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# “Everyone Gets Their First DV Free”: Proposition 57’s Neglect of Domestic Violence

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## ABSTRACT

Domestic violence is one of the most prevalent crimes in American society, permeating every social class, ethnic group, and political party. Some batterers, like former NFL player Ray Rice, are thrust into the spotlight when news of their battering goes public. For every incident that is reported, however, many more go unreported. This fact alone highlights the inherent danger of domestic violence. For a crime of this magnitude, the natural consequence would seem to be a lengthy prison sentence. In California, however, crimes of domestic violence are not classified as “violent” crimes under the Penal Code. The word “violence” is in the very name of these crimes, yet the California State Legislature has chosen not to define them as such.

Instead, California is providing these offenders with the opportunity for early release. In November 2016, California voters passed The Public Safety and Rehabilitation Act of 2016, more commonly known as Proposition 57. The Proposition allows for “nonviolent” offenders to appear before a parole board after completing the full term of their primary offense, which could allow these “nonviolent” batterers to get out of prison decades early.

This Comment will argue that California’s failure to enumerate domestic violence as a “violent” felony will be detrimental to both domestic violence survivors and California at large. First, this Comment will discuss the language of California’s domestic violence crimes and explain why these crimes should be classified as violent. Next, this Comment will examine how Proposition 57 will affect survivors of

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domestic violence by discussing the language and factors for early parole and how Proposition 57 completely undermines stated protections for victims. This Comment will conclude that in order to combat this issue, California will need to enumerate domestic violence as a violent crime and increase rehabilitation programs for offenders while in jail.

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#### I. INTRODUCTION

On February 15, 2014, at approximately 2:50 a.m., two young adults, one female and one male, were arrested after a domestic altercation at a casino in Atlantic City, New Jersey.<sup>1</sup> The male was charged with simple assault for “attempting to cause bodily injury” to his fiancée, “specifically by striking her with his hand, rendering her

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1. See Rebecca Elliott, *Everything You Need to Know About the Ray Rice Case*, TIME (Sept. 11, 2014), <http://time.com/3329351/ray-rice-timeline/>; Justin Fenton, *Ravens Running Back Ray Rice Arrested After Incident in Atlantic City*, BALTIMORE SUN (Feb. 16, 2014, 10:30 PM), <http://bsun.md/2CNZUED>.

unconscious.”<sup>2</sup> A video of the incident showed the two arguing in the hotel hallway before the female swatted her arm at the male and walked into the elevator.<sup>3</sup> The male followed and appeared to say something that caused the female to recoil.<sup>4</sup> She tried to push him away and then walked toward him.<sup>5</sup> The male then “punch[e]d her with a hard left hook, spinning [her] against the elevator wall and handrail as she drop[ped].”<sup>6</sup> Minutes passed before the female regained consciousness.<sup>7</sup> Another video showed the male dragging her unconscious body out of the elevator.<sup>8</sup>

Many Americans are familiar with this well-publicized story.<sup>9</sup> The female, Janay Palmer, was the then-fiancée (and now wife) of the male, Ray Rice, the then-running back of the Baltimore Ravens football team.<sup>10</sup> The outcome of this incident, however, is perhaps more shocking than the incident itself. Despite the indictment of Ray Rice for felony third-degree aggravated assault, he was admitted into a pretrial intervention program, which required him to pay only \$125 in fines and attend anger-management counseling for one year.<sup>11</sup> Upon completion of the program, his charges were dismissed.<sup>12</sup>

Despite the publicity surrounding this brutal attack, what happened to Janay Palmer is not a one-of-a-kind incident. Approximately 75 percent of domestic violence incidents are not reported,<sup>13</sup> and when the incidents are reported, they are known to be notoriously difficult to prosecute due to the complexity of the abuser-abusee relationship.<sup>14</sup> Even here, with actual video proof of the brutal attack, the abuser was simply

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2. Elliott, *supra* note 1.

