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Child Support Enforcement: Easy and Inexpensive Access for Custodial Parents, But Is It the Answer?

Crystal Cunningham

I. INTRODUCTION

With an increase in the number of single mothers on welfare, the states and the federal government have spent billions of dollars trying to get “deadbeat dads”¹ to pay their child support bills.² However, these massive expenditures have been unable to cure the burgeoning child support delinquency crisis.³ Perhaps this lack of success may be contributed to the strong compulsion to coerce “deadbeat dads” into paying the money without ever having considered the reasons for their delinquency.

With all of the emphasis that is placed on collecting money, the noncustodial parent’s right to visitation gets lost in the process. The government maintains a system that helps custodial parents collect child support and makes it difficult for noncustodial parents to get their visitation rights enforced.⁴ With such an inequitable system, it is little wonder why the system is so unsuccessful at getting fathers to pay child support.

In California, there are 2.1 million pending child support petitions.⁵ This is double the number that was pending five years ago.⁶ It takes \$400 million annually in federal and state funds to prosecute these deadbeat dads.⁷ Yet, California manages to collect an average of only \$380 a year per family.⁸

When the noncustodial parent, who is usually the father,⁹ fails to pay, the custodial parent often turns to the welfare system to provide support, and thus becomes a burden on taxpayers.¹⁰ Should a father meet his support obligations, the likelihood

1. The term “deadbeat dads,” as used in this Legislative Note, refers to noncustodial parents who do not pay child support—moms or dads.

2. Harry B. O’Donnell IV, *Title I of the Family Support Act of 1988—The Quest for Effective National Child Support Enforcement Continues*, 29 J. FAM. L. 149, 152 (1990).

3. See *infra* notes 5-8 (detailing the child support delinquency problem).

4. See *infra* notes 48-54 and accompanying text (discussing the inadequacies of the remedies that may be available for enforcement of visitation).

5. Dick Goldberg, *Child Support Petitions Weigh Heavily on Judicial System*, DAILY RECORDER (Sacramento, Cal.), Dec. 16, 1996, at 1.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. O’Donnell, *supra* note 2, at 152.

that the mother will need to turn to the welfare system is drastically reduced.¹¹ Only ten percent of all custodial parents receiving welfare also receive financial support from the noncustodial parent.¹²

With an increase in the divorce rate, unsuccessful child support collection, and more custodial mothers on welfare, child support delinquency drew national attention.¹³ A study done in 1971, focusing attention on the inadequacy of the system, motivated Congress to take action to improve child support collection, and thus reduce the federal costs of the AFDC program.¹⁴ Congress established a system with guidelines that were required to be utilized in each state's mandatory plan for collection of child support.¹⁵ It linked the child support system to federal assistance for state AFDC programs.¹⁶ The states were coerced into compliance by the threat of AFDC funding loss.¹⁷ In 1975, Congress added Title IV-D to the Social Security Act.¹⁸ The new law requires every state to provide child support enforcement services to recipients of AFDC at no charge.¹⁹ In addition, the law limits the amount that the states may charge to assist nonwelfare families in child support collections to only a nominal fee.²⁰ The federal government committed resources to pay the bulk of the estimated cost of running the programs.²¹

The California Legislature designed Chapter 957 to establish and enforce Title IV-D child support orders quickly and efficiently, and to provide education, information, and assistance to parents with child support issues.²² The legislature intended to create this program to alleviate high costs imposed on parents by simplifying the method used so that parents do not need the assistance of counsel.²³

Chapter 957 requires that all actions for an order to establish, modify, or enforce child or spousal support, including actions to establish paternity, be referred to a

11. See Eric Pianin, *GAO Calls HHS's Child Support Enforcement Office Ineffective*, WASH. POST, July 21, 1994, at A29 (stating that the U.S. Department of Health and Human Services estimates that a substantial increase in child support collections could reduce AFDC payments by 25%).

12. Mark J. Connor, *Resolving Child Support Issues Beyond the Scope of AR 608-99*, 132 MIL. L. REV. 67, 67 (1991); see Goldberg, *supra* note 5 (stating that in California, about 80% of the child support petitioners are on public assistance).

13. O'Donnell, *supra* note 2, at 152.

14. *Id.*

15. Social Services Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337, 2354-55 (1975).

16. See *id.* (stating that states failing to meet the requirements could lose five percent of their federal AFDC funding).

17. *Id.*; see *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 512 (1990) (concluding that legislation imposes binding obligations on states when federal funding is expressly conditioned on compliance with it).

18. Social Services Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337 (1975).

19. *Id.*

20. *Id.*

21. *Id.*

22. CAL. FAM. CODE § 4250 (enacted by Chapter 957).

23. *Id.* § 3680 (enacted by Chapter 957).

special child support commissioner for hearing.²⁴ The commissioner acts as a temporary judge unless an objection is made by the district attorney or one of the parties.²⁵ The Judicial Council is required to adopt rules of court and forms to simplify the method to modify support orders, for use by parents who are not represented by counsel.²⁶ Chapter 957 further mandates each superior court to maintain an office of the family law facilitator, to be staffed, at a minimum, by an attorney.²⁷ Family law facilitators will provide services, at no charge, to parties.²⁸ These services include providing educational materials to parents concerning the process of establishing, modifying, and enforcing child and spousal support in the courts; distributing applicable court forms; and providing assistance in completing these court forms.²⁹

Existing law specifies that in any action brought by the district attorney for child support, the action may be prosecuted in the name of the county on behalf of the child or parent, and the parent is not a necessary party to the action.³⁰ In such an action, joinder of actions or cross-complaints are prohibited.³¹ Therefore, the issues are limited to the questions of child support and paternity. Chapter 957 allows for joinder of other actions.³² After a support order has been entered in such an action, the parent who has requested or is receiving support enforcement will become a party to the action for the purposes of child support, custody, and visitation.³³

24. *Id.* § 4251(a) (enacted by Chapter 957); *see* 1996 Cal. Legis. Serv. ch. 957, sec. 3, at 4543 (repealing CAL. CIV. PROC. CODE § 640.1) (requiring that applications filed to establish or enforce child support be referred for hearing to a commissioner or referee).

25. *See* CAL. FAM. CODE § 4251(b) (enacted by Chapter 957) (providing that if any party objects to the commissioner acting as a temporary judge, the commissioner may hear the matter and make findings of fact and a recommended order); *id.* § 4251(d) (enacted by Chapter 957) (empowering the commissioner to do any of the following: review and determine *ex parte* applications for orders and writs; take testimony; establish a record; evaluate evidence; make recommendations or decisions; enter default orders and judgments; join issues concerning custody, visitation, and protective orders; and after joinder, either refer the parents for mediation of disputed custody or visitation issues or refer these contested issues to a judge or to another commissioner for hearing).

26. *Id.* § 3680(h) (enacted by Chapter 957).

27. *Id.* § 10002 (enacted by Chapter 957).

28. *Id.* § 10004 (enacted by Chapter 957).

29. *See id.* § 10005 (enacted by Chapter 957) (allowing the superior court to delegate additional duties to the family law facilitator, which may include the following: meeting with litigants to mediate child support issues, drafting stipulations to include all issues agreed to by the parties, and preparing formal orders consistent with the court's announced order in cases where both parties are unrepresented).

30. CAL. WELF. & INST. CODE § 11350.1(a) (amended by Chapter 957).

31. *Id.*

32. *Id.* § 11350.1(e)(3) (amended by Chapter 957).

33. *Id.*

Existing law specifies procedures for the enforcement of support orders,³⁴ including provisions for wage garnishment.³⁵ Chapter 957 increases the assets from which support arrearages may be taken by authorizing the issuance of a warrant to levy on and sell vehicles or aircraft for the collection of support arrearages.³⁶

II. ANALYSIS OF CHAPTERS 957 AND 565

The statistics lend strong support to the proposition that child support is a burgeoning problem that tougher enforcement does not seem to alleviate. Despite federal expenditures of \$1.5 billion in subsidies to state IV-D programs between 1980 and 1987, there is no perceptible difference in the percentage of collections successfully pursued.³⁷ Perhaps this is because the enforcement is aimed at the symptom rather than the cure.

