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Expanding the Warrantless Arrest Exception to Dating Relationships

Elizabeth Barravecchia

Code Section Affected

Penal Code § 836 (amended).

AB 2003 (Shelly); 2000 STAT. Ch. 47

I. INTRODUCTION

A teenage boy appeared before a juvenile court judge in Santa Clara County on a charge of assault for pulling his girlfriend out of a car sunroof by her hair.¹ Had this incident not occurred in Santa Clara County, where the laws applying to juvenile domestic violence abusers are stricter than state laws,² the officers would not have had the authority to arrest the abuser, absent a warrant, because their relationship had not met the proper requirement under California law.³

There is currently no law in California requiring courts to treat juvenile abusers as adults.⁴ Thus, programs like the one in Santa Clara County that treat teen domestic violence and adult domestic violence the same, are a step toward remedying the problem of teenage domestic violence.⁵ Further, these measures encourage early intervention through youth education, stressing that domestic

1. See generally Michelle Guido, *County Tries to Break Cycle of Domestic Violence Early: Pioneering Justice System Gives Special Attention to Juveniles Who Batter*, SAN JOSE MERCURY NEWS, Feb. 25, 2000, at 1A (noting the success of Santa Clara County's juvenile court dedicated to domestic and family violence cases). This court was established in April 1999 and is the first of its kind in the nation. *Id.*

2. *Id.*

3. See CAL. PENAL CODE § 836(a)-(d) (West Supp. 2000) (listing the circumstances in which an officer may make an arrest without a warrant: "when [an] officer has probable cause to believe the person arrested has committed a felony in or not in the officer's presence; or when [an] officer has probable cause to believe [that] the person arrested has committed an assault or battery upon his or her current or former spouse, fiancée, a current or former co-habitant, a person with whom the respondent has a child, and a child of a party"); see also SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2003, at 4 (June 6, 2000) (explaining that the purpose for this bill is to help victims escape further injury and familiarize teenagers with the issues surrounding domestic violence).

4. Guido, *supra* note 1, at 11A.

5. See *id.* (quoting juvenile court Judge Eugene Hyman: "[p]eople have tried to differentiate teen violence from adult violence, but now that I've had some of the young survivors in front of me, I've seen that they are exactly like adult victims"); see also Letter from Gail Jones, Executive Director, Women Escaping a Violent Environment, to Assemblymember Kevin Shelley 1 (Mar. 15, 2000) (on file with the *McGeorge Law Review*) (establishing that domestic violence should be treated the same "regardless of the age of the perpetrator or the victim").

violence is a serious crime.⁶ Hopefully, early intervention will enlighten teens about the severity of domestic violence and dismantle the cycle of domestic abuse before it has a chance to begin.⁷

Unlike the girlfriend described above, many teenage women do not have legal options for protection from domestic violence, because their relationships do not fall within statutory language,⁸ and they do not live in a county like Santa Clara, with juvenile domestic violence laws.⁹ Domestic violence has increased: it is the leading cause of injury to women in the United States between the ages of fifteen and forty-four.¹⁰ This number is larger than the number of rapes, muggings, and automobile accidents combined.¹¹ In California, there are over 200,000 reports of domestic violence each year.¹²

In reaction to these dramatic numbers, the California Legislature amended certain statutes to include dating relationships in the definition of domestic violence.¹³ Chapter 47 continues this trend toward protecting California's women by adding dating relationships to the list of specified personal relationships justifying an arrest without a warrant.¹⁴ In turn, Chapter 47 creates consistency among all of California's domestic violence laws.¹⁵ However, in creating this consistency, as is the case with most warrantless arrests, there is a delicate balance between defending the victim and respecting the rights of the offender.¹⁶ In addition,

6. See Guido, *supra* note 1, at 11A (noting that the goal of Santa Clara County is to intervene earlier to break the cycle of domestic violence in a "coordinated community response" to abusers); see also Letter from Shannon Gilley, Community Outreach Program Manager, Sexual Assault & Domestic Violence Center, to Assemblymember Kevin Shelley 1 (Mar. 22, 2000) (on file with the *McGeorge Law Review*) (affirming that the importance of Chapter 47 is to inform youths of the seriousness of domestic violence).

7. *Supra* note 6 and accompanying text.

8. CAL. PENAL CODE § 836(d) (West Supp. 2000).

9. Guido, *supra* note 1, at 11A.

10. Memorandum from Kevin Shelley, Majority Leader, Assembly, California Legislature, to the California Senate 1 (June 28, 2000) (on file with the *McGeorge Law Review*) [hereinafter Shelley Memo].

11. *Id.*

12. See Letter from Assembly Majority Leader, Kevin Shelley, to Governor Gray Davis 1 (June 19, 2000) (on file with the *McGeorge Law Review*) (informing the Governor of California about the benefits of AB 2003 and urging the Governor to sign AB 2003 into law).

13. See CAL. FAM. CODE § 6211(c) (West 1994) (defining domestic violence as "abuse perpetrated against any of the following persons . . . a person with whom the respondent is having or has had a dating . . . relationship"); CAL. PENAL CODE § 243(f)(10) (West Supp. 2001) (defining a dating relationship as "frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement independent of financial considerations"); CAL. PENAL CODE § 13700(b) (West 2000) (defining domestic violence as "abuse committed against . . . a person with whom the suspect has had or is having a dating . . . relationship").