3. See Amy Davidson Sorkin, *What the Ray Rice Video Really Shows*, NEW YORKER (Sept. 8, 2014), <https://www.newyorker.com/news/amy-davidson/ray-rice-video-shows>.

4. *See id.*

5. *See id.*

6. *Id.*

7. *See id.*

8. *See id.*

9. See Elliott, *supra* note 1; see also Sorkin, *supra* note 3.

10. See Elliott, *supra* note 1.

11. See *Domestic Violence Charges Against Ray Rice Officially Dropped*, FOX SPORTS (May 21, 2015, 11:18 AM), <http://foxs.pt/2lRbRCc>.

12. *See id.*

13. See Patricia Tjaden & Nancy Thoennes, *Extent, Nature, and Consequences of Intimate Partner Violence*, NAT’L INST. JUSTICE 49 (July 2000), <https://www.ncjrs.gov/pdffiles1/nij/181867.pdf> (providing various reporting statistics by type of victimization and gender).

14. See *People v. Brown*, 94 P.3d 574, 577–78 (Cal. 2004); Farrah Champagne, *Prosecuting Domestic Violence Cases*, A.B.A. SEC. LITIG. (Sept. 17, 2015), <https://bit.ly/2fmaBkE>.

allowed to forgo punishment in return for a questionably minimal fine and a year's worth of anger-management classes.<sup>15</sup>

Though Ray Rice's punishment was arguably laxer than most,<sup>16</sup> states like California have failed to adequately protect survivors of domestic violence. Even the California Supreme Court noted that "[d]omestic violence is a serious social and legal problem in the United States, occurring in every economic, racial, and ethnic group."<sup>17</sup> Despite the dangerous and rippling effects of spousal abuse, however, crimes of domestic violence are not classified as "violent" crimes in the California Penal Code even though they are inherently violent crimes.<sup>18</sup>

This Comment will explain how California's failure to enumerate domestic violence as a "violent" felony under Penal Code 667.5(c) will be detrimental to domestic violence victims, the California criminal justice system, and the communities of California at large. Part II of this Comment will examine the history of domestic violence in the United States and California's recent crusade to reduce prison populations.<sup>19</sup> Part III will then analyze why domestic violence crimes should be classified as "violent" under the California Penal Code and how California's failure to do so will be devastating to victims and communities when these "nonviolent" abusers are released in accordance with Proposition 57.<sup>20</sup> Ultimately, this Comment will conclude in Part IV that in order to truly reduce prison populations, California must realign its priorities, determine which defendants are truly "nonviolent," and develop programs to effectively rehabilitate domestic abusers.<sup>21</sup>

## II. BACKGROUND

This next Part details the history of domestic violence in the United States and how California's attempts to reduce prison populations have unfairly prejudiced survivors of domestic violence and other violent crimes.

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15. See FOX SPORTS, *supra* note 11.

16. See *Ray Rice's Assault Charges Were Dropped. How Unusual Is That?*, PBS (May 21, 2015, 7:45 PM), <http://to.pbs.org/2qgXID7>.

17. *Brown*, 94 P.3d at 577.

18. See CAL. PENAL CODE § 667.5(c)(West, Westlaw through 2017 Legis. Sess.).

19. See *infra* Part II.

20. See *infra* Part III.

21. See *infra* Part IV.

### A. Domestic Violence

Though recognized by the United States Attorney General as a “priority,”<sup>22</sup> domestic violence is not codified in the California Penal Code as a “violent” crime.<sup>23</sup>

The National Domestic Violence Hotline<sup>24</sup> defines domestic violence as:

[A] pattern of behaviors used by one partner to maintain power and control over another partner in an intimate relationship. . . . Domestic violence includes behaviors that physically harm, arouse fear, prevent a partner from doing what they wish or force them to behave in ways they do not want. It includes the use of physical and sexual violence, threats and intimidation, emotional abuse and economic deprivation. Many of these different forms of domestic violence/abuse can be occurring at any one time within the same intimate relationship.<sup>25</sup>