Most divorces are bitter battles with the children at the heart of the dissension.³⁸ When parties are unable to resolve their disputes, the courts impose custody and visitation orders upon them.³⁹ As a means of punishment, the custodial parent, usually the mother, deprives the noncustodial parent of his visitation rights.⁴⁰ This leaves the noncustodial parent with a child support bill and no relationship with his children.

Most court systems are so weighed down by the large expenditures required for the enforcement of child support that little money is left for the enforcement of visitation and custody rights.⁴¹ Consequently, parents who are denied rightful visitation are basically limited to two options: live with it or hire an attorney and go to court.⁴² This inequality of enforcement of child support and visitation rights leads to frustration and noncustodial parents who do not pay child support.⁴³

34. See CAL. FAM. CODE § 4506.3 (amended by Chapter 957) (detailing that the forms created by the Judicial Council shall provide notice directing payment of support to the district attorney); see also CAL. CIV. PROC. CODE § 695.221 (amended by Chapter 565) (providing for the distribution of collected support between multiple families who are owed that support).

35. CAL. WELF. & INST. CODE § 11350.5 (amended by Chapter 565); see *id.* (providing that child support payments shall be withheld from the unemployment compensation benefits or unemployment disability benefits of individuals with unmet support obligations).

36. *Id.* § 11350.7 (enacted by Chapter 957).

37. O'Donnell, *supra* note 2, at 155.

38. Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687, 690 (1985).

39. *Id.* at 694.

40. See *id.* at 692 (commenting that custodial mothers hold the child's need for a paternal relationship hostage for child support payments).

41. Mary Stephens, *Ohio Lags Behind Michigan in Enforcement of Visitation Rights*, COLUMBUS DISPATCH, Aug. 14, 1994, at 2D.

42. *Id.*

43. See Bill Bennett, Jack Kemp and Vin Weber Miss Pro-Family Bandwagon, WASH. TIMES, May 14, 1994, at D2 (asserting that the child support system is not working because there is too much emphasis put on money and not enough on the child's need for two parents); *id.* (providing Iowa as an example: a federal visitation grant showed that child support payments were substantially higher when visitation counseling was available).

Judith Seltzer, a noted psychologist, has conducted extensive research on the link between visitation and child support payments.⁴⁴ She opined that noncustodial parents pay more child support when they are allowed frequent visitation.⁴⁵ She bases this conclusion on the fact that visitation provides the noncustodial parent with knowledge about the child's material needs.⁴⁶

Advocacy groups representing custodial parents argue that denial of visitation should have no impact on payment of child support because they are separate issues.⁴⁷ They may find equity in this argument by pointing out that there are means of recovery for noncustodial parents when custodial parents have frustrated visitation.⁴⁸ A noncustodial parent can obtain: an order of contempt, an order suspending or reducing spousal support, or an order modifying custody rights.⁴⁹ In theory, these seem to be viable remedies for noncustodial parents who are prevented from exercising their visitation rights. However, each of them have limitations.

Even though an order of contempt is the most common remedy used to enforce violations of visitation orders, it has significant problems that prevent it from being an effective remedy in many cases.⁵⁰ Courts are often unwilling to jail custodial parents for contempt, and when they do, the custodial parent can avoid jail by simply complying with the order.⁵¹ With little deterrence in this enforcement system, noncustodial parents often complain that custodial parents continually repeat the offense.⁵²

The remedy of suspending or reducing spousal support is limited to the few states that provide for such a remedy.⁵³ Moreover, like an order modifying custody rights, the noncustodial parent bears the financial burden of hiring an attorney and going to court.⁵⁴ Therefore, the financial burden that the system places on the noncustodial parent is a major deterrent for parents who wish to exercise their rights to see their children. This is in sharp contrast to the free enforcement of child support provided to custodial parents.⁵⁵

A number of states have made efforts to link the enforcement of child support and visitation rights together by allowing arrears to be suspended or canceled if a

44. See Greg Geisman, Note, *Strengthening the Weak Link in the Family Law Chain: Child Support and Visitation as Complementary Activities*, 38 SAN DIEGO L. REV. 568, 572 n.30 (1993) (citing Judith Seltzer, *Family Ties After Divorce: The Relationship Between Visiting and Paying Child Support*, 51 J. MARRIAGE & FAM. 1013, 1027 (1989)).

45. *Id.*

46. *Id.* at 572.

47. *Id.* at 572 n.33.

48. See *In re Marriage of Ciganovich*, 61 Cal. App. 3d 289, 293, 132 Cal. Rptr. 261, 263-64 (1976).

49. *Id.*

50. Geisman, *supra* note 44, at 597-98 n.202.

51. *Id.*

52. *Id.* at 597.

53. See *infra* note 56 (using Florida as an example of a state allowing for the suspension of alimony).

54. See Schepard, *supra* note 38, at 692, 694.

55. See *id.* at 694.

custodial parent interferes with visitation rights.⁵⁶ In California, the existence or enforcement of a duty of child support owed by a noncustodial parent is *not* affected by a failure or refusal to implement, or interference with, any custodial rights or visitation granted by a court to a noncustodial parent.⁵⁷

In *Damico v. Damico*,⁵⁸ the California Supreme Court determined that there was no legislative intent to include concealment within the meaning of "interference" as used in these statutes.⁵⁹ Accordingly, noncustodial parents in cases involving concealment are provided more protection than if the custodial parent merely *interfered* with the noncustodial parent's visitation rights. The court offered several reasons why a child-concealing parent should not be able to collect child support arrearages. First, allowing a concealing parent to seek arrearages after the child reaches the age of majority creates a windfall to the concealing parent and provides incentive for parents to use concealment as a custody tool.⁶⁰ Second, the court noted that visitation rights equally benefit the child as well as the parent.⁶¹ Accordingly, the court believed concealing a child severs the parent-child relationship and thus is not in the best interests of the child.⁶²

These justifications support allowing arrears to be suspended or canceled for *interference* with visitation rights by a custodial parent. Allowing a custodial parent who *interferes* with visitation to collect child support similarly creates a windfall to the interfering parent. In California, the court system is so weighed down by the backlog of child support cases that most cases remain open until children reach adulthood.⁶³ Thus, the parent would not use the arrearages for the child's food and clothing.

Allowing a custodial parent who interferes with the noncustodial parent's visitation rights to collect child support also encourages manipulation by using interference as a custody tool. Interference, like concealment, is not in the best interest of the child because it punishes the child rather than the wrongdoing parent.

56. See, e.g., N.Y. DOM. REL. LAW § 241 (McKinney 1986 & Supp. 1997). But see, e.g., FLA. STAT. ANN. § 61.13 (West 1985 & Supp. 1997) (providing that when a custodial parent refuses to honor a noncustodial parent's visitation rights, the noncustodial parent shall not fail to pay any ordered child support, but allowing for the suspension or cancellation of alimony payments); MASS. GEN. LAWS ANN. ch. 209C, § 9(7)(d) (West 1987) (disallowing a noncustodial parent to use a custodial parent's interference with custody rights as a defense for failing to pay child support).

57. CAL. FAM. CODE §§ 3556, 4845 (West 1994).

58. 7 Cal. 4th 673, 872 P.2d 126, 29 Cal. Rptr. 2d 787 (1994).

59. *Damico*, 7 Cal. 4th at 679, 872 P.2d at 129, 29 Cal. Rptr. 2d at 790.

60. *Id.* at 680, 872 P.2d at 129, 29 Cal. Rptr. 2d at 790.

61. *Id.*

62. *Id.* But see *Funk v. Funk*, 545 A.2d 326, 332 (Pa. Super. 1988) (observing that the termination, suspension, or reduction of child support is against the best interests of the child because it punishes the child rather than the wrongdoing parent).