14. CAL. PENAL CODE § 836(d) (amended by Chapter 47).

15. CAL. FAM. CODE § 6211(c) (West 1994).

16. See William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 MO. L. REV. 771, 786-857 (1993) (examining the constitutional questions created by the extending enlargement of power to make warrantless arrests for misdemeanors).

the definition of dating relationship in Chapter 47 is unclear, creating some apprehension about the implementation of this measure.¹⁷

Chapter 47 provides that a peace officer may make a warrantless arrest of a person who commits an assault or battery upon a person with whom the suspect is currently having, or has previously had, a dating relationship.¹⁸ Thus, Chapter 47 creates another deviation from the general rule that a peace officer needs a warrant to arrest a person for a misdemeanor that was not committed in the officer's presence.¹⁹ This deviation is consistent with domestic violence laws in Santa Clara County, and it improves the protection available to California's women.

II. HISTORY OF CALIFORNIA'S DOMESTIC VIOLENCE LAWS

A. *Changing Police Policy in Situations of Domestic Violence*

Until the early 1990s, most states had a policy of not arresting the abuser in a domestic dispute.²⁰ For example, the 1975 training bulletin of the Oakland California police department described the role of the officer as a peacemaker, and not as an enforcer of the law.²¹ This policy could also be found during the 1970s in the Michigan and New York police departments.²²

This non-arrest strategy, often called the mediation approach, is justifiable.²³ In many battering situations, a victim who calls the police during a physical attack will retract her statements as soon as the police arrive.²⁴ The reasons why victims retract

17. See Part IV.B (discussing the *Oriola* case which turned on the definition of "dating relationship," and what the Legislature intended California's domestic violence laws to be).

18. CAL. PENAL CODE § 836(d) (amended by Chapter 47).

19. See 4 E.B. WITKIN, CALIFORNIA CRIMINAL LAW § 1928 (2d. ed. 1989) (stating that "[t]he right to arrest for a misdemeanor is generally declared to be dependent upon actual commission of the offense in the presence of the officer").

20. See Nancy James, *Domestic Violence: A History of Arrest Policies and a Survey of Modern Laws*, 28 FAM. L.Q. 509, 511-13 (1994) (describing how police have historically dealt with domestic violence in order to assist with the creation of modern arrest policies).

21. See Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 48 (1992) (using the Oakland Police Department to show how non-arrest policies in domestic violence incidents were implemented).

22. See *id.* at 49 (setting forth Michigan as an example of why police officers have not been trained properly to deal with domestic violence and stating that "[w]hile almost half of all Michigan police calls are for domestic disturbances, only three to five out of the 240 hours of police recruit training are devoted to the manner in which police should answer these calls").

23. See James, *supra* note 20, at 512 (proposing reasons for implementing non-arrest policies for police departments between 1970 and 1980).

24. See Eastside Domestic Violence Program, *Defining Domestic Violence*, available at <http://www.edvp.org/dvfacts.htm> (defining, at 8-10 (last visited Aug. 30, 2000) [hereinafter EDVP] (copy on file with the *McGeorge Law Review*) (stating that the reasons for a battered woman to stay in an abusive relationship are: fear of retaliation from the abuser if he is arrested; economic dependence on the batterer; isolation from the batterer, because he is her emotional support; low self-esteem; social stigma of admitting she is in an abusive relationship; religious and cultural beliefs about marriage; and lack of a safe shelter).

their statements range from fear, to financial dependence on, the abuser.²⁵ Even if the police arrest an abuser, a victim commonly will drop the charges, thus making it understandable for law enforcement officials to implement non-arrest policies for perpetrators of domestic violence.²⁶

In fact, arrests are almost never made when the police leave the decision of whether or not to arrest the abuser up to the victim; and when an arrest is made, it is usually because the abuser is threatening the officers.²⁷ Furthermore, the mediation approach often fails to effectively address the problem of abuse.²⁸ Mediation is often successful when two equal parties are trying to resolve a controversy through negotiation.²⁹ A history of abuse and fear defeats any hopes of two "equal" parties attempting to negotiate a fair resolution.³⁰

The ineffectiveness of the mediation approach allowed repeat performances of abuse in many households.³¹ Therefore, victims, in need of protection, looked to the courts.³² Victims and their families began filing wrongful death and failure-to-protect actions against police departments.³³ One of the first and major cases against the police was *Hartzler v. City of San Jose*,³⁴ which arose in California.³⁵ The California Court of Appeals held that San Jose's police department enjoyed absolute immunity, because there was no "special relationship" created between the victim, Ruth, and the police department.³⁶

25. *Id.*

26. James, *supra* note 20, at 512.

27. See Zorza, *supra* note 21, at 52 (citing Eve S. Buzawa and Carl B. Buzawa, *Domestic Violence: The Criminal Response* 33 (1990)).

28. Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2161-62 (1993).

29. *Id.*

30. See *id.* (explaining that the victim of domestic violence is a weak party and incapable of understanding her position in a mediation session; thus the mediation approach is an ineffective policy to control domestic violence).