In the California criminal context, domestic violence refers only to physical or sexual assaults or threats of assaults.<sup>26</sup>

#### 1. History of Domestic Violence in the United States

Historically, domestic violence has been one of the most prevalent and pervasive crimes in American society.<sup>27</sup> Until the late 19th century, beating one’s wife was a widely upheld and prominent practice in the United States.<sup>28</sup> In 1824, for example, the Mississippi Supreme Court decided in *Bradley v. State*<sup>29</sup> that a husband was allowed to inflict

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22. See Memorandum on Federal Efforts to Improve the Safety of Domestic Violence Victims 1, Off. Att’y Gen. (Jan. 4, 2016), available at <https://www.justice.gov/opa/file/809976/download>.

23. See *Facts About Proposition 57: “The Public Safety and Rehabilitation Act,”* ASS’N DEPUTY DIST. ATT’YS (2016), <https://www.laadda.com/wp-content/uploads/2016/07/Facts-About-Prop-57-Detailed-Analysis.pdf>.

24. See *About the Hotline*, NAT’L DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/about-the-hotline/> (last visited Sept. 18, 2018). The National Domestic Violence Hotline is a confidential hotline that provides support for survivors of domestic violence. *Id.* The Hotline was established as a result of the Violence Against Women Act. *Id.*

25. *What Is Domestic Violence*, NAT’L DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/is-this-abuse/abuse-defined/> (last visited Sept. 18, 2018).

26. See *Domestic Violence*, CAL. CTS. (2017), <http://www.courts.ca.gov/selfhelp-domesticviolence.htm>; see also *Forms of Domestic Violence*, STOP VIOLENCE AGAINST WOMEN (Aug. 2013), [http://www.stopvaw.org/forms\\_of\\_domestic\\_violence](http://www.stopvaw.org/forms_of_domestic_violence).

27. See Champagne, *supra* note 14.

28. See *id.*

29. *Bradley v. State*, 1 Miss. (1 Walker) 156 (Miss. 1824).

“moderate chastisement in cases of emergency.”<sup>30</sup> The tide began to turn in 1871, when Alabama became the first state to withdraw the legal right of men to beat their wives in *Fulgham v. State*.<sup>31</sup> In the same year, the Supreme Court of Massachusetts declared wife-beating illegal.<sup>32</sup> In 1882, Maryland became the first state to make “assault on wife” a crime, which was punishable by up to 40 lashes or a year in jail.<sup>33</sup>

In 1945, California added Section 273(d) to its Penal Code, which read:

Any husband who willfully inflicts upon his wife corporal injury resulting in a traumatic condition . . . and any person who willfully inflicts upon any child any cruel or inhuman corporal punishment or injury resulting in a traumatic condition . . . is nevertheless guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the State prison for not more than two years or in the county jail for not more than one year.<sup>34</sup>

Despite the enactment of this statute, prosecutions for wife-beating did not rise substantially, as prosecutors had to prove that the beating inflicted a “traumatic condition.”<sup>35</sup>

In 1969, California became the first state to adopt a no-fault divorce policy,<sup>36</sup> which allows either partner to request and obtain a divorce without having to cite a specific reason.<sup>37</sup> This no-fault divorce policy was of monumental importance to survivors of domestic violence

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30. *Id.* at 158.

31. *Fulgham v. State*, 46 Ala. 143, 146–47 (Ala. 1871). The *Fulgham* court opined: [T]he privilege, ancient though it be, to beat her with a stick, to pull her hair, choke her, spit in her face or kick her about the floor, or to inflict upon her like indignities, is not now acknowledged by our law. . . . [I]n person, the wife is entitled to the same protection of the law that the husband can invoke for himself. . . . All stand upon the same footing before the law “as citizens of Alabama, possessing equal civil and political rights and public privileges.”