63. Goldberg, *supra* note 5, at 1.

III. A SOLUTION TO THE PROBLEM

Michigan, the state with the best child support compliance rate in the nation, has adopted a program that strives to provide equality between the custodial and non-custodial parents' rights.⁶⁴ This "Friend of the Court" Act⁶⁵ began as a pilot project funded by the federal government.⁶⁶ It was designed to reduce the financial cost of providing public assistance funds for the care of children by enumerating specific procedures to handle visitation complaints and provide vigorous enforcement.⁶⁷ The program is unique because it is responsible for enforcing all child custody and visitation orders, as well as support orders.⁶⁸

The fact that visitation orders are enforced with the same intensity as the child support orders contributes to the success of the program.⁶⁹ If a custodial parent deprives the noncustodial parent of visitation rights, the Friend of the Court petitions the court for modification of the visitation order.⁷⁰ The remedies that noncustodial parents are entitled to for a violation of a custody or visitation order include make-up visitation, contempt of court, and modification of the orders.⁷¹

California adopted a "Friend of the Court" act similar to that of Michigan.⁷² However, the program was contingent on federal funding that was vetoed by the President.⁷³ Therefore, the act has virtually no utility.

IV. CONCLUSION

The effort that California and other states are making to enforce child support for custodial mothers, thereby reducing the burden on taxpayers, is a step in the right direction. However, it is not sufficient to cure the delinquency problem. The only way to solve it is to target the heart of the child support delinquency problem—a frustrated noncustodial parent who refuses to pay child support for a child he is not able to see.

64. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 506, at 2 (June 19, 1996).

65. MICH. COMP. LAWS ANN. §§ 552.501-552.535 (West 1988 & Supp. 1996).

66. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 506, at 2 (June 19, 1996).

67. See MICH. COMP. LAWS ANN. § 552.501(2) (West 1988); *id.* § 552.507 (authorizing the chief judge to designate as referee the friend of the court and giving the referee the power to hear all motions in a domestic relations matter, examine witnesses, and make a written report to the court containing a summary of testimony given, a statement of findings, and a recommended order); see also *Malicious Prosecution—Premature Claim and Delivery*, MICH. LAW. WKLY., Sept. 26, 1994, at 10 (providing an example of how vigorous enforcement is—a claim was brought against Friend of the Court officials by a support-owing father for failing to observe the 28-day post-judgment waiting period imposed by the Act, before selling his automobile).

68. MICH. COMP. LAWS ANN. § 552.501(2) (West 1988).

69. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 506, at 2 (June 19, 1996).

70. MICH. COMP. LAWS ANN. § 552.517(2) (West 1988 & Supp. 1996).

71. *Id.* § 552.641 (West 1988).

72. Compare CAL. FAM. CODE §§ 10100, 10101, 10102 (amended by Chapter 957) with MICH. COMP. LAWS ANN. §§ 552.501-552.535 (West 1988 & Supp. 1996).

73. See HR 4, 104th Cong. § 312 (1995).

With an annual expenditure of \$400 million and a collection rate that averages only \$380 a year per family, California may want to consider using its own money to fund the "Friend of the Court" act that has made Michigan the state with the best child support compliance rate in the nation.

APPENDIX

Code Sections Affected

Code of Civil Procedure §§ 689.010, 689.020, 689.030, 689.040, 689.050 (new), § 259 (amended), §§ 639.5, 640.1 (repealed); Family Code §§ 3680, 4250, 4251, 4252, 5246, 10000, 10001, 10002, 10003, 10004, 10005, 10006, 10007, 10008, 10009, 10010, 10011, 10012 (new), § 4506.3 (amended); Government Code § 70141 (amended); Welfare and Institutions Code §§ 11350.7, 11354, 11355, 11356 (new), §§ 11350.1, 11475.1, 11478.2 (amended).

AB 1058 (Speier); 1996 STAT. Ch. 957

Code of Civil Procedure § 695.221 (amended); Welfare and Institutions Code § 11350.5 (amended).

SB 1306 (Wright); 1996 STAT. Ch. 565

Fighting the Domestic Violence Battle

Julie Momjian

I. INTRODUCTION

There are between 2 and 4 million American women who are beaten by their husbands or boyfriends every year in this country.¹ Reports consistently show that domestic violence is the leading cause of injury to women, more than car accidents, muggings, and rapes combined.² Unfortunately, the cycle of abuse does not discriminate against the young. Children are also victims of domestic violence. A national study on domestic violence reveals that children are more likely to be beaten, by either parent, when the mother is a victim of domestic violence.³

After the destructive consequences of domestic violence were dramatized in the O.J. Simpson case, the issue of family violence persists in becoming an important matter of concern to Americans. California has enacted legislation in the past to help combat this ever growing dilemma.⁴ However, as the number of abuse victims increases, society's tolerance of abusive behavior decreases. Citizens desire that the legislature enact laws that will provide them with the ultimate level of protection, to feel protected in an environment where abuse runs rampant. California has responded

1. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 2224, at 2 (May 16, 1996); see SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 2224, at 5 (June 11, 1996) (stating that the Department of Justice reported 56,919 domestic violence arrests under Penal Code § 273.5 in 1994); Joan Zorza, *Mandatory Arrest for Domestic Violence: Why It May Prove the Best First Steps in Curbing Abuse*, 10 CRIM. JUST. 2, 2 (1995) (reporting that 3.9 million women are battered every year in the U.S.); John Burton, *State Needs a Policy on Spousal Abuse*, S.F. CHRON., July 13, 1994, at A21 (declaring that every 15 seconds, a woman is battered in the U.S.).

2. Melody K. Fuller & Janet L. Stansberry, *1994 Legislature Strengthens Domestic Violence Protective Orders*, 23 COLO. LAW. 2327, 2372 (1994); see Burton, *supra* note 1, at A21 (asserting that the U.S. Surgeon General has found that battering accounts for more than one-fifth of all hospital emergency room visits); *id.* (stating that domestic violence is also a cause of homelessness, which is demonstrated by the reports that reveal the following facts: for every two women admitted into a women's shelter, five must be turned away, and for every two children admitted, eight must be turned away).

3. See Howard A. Davidson, *Child Abuse and Domestic Violence: Legal Connections and Controversies*, 29 FAM. L.Q. 357, 357 (1995) (observing that approximately 70% of children who come to battered women shelters are abused or neglected).

4. See, e.g., CAL. FAM. CODE § 6250 (West Supp. 1997) (stating that a judicial officer may issue an ex parte emergency protective order if the officer has reasonable grounds to believe that either a person or a child is in immediate and present danger of domestic violence); *id.* § 6321 (West 1994) (declaring that a court may issue an ex parte order excluding a person from a dwelling if the court finds that physical or emotional harm would result); CAL. PENAL CODE § 273.5 (West Supp. 1997) (stating that persons who inflict corporal injury resulting in a traumatic condition upon a spouse, cohabitant, or person who is the mother or father of their child, will be guilty of a felony).

to this need by enacting several pieces of legislation aimed at strengthening domestic violence law in this state.⁵

II. RESTRAINING ORDERS AND THE MISDEMEANOR BATTERY PENALTY

California law protects victims of domestic violence⁶ by granting courts the power to issue restraining orders⁷ against abusive persons.⁸ These orders give victims the peace of mind they need to continue with their everyday lives without the threat of being harmed by their abuser. Thus, the primary goal of the restraining or protective order is not to punish past conduct, but to prevent future harm.