31. See *Bureau of Justice Statistics: Preventing Domestic Violence Against Women*, available at <http://www.abanet.org/domviol/stats.html> (last visited Sept. 10, 2000) (copy on file with the *McGeorge Law Review*) (stating that the six months after an episode of domestic violence, thirty-two percent of battered women are abused again).

32. See *Hartzler v. City of San Jose*, 46 Cal. App. 3d 6, 8-11, 120 Cal. Rptr. 5, 6-7 (1975) (examining police conduct in a situation where the victim of domestic abuse was killed by her husband after repeatedly calling the police for help over a two year period of time).

33. *Id.*

34. *Id.*

35. See *id.* at 8, 120 Cal. Rptr. at 6 (explaining that between 1971 and 1972, Ruth Bunnell called the San Jose police department almost two dozen times to report violent abuse against her and her daughters by her husband, Mack Bunnell). However, during such time Bunnell was only arrested once for assault. *Id.* In September 1972, Ruth made a final call to the police for help because Bunnell had just called and said he was coming home to kill her. *Id.* In response, the dispatcher told Ruth to call back when he arrived. *Id.* Forty-five minutes later, the police responded to a call from Ruth's neighbor and upon arrival, the police found Ruth's body stabbed to death by Mack. *Id.*

36. See *id.* at 10, 120 Cal. Rptr. at 7 (reasoning that "[a]bsent an indication that the police had induced decedent's reliance on a promise, express or implied, that they would provide her with protection," then no obligation on the police department could be established).

In response to this decision, pressure was placed on the Legislature to protect battered women.³⁷ By the mid-80s, two thirds of the states had amended their laws to include domestic violence as a crime of battery or assault.³⁸ Today, most states allow an arrest without a warrant for domestic assault, if the arresting officer has probable cause to believe that an offense has occurred.³⁹ However, questions still swirl as to whether warrantless misdemeanor arrests are the most effective deterrent to domestic violence.⁴⁰

B. Existing Law

Under current California law, peace officers are authorized to make arrests without a warrant under the following circumstances: "(1) when the officer has probable cause to believe that the person to be arrested has committed a public offense in the officer's presence; (2) when the person arrested has committed a felony, although not in the officer's presence; (3) when the officer has probable cause to believe that the person to be arrested has committed a felony, whether or not a felony, in fact, has been committed."⁴¹

In addition, current law permits warrantless arrests for misdemeanors, whether or not committed in an officer's presence, when there is an alleged violation of a domestic violence protective order.⁴² There are also other very limited exceptions to the general rule that a peace officer needs a warrant to arrest a person for a misdemeanor that was not committed in the officer's presence.⁴³ In all of these

37. *Id.*

38. Joan Zorza, *Must We Stop Arresting Batterers?: Analysis and Policy Implications of New Police Domestic Violence Studies*, 28 NEW ENG. L. REV. 929, 936 (1994).

39. See James, *supra* note 20, at 516-20 (displaying to many states' statutes regarding policies and guidelines involving domestic violence).

40. See Joan Zorza, *Mandatory Arrest for Domestic Violence Why It May Prove the Best First Step in Curbing Repeat Abuse*, 10-Fall CRIM. JUST. 2 (1995) (basing this on one of the first scientifically controlled experiments, from early 1981 to mid-1982 set up "to test the effectiveness of arrest . . . in Minneapolis, Minnesota, where a comparison was made of recidivism rates for misdemeanor domestic violence cases among three types of police response: those abusers that police arrested, those they removed from the household, and those situations in which police acted only as mediators"). The experiment's results showed that the recidivism rate of abusers who were arrested was lowest. *Id.*

41. CAL. PENAL CODE § 836(a) (West Supp. 2001).

42. *Id.* § 836(c)(1) (West Supp. 2001) (authorizing an officer to make a warrantless arrest if the officer "is responding to a call alleging a violation of a domestic violence protective or restraining order").

43. See *id.* § 836(d) (West Supp. 2001) (establishing these other situations as the following: a person who commits an assault or battery upon his or her current or former spouse, fiancée, a current or former co-habitant, as defined, a person with whom the suspect currently is having, or has previously had, an engagement relationship, or upon the parent of his or her child, as defined, a peace officer may arrest the person without a warrant where both of the following circumstances apply: (1) The peace officer has reasonable cause to believe that the person to be arrested has committed the assault or battery, whether or not it has in fact been committed; (2) The peace officer makes the arrest as soon as probable cause arises to believe that the person to be arrested has committed the assault or battery, whether or not it has in fact been committed).

exceptional circumstances, a peace officer must have probable cause that an assault or battery has occurred before making a warrantless arrest.⁴⁴

For an arrest to be constitutional under the Fourth Amendment, there must be probable cause to believe that the person to be arrested committed a crime.⁴⁵ As defined by recent case law, probable cause is determined by evaluating the “totality of the circumstances.”⁴⁶ This standard creates a realistic, common-sense determination as to whether, given all the circumstances, there is a sound likelihood that a crime was committed.⁴⁷ According to the United States Supreme Court, probable cause exists when “the facts and circumstances within [the officer’s] knowledge and of which [the officer] had reasonably trustworthy information [was] sufficient to warrant a prudent man in believing that [the suspect] had committed or was committing an offense.”⁴⁸

The probable cause standard established by California courts is not altered by Chapter 47.⁴⁹ In fact, the changes to California law in Family Code section 6211 and Penal Code sections 243 and 13700, which include dating relationships as relationships protected within the definition of domestic violence, are codified by Chapter 47.⁵⁰ Therefore, Chapter 47 is a necessary gap-filler, so that all of California domestic abuse law is harmonized.⁵¹

III. CHAPTER 47

Chapter 47 is a simple amendment which adds a dating relationship to the list of specified personal relationships justifying an arrest without a warrant.⁵² It is

44. *Id.*

45. See 2 WAYNE R. LAFAYE, SEARCH & SEIZURE § 3.1(a) (3d ed. 1994) (examining how the United States Supreme Court has analyzed the warrantless arrest and the Fourth Amendment).