*Id.* (quoting ALA. CONST. of 1868, art. 1, § 2).

32. *See Commonwealth v. McAfee*, 108 Mass. 458, 461 (Mass. 1871).

33. *See* Act of Mar. 30, 1882, ch. 120, 1882 Md. Laws 172 (“An Act to inflict Corporal Punishment upon Persons found guilty of Wife-beating”); *see also Herstory of Domestic Violence: A Timeline of the Battered Women’s Movement*, MINN. CTR. AGAINST VIOLENCE & ABUSE (1999), <https://bit.ly/2KAXCiG> [hereinafter MCAVA, *Herstory*].

34. *See* Act of July 11, 1945, ch. 1312, 1945 Cal. Stat. 2462.

35. *See* MCAVA, *Herstory*, *supra* note 33.

36. *See* Herma Hill Kay, *An Appraisal of California’s No-Fault Divorce Law*, 75 CAL. L. REV. 291 (1987).

37. *See Divorce or Separation: Basics*, CAL. COURTS, <http://www.courts.ca.gov/1032.htm> (last visited Aug. 25, 2018).

because only “[one] spouse or domestic partner ha[d] to state that the couple [could not] get along” for the marriage to end.<sup>38</sup>

In 1974, one of the first battered women’s shelters opened in Saint Paul, Minnesota.<sup>39</sup> In the late 1960s and early 1970s, the women’s rights movement promoted the idea that “what [went] on in the privacy of people’s homes [was] deeply political,”<sup>40</sup> a notion that stood in stark contrast to the common belief that what went on in the privacy of a person’s home was a private and intimate matter that should not be interfered with.<sup>41</sup> Shortly after, crisis centers, hotlines, and shelters for battered women began to appear on a wider scale.<sup>42</sup>

By 1975, most states allowed wives to bring criminal actions against their abusive husbands,<sup>43</sup> and by 1983, over 700 shelters for abused women and children were active nationwide.<sup>44</sup> All of these changes signaled a shifting attitude towards domestic violence and showcased the necessity of finding ways to protect women and victims of domestic violence.

## 2. History of Domestic Violence in California

The 1970s ushered in a system of police involvement in domestic violence situations.<sup>45</sup> The Richmond, California police department became the first department in the nation to make domestic crisis intervention training part of its in-service training for all officers.<sup>46</sup> During the same time period, the Hayward police department hired mental health professionals who accompanied officers on family crisis calls.<sup>47</sup> As a result of this program, repeat calls decreased by approximately 27 percent.<sup>48</sup>

Despite these improvements, the San Jose Police Department was sued in 1972 on behalf of Ruth Bunnell for police negligence leading to wrongful death.<sup>49</sup> On September 4, 1972, Ruth called the San Jose Police

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38. *Id.*

39. *See History*, WOMEN’S ADVOCATES, <https://www.wadvocates.org/about/history/> (last visited Sept. 18, 2018).

40. CYNDY CARAVELIS & MATTHEW ROBINSON, *SOCIAL JUSTICE, CRIMINAL JUSTICE: THE ROLE OF AMERICAN LAW IN EFFECTING AND PREVENTING SOCIAL CHANGE* 210 (2015).

41. *See id.*

42. *See* MCAVA, *Herstory*, *supra* note 33.

43. *See id.*

44. *See id.*

45. *See id.*

46. *See id.*

47. *See id.*

48. *See id.*

49. *See Hartzler v. City of San Jose*, 120 Cal. Rptr. 5, 6 (Cal. Ct. App. 1975).