To ensure that abusers take orders of protection seriously, statutory law imposes a punishment of either a fine of not more than \$1000 dollars, imprisonment in a county jail for not more than one year, or both fine and imprisonment for the violation of domestic violence related restraining orders.⁹ Existing law further provides that those who violate any one of the specified civil court orders will be

5. 1996 Cal. Legis. Serv. ch. 1140, at 6334-35 (enacting CAL. FAM. CODE § 6380.5); *id.* (amending CAL. FAM. CODE § 6380, and CAL. PENAL CODE § 836); 1996 Cal. Legis. Serv. ch. 1139, at 6320-31 (amending CAL. FAMILY CODE § 6380, CAL. PENAL CODE § 273.6, CAL. WELF. & INST. CODE §§ 213.5, 302, 304, 332, 361, 362.1, 362.4, 16206, 16208 and enacting CAL. WELF. & INST. CODE § 218.5); 1996 Cal. Legis. Serv. ch. 1104, at 4659-61 (enacting CAL. PENAL CODE § 3053.2); 1996 Cal. Legis. Serv. ch. 904, at 4050-67 (amending CAL. FAM. CODE § 6320, and CAL. PENAL CODE §§ 136.2, 166, 243, 273.6).

6. The California Family Code defines "domestic violence" as follows:
abuse perpetrated against either a spouse or former spouse, a cohabitant or former cohabitant, a person with whom the respondent is having or has had a dating or engagement relationship, a person with whom the respondent has had a child, a child of a party or a child who is the subject of an action under the Uniform Parentage Act, and any other person related by blood to the respondent.
CAL. FAM. CODE § 6211 (West 1994).

7. *See id.* § 6218 (West 1994) (defining a "protective order" to include orders described in §§ 6320, 6321, or 6322 of the California Family Code).

8. *See, e.g., id.* § 6320 (amended by Chapter 904) (specifying certain behavior that a court may enjoin, including but not limited to, contacting, molesting, attacking, striking, stalking, threatening, and sexually assaulting another person); *id.* § 6321 (West 1994) (establishing that a court may issue an *ex parte* order excluding a party from the family dwelling if the party who will stay can show all of the following: (1) That they have a right under law to possession of the premises, (2) that the party to be excluded has threatened or assaulted the other party or any other person under the care and custody of the other party, and (3) that physical and emotional harm will otherwise result to the other party or to any other person under the care and custody of the other party); *id.* § 6322 (West 1994) (stating that a court may enjoin other specified behavior); CAL. PENAL CODE § 136.2(a) (amended by Chapter 904) (stating that if good cause is shown that harm to, or intimidation or dissuasion of, a victim or witness may occur or has occurred, a court can issue an order enjoining a party from the specified behavior listed in California Family Code § 6320).

9. CAL. PENAL CODE § 273.6(c)(1) (amended by Chapter 904); *see id.* (providing that this section applies to violations of court orders enjoining activities which include, but are not limited to: molesting; stalking; threatening; sexually assaulting; battering; destroying personal property; contacting, either directly or indirectly, by mail or otherwise; coming within a specified distance of; or disturbing the peace of the party or other named family or household members).

guilty of a misdemeanor and shall be fined \$5000, imprisoned in a county jail for not more than a year, or both.¹⁰

Chapter 904 expands the list of civil and criminal court orders that, if violated, carry an increased punishment.¹¹ Moreover, the legislation adds to the list of enjoinable activities under California Family Code § 6320 the activities of contacting the party, either directly or indirectly, by mail or otherwise, and coming within a specified distance of the party.¹²

Prior to Chapter 904, certain activities such as stalking, coming into contact directly or indirectly with the victim, coming within a specified distance of the victim, and destroying the property of the victim, were not punishable under either California Penal Code § 273.6 or § 166.¹³ Chapter 904 renders restraining orders that prohibit these specific types of activities enforceable by adding them to the list of activities that, if violated, are punishable under either Penal Code § 273.6 or Penal Code § 166.¹⁴ Thus, Chapter 904 guarantees a victim of domestic violence peace of mind in knowing that consequences will ensue if the abuser disregards a court order.

Chapter 904 plays yet another important role in the battle against domestic violence. Existing law establishes the punishment for a battery committed against a noncohabitating former spouse, fiancé, or person whom the abuser has dated or is dating, as either a fine of not more than \$2000 or imprisonment in county jail for not more than one year.¹⁵ Prior to the enactment of Chapter 904, the law imposed a reduced punishment on a batterer whose victim was an individual with whom the abuser had lived.¹⁶ This was because the law forced spouses and cohabitating victims

10. *Id.* § 166(c)(3)(A) (amended by Chapter 904); *see id.* (providing that this section applies to violations of court orders enjoining activities which include, but are not limited to: molesting; stalking; threatening; sexually assaulting; battering; destroying personal property; contacting, either directly or indirectly, by mail or otherwise; coming within a specified distance of; or disturbing the peace of the party or other named family or household members).

11. CAL. FAM. CODE § 6320 (amended by Chapter 904); *see* SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 2224, at 3 (June 11, 1996) (stating that Chapter 904 will add to the list of punishable orders under Penal Code §§ 273.6 and 166 stalking; telephoning; destroying personal property; contacting, either directly or indirectly; or coming within a specified distance of the party).

12. CAL. FAM. CODE § 6320 (amended by Chapter 904).

13. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 2224, at 3 (June 11, 1996).

14. CAL. PENAL CODE § 166(c)(3)(A) (amended by Chapter 904); *id.* § 273.6(c)(1) (amended by Chapter 904).

15. *Id.* § 243(e)(1) (amended by Chapter 904); *see id.* (providing that if probation is granted the court may require that as a condition to the probation, the abuser attend an abuser treatment program); *id.* § 243(e)(2) (amended by Chapter 904) (stating that conditions of probation for convicted abusers will include one or both of the following requirements: (1) That the defendant make payment to a battered women's shelter of up to \$5000 and/or (2) the defendant reimburse the victim for reasonable costs of counseling and other reasonable expenses that the courts decides are the direct result of the abuse to the victim).

16. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 2224, at 4 (June 11, 1996). *But see* CAL. PENAL CODE § 273.5(a) (West Supp. 1997) (stating that a person who wilfully inflicts corporal injury upon a spouse or cohabitant is guilty of a felony, punishable by imprisonment in a state prison for two, three, or four years, imprisonment in a county jail for not more than a year, or by a fine of up to \$6000); *id.* § 12022.7(d) (West Supp. 1997) (providing for a sentence enhancement of three, four, or five years for any person who inflicts

to seek prosecution of their batterers under the simple battery statute, which provides for a less severe punishment.¹⁷

Chapter 904 increases the level of punishment inflicted upon an abuser that cohabitate with the victim.¹⁸ Proponents of Chapter 904 assert that an abuser with whom the victim cohabitate should not be punished less severely than an abusive boyfriend who does not live with the victim.¹⁹ In fact, increased punishment is warranted because the potential for abuse is greater in situations where the abuser lives with the victim. Thus, common sense dictates that the law should afford at least the same level of punishment to all batterers in a domestic violence situation.

III. RECOGNITION OF OUT-OF-STATE PROTECTIVE ORDERS

As previously discussed, California law authorizes the issuance of various types of protective orders as a means of providing safety to victims of domestic violence.²⁰ Other states also have enacted similar statutes affording restraining order protection to those who are in need of safeguarding by the state.²¹ Unfortunately, a state's protective order only guarantees the safety of victims within that state's boundaries.²² However, most victims that finally find courage to leave their abusive environments often feel compelled to flee the state to find sanctuary from their abusers.²³ Thus, a victim that relocates out of state may be left vulnerable to abuse by the batterer in the

great bodily injury under circumstances involving domestic violence in the commission or attempted commission of a felony).

17. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 2224, at 4 (June 11, 1996); see CAL. PENAL CODE § 242 (West 1988) (defining "battery" as the unintentional and unlawful use of force on another); see also *id.* § 243(a) (West Supp. 1997) (stating that a battery is punishable by a fine not exceeding \$2000, or by imprisonment in a county jail not to exceed six months).

18. CAL. PENAL CODE § 243(e)(1) (amended by Chapter 904); see *id.* (specifying the punishment for a battery when the victim is either a: (1) Spouse, (2) person with whom the defendant is cohabitating, (3) person who is a parent of the defendant's child, (4) noncohabitating former spouse or fiancé, or (5) a person whom the defendant is dating, or has dated in the past); *id.* (providing that battery upon the aforementioned persons will result in a punishment of a fine of no more than \$2000, and/or imprisonment in county jail for no more than a year).

19. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 2224, at 4 (June 11, 1996). *But see id.* (arguing that existing law already provides for a harsher penalty in cases when a person commits battery on a spouse, cohabitant, or parent of one's child, and the battery results in any kind of corporal injury, thus extending penalties available under California Penal Code § 243(d), and concluding that the harsher penalty will do little to further deter the undesirable behavior).

20. See *supra* note 8 and accompanying text (describing the circumstances under which a court may issue a restraining order).

21. See, e.g., COLO. REV. STAT. ANN. § 14-4-102 (West Supp. 1996) (stating that a court has authority to provide temporary and permanent restraining orders to prevent domestic abuse); W. VA. CODE § 48-2A-6 (1996) (asserting that a court can issue a protective order directing the respondent to refrain from abusing the petitioner and/or the minor children).

22. Catherine F. Klein, *Full Faith and Credit: Interstate Enforcement of Protective Orders Under the Violence Against Women Act of 1994*, 29 FAM. L.Q. 253, 255 (1995).

23. See *id.* at 258 (stating that domestic violence protective orders should be designed to consider special needs of victims fleeing from their home states).

new state, until the victim petitions for a new order in that state.²⁴ Accordingly, when a state does not recognize out-of-state protective orders, the state limits its power to protect those victims who are forced to flee their attackers and only provides full protection to those victims who remain within the state's boundaries.²⁵

Chapter 1140 sets forth conditions under which out-of-state protective orders would be deemed valid in California.²⁶ It establishes that an out-of-state protective order will be given full faith and credit and treated as if it had been issued in California, after the order has been entered into the Domestic Violence Protective Order Registry.²⁷

California is among several states that recognize protective orders issued by sister states.²⁸ California requires that the holder of the order register it with the state before it becomes effective.²⁹ The registration requirement acts as an informative tool for officers in discovering the existence of particular protective orders.³⁰ Moreover, registration offers relief to law enforcement officers who have to assess the validity of orders on a domestic violence call.³¹ Thus, officers on a domestic violence call, before taking any action toward the offender, can verify that the restraining order held by the victim is valid simply by checking to see whether it is an order that has been registered with the Domestic Violence Protective Order Registry.

Although the registration requirement possesses some advantages, the disadvantages tend to undermine the entire purpose of full faith and credit statutes.

24. *Id.*

25. *Id.*

26. CAL. FAM. CODE § 6380.5 (enacted by Chapter 1140); *see id.* § 6380.5(a) (enacted by Chapter 1140) (stating that an out-of-state protective order issued by a state, tribal, or territorial court related to domestic or family violence shall be deemed valid if the issuing court had jurisdiction over the parties and matter under the law of the state, tribe, or territory); *id.* (declaring that a presumption of validity will be granted to a protective order which appears authentic on its face); *see also* 18 U.S.C.A. § 2265 (West 1996) (establishing that a protective order that is issued in a state where the court has jurisdiction over the parties and the subject matter shall be afforded full faith and credit where reasonable notice and opportunity to be heard is given to the person against whom the order is issued).

27. CAL. FAM. CODE § 6380(b) (amended by Chapter 1140); *see id.* (mandating that the Department of Justice be notified of the contents of the various domestic violence-related protective orders and temporary restraining orders immediately upon being issued); *id.* § 6380(e) (amended by Chapter 1140) (requiring the maintenance of the Domestic Violence Protective Order Registry); *id.* § 6380.5(c) (enacted by Chapter 1140); *see id.* § 6380.5(b) (enacted by Chapter 1140) (stating that a protective order issued by another state may be registered with the court, be entered into the Domestic Violence Protective Order Registry).

28. *See, e.g.*, KY. REV. STAT. ANN. § 426.955 (Banks-Baldwin 1996) (stating that a copy of any judgment of a foreign court may be filed in any jurisdiction of the state and treated as a judgment of a court of Kentucky); N.H. REV. STAT. ANN. § 173-B:11-b (1994) (asserting that any protective order issued by any other state shall be given full faith and credit throughout the state of New Hampshire); OR. REV. STAT. § 24.115 (1995) (stating that a foreign judgment shall be treated in the same manner as a judgment of the circuit court of Oregon); W. VA. CODE § 48-2A-3(e) (1996) (accorded full faith and credit to an out-of-state protective order if its terms are substantially similar to the terms contained in an order issued in West Virginia).

29. CAL. FAM. CODE § 6380.5(c) (enacted by Chapter 1140); *see id.* (stating that an out-of-state protective order will be enforced after it has been registered).

30. Klein, *supra* note 22, at 263.

31. *Id.*

Requiring registration leaves a victim vulnerable from the time the victim enters a new state to the time the requirement becomes apparent and the victim complies with it.³² Because the victims may lack access to legal assistance or may fear that going to court would reveal their place of refuge to their abusers, most victims on the run fail to immediately register their protective orders.³³ This creates a gap in the protection of the victim from the time of entry into a state until the time the victim complies with that state's registration statutes.

Mandatory registration, because it encompasses these disadvantages, should be replaced by a system of registration which ensures the protection of the victim immediately upon arrival in the new state. For instance, although New Hampshire law requests that victims holding out-of-state protective orders register them with the state, registration is not mandatory.³⁴ Thus, registration is not a prerequisite to recognition of the restraining order. Such a system introduces the benefits of registration to the system, without allowing for the decreased level of protection that mandatory registration creates.

Although the goals the legislature tried to achieve through the enactment of Chapter 1140 are commendable, establishing mandatory registration of out-of-state protective orders does little to help a vulnerable victim. In fact, this requirement could pose greater harm to the victim, for it gives the abuser an opportunity to locate the victim, which in turn places the victim in potential danger.

IV. WARRANTLESS ARRESTS UNDER DOMESTIC VIOLENCE PROTECTIVE ORDERS

Domestic violence situations may lead to an arrest depending on the severity of the abuse.³⁵ Ordinarily, an arrest must be made pursuant to a warrant based upon probable cause, or it is considered a violation of the constitutional prohibition against unreasonable searches and seizures.³⁶ However, California has carved out special exceptions to this rule which are set forth in California Penal Code § 836.³⁷ In 1993,

32. See *id.* at 258 (discussing how the Kentucky registration requirement leaves victims without protection until they have filed their order with the court).

33. *Id.*

34. *Id.* at 263; see N.H. REV. STAT. ANN. § 173-B:11-b (1994) (explaining that a peace officer may rely upon an order provided by any source and also on a statement that the order remains in effect).

35. Nancy James, *Domestic Violence: A History of Arrest Polices and a Survey of Modern Laws*, 28 FAM. L.Q. 509, 511 (1994). But see *Zorza, supra* note 1, at 2 (stating that traditionally, police were taught that domestic violence was a private matter, thus they either ignored domestic violence calls or delayed their response to them for several hours).

36. See U.S. CONST. amend. IV (guaranteeing the right of people to be free from unreasonable searches and seizures in their persons, houses, papers, and effects); see also CAL. CONST. art I, § 13 (incorporating the Fourth Amendment into the Fourteenth Amendment, thus making it applicable to the states).

37. CAL. PENAL CODE § 836 (amended by Chapter 1140); see *id.* § 836(a) (amended by Chapter 1140) (stating that an officer may arrest a person without a warrant in any of the following circumstances: (1) The officer has reasonable cause to believe that the person to be arrested has committed a public offense in the officer's presence; (2) the person arrested has committed a felony, although not in the officer's presence; or (3) the officer

California added violations of domestic violence protective orders as an exception to its warrant requirement.³⁸ This provision requires only that the arresting officer have reasonable cause to believe that the person against whom the restraining order has been issued knew of the existence of the order, but nevertheless, acted in violation of it.³⁹

The intent behind creating this exception focused on decreasing the frequency and severity of domestic violence.⁴⁰ Batterers tend to believe that they will not be penalized for their abusive tendencies; thus, they do not have much incentive to change their behavior toward the victim.⁴¹ However, allowing officers to arrest abusers without a warrant demonstrates the seriousness of the crime and tends to have a deterrent effect upon the number of violations.⁴² Moreover, studies reveal that arrest effectively deters domestic violence.⁴³

Chapter 1140 enables a law enforcement officer to make a warrantless arrest for a violation of an out-of-state protective order.⁴⁴ This affords victims who have registered their protective orders with the State of California additional security. They can rest assured that if their batterers do manage to locate them, the protective order that they hold can be used as a tool to facilitate their batterer's arrest.