46. See *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985) (citing cases that apply the “totality of the circumstances” analysis); *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (reaffirming the “totality of the circumstances” analysis); *Schmerber v. California*, 384 U.S. 757, 767 (1966) (example of cases where “the question was whether the totality of the circumstances justified a particular sort of search or seizure”); *Ker v. California*, 374 U.S. 23, 33 (1963) (same).

47. *Gates*, 462 U.S. at 238.

48. *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

49. See CAL. PENAL CODE § 836(d) (amended by Chapter 47) (retaining probable cause as the standard for a police officer to decide whether the person to be arrested has committed the assault or battery).

50. See CAL. FAM. CODE § 6211(c) (West 1994) (defining domestic violence as “abuse perpetrated against any of the following persons . . . [a] person with whom the respondent is having or has had a dating . . . relationship”); CAL. PENAL CODE § 243(f)(10) (West Supp. 2001) (defining that a dating relationship as “frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement independent of financial considerations”); CAL. PENAL CODE § 13700(b) (West 2000) (maintaining that domestic violence is “abuse committed against . . . [a] person with whom the suspect has had or is having a dating . . . relationship”); CAL. PENAL CODE § 836(d) (amended by Chapter 47) (adding a dating relationship, as defined by Section 243 of the Penal Code, to the list of specified personal relationships justifying an arrest without a warrant).

51. Shelley Memo, *supra* note 10, at 2.

52. CAL. PENAL CODE § 836(d) (amended by Chapter 47) (providing that a “dating relationship, as defined in paragraph (10) of subdivision (f) of Section 243” of the Penal Code is added to the list of personal relationships justifying an arrest without a warrant in domestic violence situations).

necessary because domestic violence in dating relationships are not adequately addressed by current law.⁵³ For example, teenagers and homosexuals are not protected by current California domestic violence law, because the definition of relationships covered by California Penal Code section 836 was too narrow.⁵⁴ With the enactment of Chapter 47, victims of domestic abuse only need to be in a dating relationship with the abuser to have the abuser arrested without a warrant.⁵⁵ Because victims in violent dating relationships meet the necessary relationship definition in Chapter 47, more individuals are protected under California law.⁵⁶ Thus, all victims in dating relationships with their abuser have the blanket of the law to shield them from chronic abuse, regardless of the living status, child custody situation, or sexual orientation of the victim or abuser.⁵⁷

Moreover, protecting all Californians who are victims of domestic violence is necessary because the costs to society are so high.⁵⁸ For example, New York taxpayers paid at least forty-one million dollars for domestic violence arrests in 1989, not including expenses for incidents not resulting in arrests.⁵⁹ Also, more than 1.4 million victims of domestic abuse visit emergency rooms in America every year.⁶⁰ Thus, the fiscal effects of domestic violence impacts all Californians.

Chapter 47 gives officers the legal ability to justify an arrest of an abuser without ascertaining at the scene whether this couple's relationship meets the required definition.⁶¹ Now police only need probable cause that the victim is or was in a dating relationship with the abuser in order to arrest.⁶²

53. See *id.* § 836(d) (West Supp. 2001) (stating that the specific personal relationships justifying a warrantless arrest are his or her current or former spouse, a current or former co-habitant, a person with whom the respondent has a child, and a child of a party); see also American Psychol. Ass'n, *Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family*, available at <http://www.abanet.org/domviol/stats.html> (last visited Sept. 10, 2000) [hereinafter APA Report] (copy on file with the *McGeorge Law Review*) (maintaining that "violence against women occurs in 20% of dating couples).

54. CAL. PENAL CODE § 836(d) (West Supp. 2000).

55. *Id.* (amended by Chapter 47).

56. *Id.*

57. See *id.* (noting that "dating relationship" to the domestic violence laws in California increases the number of victims that the police are able to assist when called to a domestic dispute).

58. See Joan Zorza, *Women Battering: High Costs and the State of the Law*, 28 CLEARINGHOUSE REV. 383, 384-85 (1994) (examining the monetary impact of domestic abuse on society).

59. See *id.* (using New York as an example of how much domestic abuse incidents can cost the state if the perpetrators are not deterred from violent conduct).

60. *Id.* at 383.