Department and told officers that her estranged husband told her that he was coming to kill her.<sup>50</sup> She requested the help of the police, who refused and told her to call when her estranged husband actually arrived at the house.<sup>51</sup> Approximately 45 minutes after the call was made, Ruth was brutally stabbed to death by her estranged husband.<sup>52</sup> She had called the San Jose Police Department about violence from her estranged husband over 20 times in the year prior to her death.<sup>53</sup>

The California Court of Appeal held that the San Jose Police Department had absolute immunity under statutory law and could not be held responsible for Ruth's death.<sup>54</sup> Furthermore, the court held that there was no indication that the San Jose Police Department "assumed a duty toward [Ruth] greater than the duty owed to another member of the public," and thus, the San Jose Police Department had no extra duty of care to protect Ruth.<sup>55</sup>

After the murder of Ruth Bunnell, California began to make strides in domestic violence legislation. In 1977, California amended its Code of Civil Procedure to give courts the power to grant temporary restraining orders to domestic violence victims.<sup>56</sup> Then, in 1985, California amended its Penal Code to mandate at least 48 hours of jail time for individuals who violated domestic violence restraining orders.<sup>57</sup> In 1993, California further amended its Penal Code to prohibit individuals under domestic violence restraining orders from obtaining a gun.<sup>58</sup> This prohibition was an important development for survivors of domestic violence, as "a gun in a violent home increases the likelihood that [domestic violence] incidents will result in death."<sup>59</sup>

The mid-1990s spurred another push for domestic violence legislation. The aftermath of the 1994 arrest of O.J. Simpson for the

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50. *See id.*

51. *See id.*

52. *See id.*

53. *See id.*

54. *See id.* at 6–7.

55. *Id.* at 7.

56. *See* Act of Sept. 12, 1977, ch. 720, 1977 Cal. Stat. 2304, 2305.

57. *See* Act of Oct. 1, 1985, ch. 1387, 1985 Cal. Stat. 4914, 4915; *see also* Kate Sproul, *California's Response to Domestic Violence*, CAL. SENATE OFFICE OF RESEARCH 9–10 (2003), <http://bit.ly/2EFH9D4> (describing early milestones in California domestic violence legislation).

58. *See* Act of Sept. 29, 1993, ch. 600, 1993 Cal. Stat. 3153. For the current version of this law, *see* CAL. PENAL CODE § 29825 (West, Westlaw through 2017 Legis. Sess.).

59. Shannon Frattaroli, *Removing Guns from Domestic Violence Offenders: An Analysis of State Level Policies to Prevent Future Abuse*, JOHNS HOPKINS CTR. FOR GUN POL'Y & RESEARCH 4 (2009), <https://bit.ly/2wqCFOk>.



murders of Nicole Brown-Simpson and Ron Goldman,<sup>60</sup> and O.J. Simpson’s subsequent acquittal in 1995,<sup>61</sup> resulted in a host of domestic violence legislation in California.<sup>62</sup> This legislation included a statewide registry for domestic violence restraining orders, a pro-arrest policy in domestic violence incidents, and the elimination of diversionary options for domestic violence defendants.<sup>63</sup>

In 1995, California enacted legislation that required police responses to all domestic disturbances, written policies on such disturbances, statewide officer training, and the recording of domestic violence calls.<sup>64</sup> In 1996, an amendment to the California Penal Code allowed police officers to arrest suspects in domestic violence cases so long as they had “reasonable cause” to believe that the individual committed an assault or battery, regardless of whether the officer witnessed the attack.<sup>65</sup> The same year, California also amended its Evidence Code in order to allow prosecutors to introduce evidence of prior acts of domestic violence in prosecuting offenders.<sup>66</sup>

Each piece of legislation introduced a new or improved protection for survivors of domestic violence. Despite all of these protections, however, domestic violence still continues to permeate American society.<sup>67</sup>

### 3. Domestic Violence Today

Domestic violence is just as prevalent today as it has always been.<sup>68</sup> Approximately 20 people are physically abused by a partner every minute,<sup>69</sup> totaling approximately ten million instances of intimate partner

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60. See Michelle, “*O.J. Simpson: The Lost Confession?*”: A Recap from The Hotline, NAT’L DOMESTIC VIOLENCE HOTLINE (Mar. 30, 2018), <https://bit.ly/2wsLZBj>; see also Charlotte Alter, *How the OJ Simpson Case Helped Fight Domestic Violence*, TIME (June 12, 2014), <https://ti.me/1kRoTtp>.