V. LEGISLATION AIMED AT PROTECTING CHILDREN

Studies reveal that there exists an undeniable link between domestic violence and child abuse.⁴⁵ Often, children fall victim to the violence occurring between a mother

has reasonable cause to believe that the person arrested has committed a felony, whether or not a felony, in fact, has been committed); *see also* *People v. Davis*, 2 Cal. App. 3d 230, 235, 82 Cal. Rptr. 561, 563 (1969) (establishing that each case involving the question of reasonable or probable cause for an arrest without a warrant must be decided on its own facts and circumstances); *People v. Hines*, 260 Cal. App. 2d 13, 15, 66 Cal. Rptr. 875, 876 (1968) (finding that a police officer may arrest a person whenever the officer has reasonable cause to believe that the person arrested has committed a felony). For additional states that have exceptions to the warrant requirement, *see* DEL. CODE ANN. tit. 11, § 1904 (1995 & Supp. 1996); NEB. REV. STAT. § 29-402.02 (1995); N.D. CENT. CODE § 29-06-15 (1991); and VA. CODE ANN. § 19.2-81 (Michie 1996).

38. CAL. PENAL CODE § 836(c)(1) (amended by Chapter 1140); *see id.* § 836(c) (amended by Chapter 1140) (allowing warrantless arrests for violations of protective orders).

39. *Id.* § 836(c) (amended by Chapter 1140); *see id.* (stating that the officer shall, as soon as possible after the arrest, confirm with the appropriate authorities or the Domestic Violence Protection Order Registry maintained pursuant to § 6380 of the California Family Code that a true copy of the protective order has been registered, unless the victim provides the officer with a copy of the protective order).

40. SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 1850, at 2 (Aug. 24, 1993).

41. *Id.* at 3.

42. *Id.*; *see Zorza, supra* note 1, at 54 (stating that for abusers to behave responsibly toward their victim, there must exist a community response to domestic violence that holds the abuser fully accountable for the abuse).

43. *See Zorza, supra* note 1, at 3 (reporting that, pursuant to an experiment conducted on abusers, only 19% of the arrested abusers had repeated the abuse, compared to 33% of those who were removed from the scene and 37% of those who were simply advised); *see also Klein, supra* note 22, at 264 (opining that ineffective police response to domestic violence serves to exacerbate the problem).

44. CAL. PENAL CODE § 836(c) (amended by Chapter 1140).

45. *See Davidson, supra* note 3, at 358 (discussing how domestic violence and child abuse are linked, and suggesting a policy agenda that could help in the battle against child abuse).

and father within the home.⁴⁶ Domestic violence between the parents could potentially result in abuse to the children in the home in at least three different ways.⁴⁷ First, abusers in the home may abuse their children as well as their spouses.⁴⁸ Second, *abused* parents may take out their anger on their children, thereby becoming the perpetrators of abuse upon their children.⁴⁹ Finally, the children may become victims of the violence carried out in the home by merely being observers, for the trauma of living in a violent home can be just as harmful as physical abuse to the body.⁵⁰ The sad reality of abuse reveals that children raised in abusive environments tend to become more aggressive and violent in their adult years.⁵¹ Thus, any program aimed at reducing the incidence of domestic violence in the home must necessarily address the needs of children as well.

Chapter 1139 seeks to protect children by making several changes in California law concerning abused and maltreated children.⁵² The first major change initiated by Chapter 1139 involves the existing punishment for the violation of a protective order.⁵³ Chapter 1139 adds several protective orders to be issued by courts during dependency proceedings to the list of protective orders that, if violated intentionally or knowingly, will be punishable as a misdemeanor.⁵⁴ Imposing a punishment for violations of these protective orders signifies to the parent that the order is serious and should be heeded. Accordingly, parents against whom the court issues an order are provided the incentive to obey the order, which, in turn, removes children from potential danger.

It remains clear that, whenever possible, an abused child needs to remain in the home with a nonoffending parent to maintain the stability and well-being of the child.⁵⁵ However, courts often feel that the well-being of the child will be jeopardized if permitted to remain at home, and thus, under certain circumstances, will order the

46. *Id.*

47. *Id.* at 358-59.

48. *Id.*

49. *Id.* at 359.

50. *Id.*

51. *See id.* at 368 (warning that children who grow up with violence tend to be violent and demonstrate a general disregard for the rights and welfare of others); Steven Barmazel, *Vertical Prosecution, 'No Drop' Policies Fight Violence*, DAILY RECORDER (Sacramento, Cal.), at 4 (reporting that 60% of batterers grew up with domestic violence).

52. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 2647, at 3 (Aug. 27, 1996).

53. *See* CAL. PENAL CODE § 273.65(a) (enacted by Chapter 1139).

54. *Id.* § 273.65(a) (enacted by Chapter 1139); *see id.* (stating that a violation of a protective order under §§ 362.4, 213.5, or 304 of the California Welfare & Institutions Code will be a misdemeanor); *id.* (establishing that the punishment for a violation of the aforementioned protective orders may include a fine of not more than \$1000, imprisonment in a county jail for not more than a year, or both fine and imprisonment).

55. *See In re David B.*, 91 Cal. App. 3d 184, 198, 154 Cal. Rptr. 63, 72 (1979) (holding that before the parental relationship may be severed, the court must consider the availability of less severe alternatives designed to keep the family intact).

removal of the child from the parents' custody.⁵⁶ Chapter 1139 seeks to avoid this result by providing the court with alternatives to the child's removal from the abusive environment.⁵⁷ Chapter 1139 grants to a judge the option of removing an *offending parent* from the home or allowing a nonoffending parent to retain custody, as long as that parent can present a plan to the court demonstrating the ability to protect the child from further harm.⁵⁸ Additionally, Chapter 1139 relaxes the provisions that govern when a court may issue an *ex parte* order excluding a violent parent from the dwelling of a person who cares for the minor.⁵⁹ Unfortunately, in cases of pervasive abuse, the removal of the child from the home becomes a necessity. Chapter 1139 seeks to expand the protection afforded to a child after removal from the home.⁶⁰ Existing law requires that once a child has been removed from the parents' custody, visitation between the child and the family must be maintained to preserve family ties and to determine if and when custody should be reinstated with the family.⁶¹ Chapter 1139 guarantees the protection of the child by establishing that the required visitation cannot, under any circumstances, endanger the safety of the child.⁶² Chapter 1139 further ensures the safety of the child by enabling the court to keep the address of the child confidential where the safety of the child is at issue.⁶³

56. CAL. WELF. & INST. CODE § 361(b)(1)-(5) (amended by Chapter 1139); *see id.* § 361(b)(1) (amended by Chapter 1139) (declaring that a dependent child of the court will be taken from the custody of the parents when there is substantial danger to the physical health of the minor, and there is no reasonable means by which the minor's health may be protected); *id.* § 361(b)(2) (amended by Chapter 1139) (stating that a child will be taken from the parents' custody if the parent or guardian is unwilling to have custody of the minor); *id.* § 361(b)(3) (amended by Chapter 1139) (requiring a child to be taken from the parents' custody when the minor is suffering from severe emotional damage, as indicated from extreme anxiety, depression, or withdrawal); *id.* § 361(b)(4) (amended by Chapter 1139) (asserting that a child will be taken from the parents' custody if the minor or a sibling of the minor has been sexually abused); *id.* § 361(b)(5) (amended by Chapter 1139) (indicating that a child will be taken from the parents' custody if the minor has been left without any provision for support); *see also id.* § 300 (West Supp. 1997) (setting forth the following bases for determining whether a child should be adjudged a dependent child of the court: (1) The minor has suffered serious physical harm, serious emotional distress, or sexual abuse; (2) the minor is a child of abuse under five years of age; (3) the minor has been abandoned, adopted, or treated with cruelty; and (4) the minor's sibling has been abused or neglected); *id.* § 304 (amended by Chapter 1139) (specifying that once a petition pursuant to § 311 has been filed with the court and until the time the petition is dismissed or dependency is terminated, no other court may hear a proceeding regarding the custody of the minor).