61. CAL. PENAL CODE § 836(d) (amended by Chapter 47).

62. *Id.*

IV. ANALYSIS OF CHAPTER 47

One in three females will experience domestic violence by a boyfriend before they reach the age of eighteen.⁶³ This alarming statistic is coupled with the fact that “during the six months following an episode of domestic violence, 32% of battered women are victimized again.”⁶⁴ In addition, the risk of domestic homicide increases with every incident of domestic violence.⁶⁵ Based on these atrocious statistics, current legal actions for dating victims of domestic violence are not enough.⁶⁶

A. Will Arresting Batterers Reduce Domestic Violence?

“An arrest . . . is a serious matter for any person even when no prosecution follows or when an acquittal is obtained.”⁶⁷ This is true even if a person is arrested for a minor offense, like a misdemeanor.⁶⁸ The aftermath of an arrest can range from loss of current employment, to loss of future employment opportunities, to a risk of raising more suspicions with law enforcement officials.⁶⁹

In addition, emotional damage and public humiliation can stem from an arrest.⁷⁰ The arrestee is constrained, searched, photographed, fingerprinted, and forced into an unfamiliar place.⁷¹ Moreover, if an arrest occurs in the presence of family, colleagues, or friends, erasing the social stigma is difficult.⁷² Because of the negative implications surrounding an arrest, the United States Constitution provides safeguards,⁷³ like requiring an arrest warrant for the person to be arrested, and

63. See APA Report, *supra* note 53, at 1 (evaluating the effects of violence on the family, by the American Psychological Association for the Presidential Task Force). These statistics, along with many others, have been compiled by the American Bar Association’s Commission on Domestic Violence in order to resolve the problem of domestic violence. *Id.*

64. Bureau, *supra* note 31, at 5.

65. *Id.* at 12-13.

66. See Shelley Memo, *supra* note 10, at 1 (providing findings by the sponsor of AB 2003, California Alliance Against Domestic Violence, in order to answer questions about the bill for Governor Gray Davis).

67. *Foley v. Connelie*, 435 U.S. 291, 298 (1978).

68. See *United States v. Watson*, 423 U.S. 411, 428 (1976) (Powell, J., concurring) (“[a] search may cause only annoyance and temporary inconvenience to the law-abiding citizen . . . [a]n arrest, however, is a serious personal intrusion regardless of whether the person seized is guilty or innocent.”).

69. See Schroeder, *supra* note 16, at 797-98 (explaining how the consequences of an arrest are substantial to a person).

70. *Id.* at 799-800.

71. *Id.* at 799.

72. See *Gramenos v. Jewel Cos., Inc.*, 797 F.2d 432, 440 (7th Cir. 1986) (recognizing the “sheer embarrassment” of any arrest).

73. See U.S. CONST. amend. IV (stating that, “[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place . . . and the persons [to be searched] or things to be seized”).

allowing a neutral magistrate the opportunity to evaluate the situation before the person's reputation is further tarnished.⁷⁴

However, there are very few exceptions to the general rule that an officer have a warrant to arrest a person when a misdemeanor was not committed in the officer's presence.⁷⁵ All of these exceptions involve the possibility of physical harm to others, with the exception of an arrest of a parolee thought to be in violation of parole.⁷⁶ The violating parolee exception is based on the fact that a parolee has fewer rights than an ordinary individual.⁷⁷ Therefore, because certain exceptions to the warrant requirement have been acceptable in the past, Chapter 47 is not an aberration to criminal law.⁷⁸

Arguably, officers can arrest abusers under assault or battery law in California; thus, Chapter 47 could be viewed as unnecessary.⁷⁹ However, most of these incidents of domestic abuse would be classified as misdemeanors. Thus, in order for an officer to arrest the perpetrators, the crime would have to be committed in the

74. See *Johnson v. United States*, 333 U.S. 10, 14 (1948) (evaluating the purpose of the Fourth Amendment by reasoning that without the magistrate's determination to issue a search warrant "the [Fourth] Amendment [would be reduced] to a nullity and leave the people's homes secure only in the discretion of police officers"); see also *Giordenello v. United States*, 357 U.S. 480, 485-86 (1958) (stating what is necessary to obtain a warrant under the Federal Rules of Criminal Procedure, which provide that "an arrest warrant shall be issued only upon a written and sworn complaint (1) setting forth the essential facts constituting the offense charged, and (2) showing that there is probable cause to believe that [such] an offense has been committed and that the defendant has committed it").

75. See CAL. PENAL CODE § 836(c)(1) (West Supp. 2001) (empowering an officer to make a warrantless arrest when reacting to a call alleging a violation of "a protective order, whether or not the violation has occurred in the presence of the officer, and the officer has reasonable cause to believe that the person against whom the order is issued has notice of the order and has committed an act in violation of the order"); *id.* § 836.1 (West Supp. 2001) (specifying that grounds for warrantless arrest exist when the person commits an assault or battery against firefighters or other emergency personnel); *id.* § 12031(a)(5)(A) (West 2000) (providing for the warrantless arrest of someone carrying a loaded firearm in a public place); *id.* § 243.5 (West 1999) (granting the warrantless arrest of someone who commits an assault on school property during school hours when school activities are taking place).

76. *Id.* § 836.3 (West 1985).

77. See CAL. PENAL CODE § 3056 (West 2000) (stating that, "[p]risoners on parole shall remain under the legal custody of the department and shall be subject at any time to be taken back within the inclosure of the prison"); see also SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2003, at 5-6 (June 6, 2000) (explaining the background to warrantless arrests by stating the exceptions to the general rule).