61. N.R. Kleinfeld, “*NOT GUILTY: THE MOMENT; A Day (10 Minutes of It) the Country Stood Still*,” N.Y. TIMES (Oct. 4, 1995), <https://nyti.ms/2MyXy4z>.

62. See Sproul, *supra* note 57, at 1 (explaining that O.J. Simpson’s murder trial revealed that Nicole had repeatedly reached out to police in fear of her husband, who pled no contest to abusing her just five years before her murder).

63. See *id.* at 43–44, 46.

64. See Act of Oct. 16, 1995, ch. 965, 1995 Cal. Stat. 7377; see also MCAVA, *Herstory*, *supra* note 33.

65. See Act of July 7, 1996, ch. 131, 1996 Cal. Stat. 651.

66. See Act of July 20, 1996, ch. 261, 1996 Cal. Stat. 1795.

67. See MCAVA, *Herstory*, *supra* note 33.

68. See *id.*

69. *National Statistics*, NAT’L COAL. AGAINST DOMESTIC VIOLENCE (2015), <https://bit.ly/2wg6lMV> [hereinafter NCADV, *Statistics*]. See generally Michele C. Black et al., *National Intimate Partner and Sexual Violence Survey: 2010 Summary Report*, CTRS. FOR DISEASE CONTROL & PREVENTION (2011), <https://bit.ly/2OB1lvc> (providing

violence nationwide every year.<sup>70</sup> On average, one in three women and one in four men have been physically abused by an intimate partner.<sup>71</sup> Additionally, one in four women and one in seven men have been *severely* physically abused by an intimate partner.<sup>72</sup> Domestic violence accounted for approximately 21 percent of all violent crime in the United States between 2003 and 2012,<sup>73</sup> and approximately 20,800 calls are made to domestic violence hotlines every day.<sup>74</sup>

During one twenty-four-hour period, 116 California domestic violence programs responded to approximately 5,177 victims and answered approximately 1,471 domestic violence hotline calls.<sup>75</sup> According to the Centers for Disease Control and Prevention, 32.9 percent of California women and 27.3 percent of California men experience domestic violence in their lifetimes, which translates to approximately 4.5 million female victims and 3.7 million male victims.<sup>76</sup> These facts and figures, which are similar to those of other states, demonstrate just how many domestic violence incidents occur in American society. Despite the sheer volume of domestic violence, however, states like California have chosen to focus their attention on other issues.

#### *B. California's Crusade to Reduce Prison Populations*

Domestic violence is not the only issue California faces. California has also suffered from a long history of constitutional violations within its prison system.<sup>77</sup> In response to Eighth Amendment<sup>78</sup> claims brought

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detailed statistics regarding the prevalence of domestic violence) [hereinafter CDC, *2010 Survey*].

70. NCADV, *Statistics*, *supra* note 69.

71. CDC, *2010 Survey*, *supra* note 69, at 39.

72. *Id.* at 43–44.

73. See Jennifer L. Truman & Rachel E. Morgan, *Nonfatal Domestic Violence, 2003-2012*, BUREAU OF JUSTICE STATISTICS 1 (Apr. 2014), <https://www.bjs.gov/content/pub/pdf/ndv0312.pdf>.

74. NCADV, *Statistics*, *supra* note 69.

75. *2015 Domestic Violence Counts: California Summary*, NAT'L NETWORK TO END DOMESTIC VIOLENCE (2015), [http://www.cpedv.org/sites/main/files/file-attachments/nnedv\\_dv\\_count\\_2015.pdf](http://www.cpedv.org/sites/main/files/file-attachments/nnedv_dv_count_2015.pdf).