57. *Id.* § 361(b)(1) (amended by Chapter 1139).

58. *Id.*

59. *Id.* § 213.5(c)(1) (amended by Chapter 1139); *see id.* § 213.5(c)(2)(A)-(C) (amended by Chapter 1139) (declaring that a court may issue an *ex parte* order on the showing of the following: (A) The party who will stay has the right under color of law to possession of the premises, (B) the party to be excluded has assaulted or threatened to assault the other party or minor child, and (C) that physical or emotional harm would otherwise result to the other party or to the minor child if the party to be excluded remains in the home).

60. *See id.* § 362.1(a) (amended by Chapter 1139).

61. *Id.* § 362.1 (amended by Chapter 1139).

62. *Id.* § 362.1(a) (amended by Chapter 1139).

63. *Id.*; *see id.* § 332(e) (amended by Chapter 1139) (setting forth that the name and residence of both parents of the child are required in a petition to commence proceedings in the juvenile court); *see also id.* § 302(b) (amended by Chapter 1139) (providing that although parents must be notified of a proceeding involving their child, a probation officer will keep the address of a parent, who is known to be a victim of domestic violence, confidential).

In addition to increasing the protection directly afforded to a minor child, Chapter 1139 aims to enhance the mechanisms courts use to achieve the goals of the dependency proceeding.⁶⁴ California requires that the state Department of Social Services adopt an Emergency Response Protocol, which is a statewide system involving telephone screening of emergency response referrals aimed at protecting children from abuse and neglect.⁶⁵ Chapter 1139 mandates that the Emergency Protocol System incorporate written procedures to determine whether abuse of another household member is occurring when a call is made concerning the abuse of a particular child.⁶⁶ This new requirement will probe into the entire family or household to determine whether there is violence occurring beyond that for which the call was made.⁶⁷ This program gives the county child protective services an opportunity to provide protection for all those who are being abused within a home.

Another provision initiated by Chapter 1139 that seeks to strengthen the mechanisms used by the state to realize the goals of the dependency proceeding involves education or training on domestic violence to those working with abused or neglected children.⁶⁸ California provides for a statewide training program designed to meet the needs of child protective service social workers assigned with responsibilities including emergency response, family maintenance, family reunification, permanent placement, and adoption.⁶⁹ Chapter 1139 provides that the statewide training program include the dissemination of information regarding the dynamics and effects of domestic violence upon children and families.⁷⁰ Because studies reveal that a close link exists between domestic violence and child abuse,⁷¹ this training will prove to be valuable to those social workers and attorneys aiding a child who has

64. See CAL. FAM. CODE § 6380(b) (amended by Chapter 1139); CAL. WELF. & INST. CODE § 218.5 (enacted by Chapter 1139); *id.* § 16206(b)(10) (amended by Chapter 1139); *id.* § 16208(a)(2) (amended by Chapter 1139).

65. CAL. WELF. & INST. CODE § 16208 (amended by Chapter 1139).

66. *Id.* § 16208(a)(2) (amended by Chapter 1139); *see id.* (explaining that this additional referral criteria will be developed in consultation with domestic violence victims' advocates, other public and private agencies that provide programs for victims of domestic violence, and the County Welfare Directors Association).

67. *Id.*

68. *Id.* §§ 218.5, 16206(b)(10) (amended by Chapter 1139).

69. *Id.* § 16206(a) (amended by Chapter 1139); *see id.* § 16206(b)(1)-(10) (stating that the training shall include the following: (1) Crisis intervention, (2) investigative techniques, (3) rules of evidence, (4) indicators of abuse and neglect, (5) assessment criteria, (6) intervention strategies, (7) information regarding the legal requirement of child protection which includes requirements of child abuse reporting laws, (8) case management, (9) using community resources, and (10) information regarding the dynamics and effects of domestic violence upon families and children).

70. *Id.* § 16206(b)(10) (amended by Chapter 1139); *see id.* § 16206(e) (stating that the training program must provide practice-relevant training to county child protective service workers who screen referrals for child abuse or neglect, and for all workers assigned to provide emergency response, family reunification, family maintenance, and permanent placement services); *see also id.* § 218.5 (enacted by Chapter 1139) (requiring all counsel who perform duties under the specific chapter of the California Welfare & Institutions Code to participate in mandatory training on domestic violence).

71. Davidson, *supra* note 3, at 357; *see* SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 2647, at 2 (July 9, 1996) (reporting that child abuse is 15 times more likely to occur in families where domestic violence is present).

been raised in a home where domestic violence is prevalent by allowing them to provide assistance for these minors not only legally, but emotionally.

Finally, existing law states that any restraining order issued pursuant to California Family Code § 6221, California Civil Procedure Code § 527.8, or California Penal Code § 136.2 must be electronically transmitted to the Department of Justice.⁷² Chapter 1138 adds to the list of orders that must be transmitted juvenile court restraining orders related to domestic violence issued under §§ 213.5, 304, and 362.4 of the California Welfare and Institutions Code.⁷³ By authorizing the registration of these restraining orders, law enforcement officers and social workers will at all times be informed of all existing protection orders, thereby facilitating the enforcement of those orders.

As is evident, Chapter 1139 seeks to make existing law more protective of minors. Chapter 1139 aims to accomplish this objective by granting courts more discretion as to whether the child should be removed from the home, and also by strengthening requirements instituted by the legislature that promote the goal of the dependency proceeding.⁷⁴ Viewed in isolation, the changes proposed by Chapter 1139 do not resemble huge steps toward winning the battle against child abuse and domestic violence. However, the legislature, by initiating these changes, recognizes that there exists a problem with domestic violence in California and that the strengthening of the laws to protect victims and punish perpetrators is the solution to the problem.

VI. ABUSER TREATMENT PROGRAMS

With the increasing rate of spousal and child abuse,⁷⁵ the law needs to focus more on the rehabilitation of the abuser, rather than the mere punishment of his or her violent acts. Studies have demonstrated that punishment alone only induces many batterers to continue their violent behavior, while treatment involving behavior modification and therapy tends to eradicate the behavior.⁷⁶ Fortunately, the reality of violence is that it is a form of learned behavior which can be unlearned.⁷⁷ Treatments which have proven to be the most effective involve discussions between a batterer

72. CAL. FAM. CODE § 6380(b) (amended by Chapter 1139).

73. *Id.*

74. *Id.* § 6380 (amended by Chapter 1139); CAL. PENAL CODE § 273.6 (amended by Chapter 1139); CAL. WELF. & INST. CODE §§ 213.5, 302, 304, 332, 361, 362.1, 362.4, 16206, 16208 (amended by Chapter 1139); *id.* § 218.5 (enacted by Chapter 1139).

75. *See* CAL. PENAL CODE § 3053.2(b) (enacted by Chapter 983) (finding that domestic violence is a serious and widespread crime).