78. See CAL. PENAL CODE § 836(c)(1) (West Supp. 2001) (empowering an officer to make a warrantless arrest when reacting to a call alleging a violation of "a protective order, whether or not the violation has occurred in the presence of the officer, and the officer has reasonable cause to believe that the person against whom the order is issued has notice of the order and has committed an act in violation of the order"); *id.* § 836.1 (West Supp. 2001) (specifying that the grounds for warrantless arrest exist when the person commits an assault or battery against firefighters or other emergency personnel); *id.* § 12031(a)(5)(A) (West 2000) (granting the warrantless arrest of someone carrying a loaded firearm in a public place); *id.* § 243.5 (West 1999) (providing for the warrantless arrest of someone who commits an assault on school property during school hours when school activities are taking place).

79. See CAL. PENAL CODE § 240 (West 1999) (defining assault as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another"); *id.* § 242 (West 1999) (stating that a battery is "any willful and unlawful use of force or violence upon the person of another"); see also Letter from Wendy Taylor, Legislative Advocate, California Attorneys for Criminal Justice, to Assemblymember Kevin Shelley 1 (June 1, 2000) [hereinafter Taylor Letter] (on file with the *McGeorge Law Review*) (addressing the concern that dating relationships were not within the considered situations when the Legislature adopted the domestic violence laws).

officer's presence.⁸⁰ Unfortunately, most domestic abuse does not occur in an officer's presence.⁸¹ Therefore, if assault or battery is the only crime of an abuser, police will often only separate the victim from their abuser.⁸² This is comparable to the non-effective mediation approach to domestic violence.⁸³ Additionally, with the new ability to arrest an abuser without a warrant, police may "prevent further incidents of violence and [provide] a measure of safety to victims of domestic violence."⁸⁴ Therefore, for the safety of the victim in dating relationships, the police must have the ability to arrest the abuser, with probable cause but without a warrant.⁸⁵

The consequences of an arrest serve as the deterrent for authorizing warrantless arrests in domestic violence cases.⁸⁶ The effectiveness of arrests has been supported by various experiments conducted all over the United States.⁸⁷ Also, the United States Attorney General has formally recommended that arrest be the law enforcement standard in misdemeanor domestic violence cases.⁸⁸ However, current remedies do nothing to diminish the problem of domestic abuse for juveniles and homosexuals in dating relationships.⁸⁹

80. See CAL. PENAL CODE § 836(c)(1) (West Supp. 2001) (empowering an officer to make a warrantless arrest when reacting to a call alleging a violation of "a protective order, whether or not the violation has occurred in the presence of the officer, and the officer has reasonable cause to believe that the person against whom the order is issued has notice of the order and has committed an act in violation of the order"); *id.* § 836.1 (West Supp. 2001) (specifying that the grounds for warrantless arrest exist when the person commits an assault or battery against firefighters or other emergency personnel); *id.* § 12031(a)(5)(A) (West 2000) (granting the warrantless arrest of someone carrying a loaded firearm in a public place); *id.* § 243.5 (West 1999) (providing for the warrantless arrest of someone who commits an assault on school property during school hours when school activities are taking place).

81. See Florida Governor's Task Force on Domestic and Sexual Violence, Florida Mortality Review Project, at 3 (1997) (reporting that "only about one-seventh of all domestic assaults come to the attention of the police").

82. See *supra* Part II.A (discussing how the mediation policy adopted by police departments was not effective in dealing with domestic violence).

83. *Id.*

84. See Letter from Jackie Love-Baker, Coordinator of Legal Department, Young Women's Christian Association, to Barbra Biglieri, Staffmember, Assemblymember Kevin Shelley 1 (Apr. 6, 2000) (on file with the *McGeorge Law Review*) [hereinafter Love-Baker Letter] (compelling the California Legislature to vote in support of Chapter 47, because it fills the narrow gap in California's domestic violence laws).

85. See *id.* at 1 (explaining that safety for victims of domestic violence enhances the need for Chapter 47).

86. See Zorza, *supra* note 21, at 66 (finding that if arrest does not deter most unemployed abusers, arrest still deters the vast majority of all abusers).

87. See Machaela M. Hootor, Comment, *Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California*, 85 CAL. L. REV. 643, 655-61 (1997) (interpreting the studies of the effectiveness of arrest in Minneapolis, Milwaukee, Colorado Springs, Metro-Dade, and Charlotte). Some studies showed "that arrest may actually increase recidivism among unemployed abusers . . . [but] viewed properly, arrest is an action taken by the state that communicates to society that certain behavior will not be tolerated." *Id.* at 659.

88. See *id.* (indicating that, according to the victim reports, "suspects who were counseled had the highest rate of recidivism, while those who were arrested had the lowest").

89. See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2003, at 4 (expressing the need for Chapter 47 because it expands the warrantless arrest exception to dating relationships which is necessary to protect some underrepresented groups).

Therefore, Chapter 47, which prescribes warrantless arrests in dating relationships, reduces domestic abuse by tarnishing the abuser's reputation.⁹⁰ Furthermore, Chapter 47 maintains the safeguard of probable cause provided in the United State Constitution,⁹¹ required in all warrantless arrests.⁹² Therefore, Chapter 47 reduces domestic violence by threat of arrest while conserving the rights of the abuser by requiring probable cause.