76. CDC, *2010 Survey*, *supra* note 69, at 74, 76.

77. See *Brown v. Plata*, 563 U.S. 493, 499, 501–02 (2011). The *Brown* Court stated:

The population reduction potentially required is . . . of unprecedented sweep and extent. Yet so too is the continuing injury and harm resulting from these serious constitutional violations. For years the medical and mental health care provided by California's prisons has fallen short of minimum constitutional requirements and has failed to meet prisoners'

by various parties,<sup>79</sup> the U.S. Supreme Court held in *Brown v. Plata*<sup>80</sup> that the Prison Litigation Reform Act (PLRA)<sup>81</sup> allowed the Court to mandate that California reduce its prison population down to 137.5 percent of design capacity.<sup>82</sup> The ruling in *Plata* was monumental, as it called for the release of over 46,000 incarcerated individuals.<sup>83</sup> As Justice Scalia noted in his dissent, this decision was “perhaps the most radical injunction issued by a court in our Nation’s history.”<sup>84</sup>

In response to this federal mandate, California began reforming its criminal justice system.<sup>85</sup> In 2011, California Governor Edmund G. Brown, Jr. signed Assembly Bills 109 and 117, commonly known as the

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basic health needs. Needless suffering and death have been the well-documented result.

*Id.* at 501.

78. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

79. *See Brown*, 563 U.S. at 499, 500 (addressing two class actions: *Coleman v. Brown*, in which the plaintiffs were prisoners with mental disorders, and *Plata v. Brown*, in which the plaintiffs were prisoners with serious medical conditions).

80. *Brown v. Plata*, 563 U.S. 493 (2011).

81. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 801, 101 Stat. 1321-66. The Prison Litigation Reform Act was enacted by Congress as an effort to “address the large number of prisoner complaints filed in federal court.” John W. Palmer, CONSTITUTIONAL RIGHTS OF PRISONERS 414 (9th ed. 2010). Prior to 1996, there had been an abounding number of lawsuits filed by prisoners alleging violations of their constitutional rights, totaling over 39,000 in 1994. *See id.* at 413. Many of these lawsuits were filed by indigent prisoners, so the cost of litigation fell upon the taxpayers. *See id.* The sheer volume of these lawsuits absorbed “an inordinate amount of judicial time and energy” and approximately 70 percent of the lawsuits were found to be frivolous. *See id.* The public favored reform, and the Prison Litigation Reform Act was created. *See id.* at 413–14. The Act itself requires prisoners to abide by multiple restrictions before filing a lawsuit. *See id.* at 414. A prisoner must exhaust their administrative remedies prior to filing a lawsuit. *See id.* Prisoners must go through their prison’s formal grievances system and attempt to resolve their issue. *See id.* A prisoner must suffer a physical injury in order to receive monetary compensation. *See id.* at 416. Prisoners are also required to pay their own court filing fees. *See id.*

82. *See Brown*, 563 U.S. at 500–02. The *Brown* Court stated that at the time of the trial, California state prisons were built to hold a maximum of just under 80,000 prisoners. *Id.* In 2011, the California prison system held approximately 156,000 inmates, or almost 200 percent of the design capacity. *Id.*

83. *See id.* at 550 (Scalia, J., dissenting). California state prisons had been operating at approximately 200 percent of design capacity for 11 years, forcing over 200 prisoners to live in gymnasiums and requiring as many as 54 prisoners to share a single toilet. *Id.* at 502 (majority opinion). Mentally and physically ill inmates were not receiving adequate care and were dying as a result. *See id.* at 503–05.

84. *Id.* at 550 (Scalia, J., dissenting).

85. *See 2011 Public Safety Realignment Fact Sheet*, CAL. DEP’T OF CORR. & REHAB. 1 (Dec. 2013), <http://www.cdcr.ca.gov/realignment/docs/Realignment-Fact-Sheet.pdf>.