76. Lenore E. Walker, *Seize the Moment to Stop Domestic Abuse*, L.A. TIMES, Nov. 21, 1995, at B9.

77. *Id.*; *see* Davidson, *supra* note 3, at 359 (suggesting that observing a violent and abusive parent during childhood causes a child to be an aggressive and violent adult); *see also* CAL. PENAL CODE § 3053.2(c) (enacted by Chapter 983) (finding that domestic violence has long-term effects that negatively impact all family members, especially children, who might erroneously *learn* that violence is an acceptable way to cope with problems or stress).

and a counselor that focus on reaching the root of what causes the batterer to behave brutally toward the batterer's spouse and/or children.⁷⁸ Therefore, successful administration of abuser treatment programs could be the key to actually minimizing the rate of domestic violence in this country.⁷⁹

Existing law in California mandates that persons granted probation for a domestic violence offense successfully complete an abuser's treatment program involving lectures, classes, group discussions, and counseling.⁸⁰ This provision, however, does not affect batterers convicted and sentenced for their violent crime.⁸¹ Chapter 983 fills in this gap by requiring completion of an abuser treatment program as a condition for release on parole for batterers that have been convicted of a violent crime but are released prior to the end of their sentence.⁸²

Because the provision introduced by Chapter 983 would require batterers convicted before its enactment to participate in the treatment program, opponents of Chapter 983 fear that the legislation constitutes an *ex post facto* law.⁸³ An *ex post facto* law is considered a retroactive criminal statute that is applicable to crimes committed before its enactment and that causes injury to the accused, by either punishing an act that was innocent when committed or by increasing the punishment applied to a crime when committed.⁸⁴ The Constitution prohibits the enactment of *ex post facto* legislation, thereby assuring citizens that reliance can be placed on the present interpretation of the law and that notice to citizens of any changes made in the law will be granted.⁸⁵

In order for a law to be *ex post facto* it must, in some way, alter the punishment of a crime in such a way as to disadvantage the offender who is affected by it.⁸⁶ However, if a provision is preventative or enacted to serve a legitimate government

78. See *Inhumanity on the Home Front*, L.A. TIMES, Dec. 30, 1989, at B6 (stating that therapists who conduct these abuser treatment sessions say the sessions work because they help the abusers get to the root of the problem).

79. See Walker, *supra* note 76, at B9 (stating that the key to dealing with domestic violence is providing proper treatment after an arrest); see also CAL. PENAL CODE § 3053.2(d) (enacted by Chapter 983) (finding that those convicted of domestic violence offenses can benefit from participation in a structured batterer's program).

80. CAL. PENAL CODE § 1203.097 (West Supp. 1997). For other states that authorize abuser treatment programs for domestic violence crimes, see FLA. STAT. ANN. ch. 741.281 (Harrison 1995); MASS. GEN. LAWS ANN. ch. 209A, § 10 (West 1996); and TEX. FAM. CODE ANN. § 71.11 (West 1996).

81. See CAL. PENAL CODE § 1203.097 (West Supp. 1997).

82. *Id.* § 3053.2(b) (enacted by Chapter 983); see *id.* § 3040 (West Supp. 1997) (asserting that the Board of Prison Terms will have the power to allow prisoners to be paroled outside the prison walls and enclosures); *id.* § 3053 (West Supp. 1997) (explaining that the Board of Prison Terms, upon granting any parole to any prisoner, may impose on the parole any conditions that it may deem proper).

83. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 2353, at 5 (July 9, 1996).

84. *Id.*

85. Lori N. Sabin, *Doe v. Poritz: A Constitutional Yield to an Angry Society*, 32 CAL. W. L. REV. 331, 341 (1996); see U.S. CONST. art. I, § 10 (declaring that "no state shall . . . pass any . . . *ex post facto* Law").

86. *Weaver v. Graham*, 450 U.S. 24, 29 (1980).

interest, it cannot be considered penal.⁸⁷ Thus, such a provision does not violate the constitutional prohibition against the enactment of ex post facto laws.⁸⁸

*Kennedy v. Mendoza-Martinez*⁸⁹ establishes the criteria for making the prevention/punishment determination.⁹⁰ Factors that are relevant to the inquiry suggested by the *Kennedy* Court include, but are not limited to, whether the law has traditionally viewed the provision as punishment, whether its operation will promote retribution and deterrence, whether there is an alternative rational purpose for the enactment of the law, and whether the provision seems excessive in relation to the alternative purpose assigned to its enactment.⁹¹ Applying these criteria to parolees who are required to undergo a batterer's treatment program as a condition to their parole, it becomes evident that Chapter 983 is more of a preventative measure than a penal one.

First, treatment programs have never really been considered a punishment for a crime.⁹² Persons normally undergo treatment programs willingly, thus, these programs cannot be considered "punishment" within the meaning of the Constitution. Second, treatment programs for batterers are not aimed at satisfying the twin aims of punishment. For example, it is unlikely that an abuser will think twice before beating a spouse because of a fear of being forced to undergo a batterer's treatment program once convicted. Therefore, this provision cannot be considered a deterrent to criminal behavior. Further, treatment programs do not satisfy those who hold a retributivist theory of punishment because batterers do not *deserve treatment* to get over their abusive behavior, rather they deserve punishment that will be in proportion to the pain they inflicted on their victim. Finally, the requirement that parolees complete a batterer's treatment program can be justified by an alternative rational purpose for the law, which is prevention of future abuse. By making batterers complete a treatment program, the legislature is furthering safety by protecting the public from repeat offenses by the batterer.⁹³

In summary, a court will likely find that Chapter 983 does not constitute an ex post facto law because it cannot be considered as increasing the "punishment" imposed for the crime of domestic violence. Mandating the completion of a batterer's

87. See Note, *Prevention Versus Punishment: Toward a Principled Distinction in the Restraint of Released Sex Offender*, 109 HARV. L. REV. 1711, 1715-17 (1996) [hereinafter Note, *Prevention*] (stating that a state is generally free to impose restrictions that are rationally related to the public safety goal of the U.S.).

88. *Id.*

89. 372 U.S. 144 (1963).

90. Note, *Prevention*, *supra* note 87, at 1717.

91. See *Kennedy*, 372 U.S. at 168-69.

92. See *Neal v. Shimoda*, 905 F. Supp. 813, 822 (D. Haw. 1995) (holding that the sex offender treatment program does not violate the Ex Post Facto Clause because it was established to treat inmates, not punish them); see also *Russell v. Eaves*, 722 F. Supp. 558, 560 (E.D. Mo. 1989) (holding that the Missouri Sex Offender Program, which is a therapy program for convicted sex offenders, is not penal in nature, but rehabilitative instead).

93. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 2647, at 5 (Aug. 28, 1996); see *id.* (stating that domestic violence offenders generally repeat their conduct, thus it is appropriate that a parolee receive additional monitoring to diminish the likelihood of future violent or harassing activities).

treatment program may properly be considered as a provision instituted for the betterment of society. Thus, it acts as a preventative measure enacted by the legislature to ensure the well-being of its citizens.

VII. CONCLUSION

In the domestic violence battle that is being fought today around the country, to avoid defeat imposed by violent and abusive individuals, states have to get tough on perpetrators of domestic violence. California has attempted to win this battle by enacting several pieces of legislation aimed at providing greater protection to victims and children. The legislature has also attempted to prevent future harmful behavior by hardening the punishment imposed on batterers, in the hopes of deterring them from engaging in such activity in the future. However, because punishment alone may not be enough to deter certain batterers from engaging in such activity, California has also enacted legislation requiring offenders to undergo treatment programs to unlearn the violent behavior that is destructive to their relationships. If California keeps strengthening its domestic violence legislation, hopefully the day will come when the rates of spousal abuse and child abuse will decrease instead of increase.

APPENDIX

Code Sections Affected

Family Code § 6320 (amended); Penal Code §§ 136.2, 166, 243, 273.6 (amended).

AB 2224 (Kuehl); 1996 STAT. Ch. 904

Family Code § 6380.5 (new), §6380 (amended); Penal Code § 836 (amended).

AB 2231 (Kuehl); 1996 STAT. Ch. 1140

Penal Code § 3053.2 (new).

AB 2353 (Alpret); 1996 STAT. Ch. 983

Family Code § 6380 (amended); Penal Code § 273.6 (amended); Welfare and Institutions Code § 218.5 (new), §§ 213.5, 302, 304, 332, 361, 362.1, 362.4, 16206, 16208 (amended).

AB 2647 (Kuehl); 1996 STAT. Ch. 1139