Thus, Chapter 47 is essentially closing a loophole in California domestic violence law, which has allowed abusers in dating relationships to receive better treatment than abusers in marital relationships.⁹³

B. Is a "Dating Relationship" Really Defined in California Law?

A criticism of Chapter 47 is whether the term "dating relationship" clearly defines what a relationship must consist of before a misdemeanor assault or battery qualifies as domestic violence.⁹⁴ However, the dating relationship standard of Chapter 47 comes directly from the California Penal Code.⁹⁵ A dating relationship is described in the Penal Code as: "frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement independent of financial considerations."⁹⁶ According to the author of Chapter 47, California's other domestic violence law include abuse against persons in a dating relationship,⁹⁷

90. See *supra* Part IV.A (supporting conclusion with results from experiments that have been done which substantiate the claim that arrests effectively reduce the recidivism rate of domestic abuse).

91. CAL. PENAL CODE § 836(d) (as amended by Chapter 47); see U.S. CONST. amend. IV (stating that "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place and the persons or things to be seized").

92. See CAL. PENAL CODE § 836(c)(1) (West Supp. 2001) (empowering an officer to make a warrantless arrest when reacting to a call alleging a violation of "a protective order, whether or not the violation has occurred in the presence of the officer, and the officer has reasonable cause to believe that the person against whom the order is issued has notice of the order and has committed an act in violation of the order"); *id.* § 836.1 (West Supp. 2001) (specifying that the grounds for warrantless arrest exist when the person commits an assault or battery against firefighters or other emergency personnel); *id.* § 12031(a)(5)(A) (West 2000) (granting the warrantless arrest of someone carrying a loaded firearm in a public place); *id.* § 243.5 (West 1999) (providing for the warrantless arrest of someone who commits an assault on school property during school hours when school activities are taking place).

93. Shelley Memo, *supra* note 10, at 1.

94. See Taylor Letter, *supra* note 79, at 1 (stating concern for Chapter 47 because "[i]t is unclear how intimate the relationship has to be and for how long the people had to have 'dated' . . . [to] justify an arrest without a warrant").

95. See CAL. PENAL CODE § 836(d) (amended by Chapter 47) (adding a dating relationships, defined by Section 243 of the Penal Code, to the list of specified personal relationships justifying an arrest without a warrant).

96. *Id.* § 243(f)(10) (West Supp. 2001).

97. See Shelley Memo, *supra* note 10, at 1 (stating that "[d]omestic violence is currently defined to include abuse perpetrated against a person or persons in a dating relationship").

so the addition of a dating relationship to Penal Code section 836(d) under Chapter 47 is consistent with all of California's domestic abuse laws.⁹⁸

However, the categorization of dating relationship in all of California's domestic violence laws is creating definitional inconsistencies in California's courts.⁹⁹ Recently, an Appellate Court in San Francisco heard *Oriola v. Thaler*, which concerned a woman who was trying to get a restraining order against a man under California's Domestic Violence Prevention Act (DVPA).¹⁰⁰ Although this case did not involve arrest warrants, it did involve the task of defining a "dating relationship."¹⁰¹ The *Oriola* court held that the parties did not have enough of an intimate relationship under California law to be defined as a "dating relationship."¹⁰² This determination is critical under this measure, because Chapter 47 turns on the application of dating relationships, as defined by the California Penal Code.¹⁰³ However, *Oriola* might not be applicable to the discussion of Chapter 47, because the court did not consider Penal Code section 243 when rendering its decision.¹⁰⁴ On the other hand, a concern for supporters of Chapter 47 might be that, if courts are not going to consider the definition of a dating relationship in Penal Code section 243, then the effectiveness of Chapter 47 lies with the courts interpretation of what encompasses a dating relationship.¹⁰⁵

In *Oriola*, the court held that there was not enough of an intimate relationship between the parties, because the appellant stated at the beginning that she did not

98. See CAL. FAM. CODE § 6211(c) (West 1994) (defining domestic violence as "abuse perpetrated against any of the following persons . . . [a] person with whom the respondent is having or has had a dating . . . relationship"); CAL. PENAL CODE § 243(f)(10) (West Supp. 2001) (defining a dating relationship as "frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement independent of financial considerations"); CAL. PENAL CODE § 13700(b) (West 2000) (defining domestic violence as "abuse committed against . . . [a] person with whom the suspect has had or is having a dating . . . relationship").

99. See *Oriola v. Thaler*, 84 Cal. App. 4th 397, 100 Cal. Rptr. 2d 822 (2000) (inquiring into what is necessary to constitute a dating relationship in California law).

100. *Id.*; CAL. FAM. CODE § 6200 (West 1994).

101. See *Oriola*, 84 Cal. App. 4th at 400, 100 Cal. Rptr. 2d at 824 (stating that "[t]he sole legal question this case presents, which is considerably more difficult than it may first appear, is the meaning of the phrase 'dating relationship' as used in the DVPA [Domestic Violence Prevention Act]").

102. *Id.* at 412, 100 Cal. Rptr. 2d at 833.

