a vain and delusional attempt to do so, and we need to eliminate them.

Violence Against Women Act

Nothing illustrates the political tablet upon which domestic restraining orders are written better than the federal Violence Against Women Act of 1994, passed during the Clinton presidency. It took a bad system and made it worse by providing federal money to certain favored programs that foment more dissension between the sexes.

The act was designed to create a federal effort to address violence against women by providing uniform definitions of abuse and providing funds for victim advocates, women’s shelters, and counseling. It also instructs and enlists local police in the effort to combat domestic violence and make more arrests, and it coordinates interstate enforcement efforts of abuse-protection orders.

The act is discriminatory on its face, since it gives a political, legal, and financial advantage to women in family court matters. As the rantings of Judge Richard Russell in his judicial training seminar about restraining orders reveal, judges are certainly affected by the laws and the legal culture. Police almost always arrest men in any domestic altercation, even if the man is the only injured party.

Several new versions of the act have been passed in the intervening years. The website of the Family Violence Prevention Fund contains the following statement about the 2005 version of the act:

The Violence Against Women Act of 2005 contains groundbreaking new initiatives to help children exposed to violence, train health care providers to support victims of abuse, encourage men to teach the next generation that violence is wrong, and provide crisis services for victims of rape and sexual assault.

We used to have a much better program that was far more effective in preventing and treating violence against women. It was called the family.

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