103. CAL. PENAL CODE § 836(d) (amended by Chapter 47); *id.* § 243(f)(10) (West Supp. 2001).

104. See generally *Oriola*, 84 Cal. App. 4th at 399-415, 100 Cal. Rptr. 2d at 824-35 (failing to make any mention of California Penal Code Section 243 in its analysis of the definition of dating relationship in California's domestic violence laws); Interview with J. Clark Kelso, Director of the Governmental Affairs Program and the Capital Center for Government Law and Policy and Professor of Law, in Sacramento, Cal. (Mar. 2, 2001) (explaining that the definitions in Penal Code § 243 technically only apply to that section; however, Chapter 47 is applying the dating relationship definition in Penal Code § 243(f) to Penal Code § 836(d); thus, the Legislature's intent is to have Penal Code § 243(f)(10) definition of dating relationship apply in other situations of domestic violence). In addition, Penal Code section 836 defines a current or former cohabitant pursuant to Family Code § 6209. See CAL. PENAL CODE § 836(d) (West Supp. 2000). Also Penal Code § 836 authorizes a peace officer to arrest in situations as defined by acts within the Family Code, including the Domestic Violence Prevention Act. CAL. PENAL CODE §§ 836(c)-(d) (West Supp. 2001).

105. See *Oriola*, 84 Cal. App. 4th at 409-10, 100 Cal. Rptr. 2d at 831 (stating that if the Legislature fails to define the nature of the dating relationship that it had in mind then it "creates a daunting judicial problem").

want a romantic relationship with the respondent.¹⁰⁶ What was essential to the court's decision was that the law did not provide a definition of what forms a dating relationship.¹⁰⁷ The court could not find the Legislative intent behind "dating relationship" in the law, because it did not look to Penal Code section 243.¹⁰⁸ In fact, the court looked to a dictionary in order to find the definition of dating relationships instead of looking to the Penal Code.¹⁰⁹ Therefore, the *Oriola* court held that the appellant and respondent did not have a dating relationship,¹¹⁰ as the court did not compare their relationship to the definition of a dating relationship under Penal Code section 243.¹¹¹

It is interesting that the *Oriola* decision turned on what exactly a dating relationship means and failed to use the definition in California law when it made its decision.¹¹² Although the definition of "dating relationship" in the Penal Code is not in the Family Code where the cause of action arose, one would hope that the court would exhaust California law for the definition of "dating relationship" before it looked to the Oxford Dictionary and other State definitions for clarification.¹¹³ *Oriola* proves that Chapter 47 is needed, because by adding the dating relationship defined in Penal Code section 243, to California's domestic violence laws, the Legislature provides a clear definition of dating relationships, encouraging the courts to be consistent when ruling on what is considered a "dating relationship" under California law.

V. CONCLUSION

A clear demonstration of intolerance for domestic violence in California is to provide that perpetrators who abuse their partners will be arrested.¹¹⁴ However, the rights of the accused must also be preserved.¹¹⁵ Thus, Chapter 47 provides such a

106. *Id.* at 412, 100 Cal. Rptr. 2d at 833.

107. *See id.* at 407, 100 Cal. Rptr. 2d at 829 (stating specifically that "[t]he DVPA does not define the phrase 'dating or engagement relationship' and the meaning of a 'dating relationship' is not clear enough to delineate the particular meaning the Legislature had in mind when it used these words").

108. *Id.* at 399-415, 100 Cal. Rptr. 2d at 824-35.

109. *See id.* at 407 n.6, 100 Cal. Rptr. 2d at 829 n.6 (emphasizing that "[s]tandard dictionaries do not define a 'dating relationship,' and the pertinent definition of a 'date'—'an appointment or engagement at a particular time, freq. with a person of the opposite sex, a social activity engaged in by two persons of opposite sex (Oxford English Dict. 2d ed. CD-ROM 1994)—is not particularly useful").

110. *See Oriola*, 84 Cal. App. 4th at 412, 100 Cal. Rptr. 2d at 833 (holding that this relationship was not classified as a dating relationship because at the outset the appellate stated that she did not want a romantic relationship with the respondent).

111. CAL. PENAL CODE § 243(f)(10) (West Supp. 2001).

112. *Oriola*, 84 Cal. App. 4th at 409-10, 100 Cal. Rptr. 2d at 830-31; CAL. FAM. CODE § 6200 (West 1994 & Supp. 2001).

113. *See id.* at 404-13, 100 Cal. Rptr. 2d at 827-33 (examining the definition of date, dating, domestic, and romantic in the Family Code, in the Oxford Dictionary, and in Illinois, Michigan, Tennessee, and Washington state statutes).

114. *Supra* Part IV.A.

115. *Id.*

delicate balance because it does not change the already well established standard of probable cause. Rather, it only adds a dating relationship to the statute's defined relationships.¹¹⁶ This change serves to aid victims of abuse in dating relationships by providing them with legal remedies that were previously unavailable. Chapter 47 also addresses the problem that courts have when deciding a case that hinges on the definition of a dating relationship by creating consistency and clarification in California domestic violence law.¹¹⁷

116. CAL. PENAL CODE § 836(d) (amended by Chapter 47).

117. See Shelley Memo, *supra* note 10, at 1 (explaining that "AB 2003 makes the law consistent with other domestic violence laws, which include a dating relationship as a relationship where domestic violence can occur"); Love-Baker Letter, *supra* note 84, at 1 (stating that, "[Chapter 47] would expand the scope of warrant-less arrest provisions to reflect the scope of other domestic violence legislation").