2011 Realignment Legislation.<sup>86</sup> The realignment bills allowed “newly-convicted low-level offenders without current or prior serious or violent offenses to stay in county jail to serve their sentence,” rather than requiring them to serve their time in state prisons.<sup>87</sup>

In 2014, California made another attempt to reduce prison populations by placing Proposition 47 to the public vote.<sup>88</sup> Proposition 47 reduced certain “low-level, nonviolent” crimes from felonies to misdemeanors and allowed for inmates to be resentenced according to these new reductions.<sup>89</sup> Crimes available for resentencing included various drug possession crimes, shoplifting, petty theft, grand theft under \$950, forgery under \$950, and receiving stolen property.<sup>90</sup> As of November 2017, approximately 4,699 individuals have been re-sentenced and released from state prisons under Proposition 47.<sup>91</sup>

California’s next attempt at reducing prison populations came in the form of Proposition 57, The Public Safety and Rehabilitation Act of 2016.<sup>92</sup> On November 8, 2016, California voters passed Proposition 57 by a 64 percent to 35 percent margin.<sup>93</sup> Proposition 57 added Section 32 to Article I of the California Constitution, which now states that “any person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense.”<sup>94</sup> The California Constitution defines a full term as the “longest term of imprisonment imposed by the court for any offense, excluding the imposition of an enhancement, consecutive sentence, or alternative sentence.”<sup>95</sup>

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86. *See id.*; *see also* Act of Apr. 4, 2011, ch. 15, 2011 Cal. Stat. 271 (enacting Assembly Bill 109); Act of June 30, 2011, ch. 39, 2011 Cal. Stat. 1674 (enacting Assembly Bill 117).

87. 2011 Public Safety Realignment Fact Sheet, *supra* note 85.

88. *See California Proposition 47, Reduced Penalties for Some Crimes Initiative (2014)*, BALLOTEDIA, <http://bit.ly/1VNJoGH> (last visited Aug. 26, 2018).

89. *See About Proposition 47*, MyPROP47, <http://myprop47.org/about/> (last visited Aug. 26, 2018).

90. *See What You Need to Know About Proposition 47*, CAL. DEP’T OF CORR. AND REHAB., <http://www.cdcr.ca.gov/news/prop47.html> (last visited Aug. 26, 2018); *see also About Proposition 47*, *supra* note 89.

91. *See* Defendants’ December 2017 Status Report in Response to February 10, 2014 Order at 4, *Plata v. Brown*, No. 3:01-cv-1351-JST (N.D. Cal. Dec. 15, 2017), <https://www.cdcr.ca.gov/News/docs/3JP-Dec-2017.pdf>.

92. *See Proposition 57, The Public Safety and Rehabilitation Act of 2016*, CAL. DEP’T OF CORR. AND REHAB., <http://www.cdcr.ca.gov/proposition57/> (last visited Aug. 26, 2018).

93. *Id.*

94. CAL. CONST. art. I, § 32(a)(1).

95. CAL. CONST. art. I, § 32(a)(1)(A).

Proposition 57 granted the California Department of Corrections and Rehabilitation (CDCR) the power to regulate and implement these new parole procedures.<sup>96</sup> Per CDCR:

Proposition 57 created a process for non-violent offenders, as defined by California Penal Code, who have served the full term for their primary offense to be considered for parole by the Board of Parole Hearings (BPH). This does not mean that inmates are automatically granted parole. The inmate’s behavior will be reviewed and considered by BPH. The commissioners may find that inmate suitable for parole if they believe he or she does not pose a current threat to public safety.<sup>97</sup>

The Office of Administrative Law (OAL) approved emergency regulations guiding the implementation of Proposition 57 on April 13, 2017, and CDCR began referring inmates to BPH on July 1, 2017.<sup>98</sup> OAL approved final Proposition 57 regulations on May 1, 2018, which are now promulgated in Title 15 of the California Code of Regulations.<sup>99</sup>

C. “Violent” Crimes in the California Penal Code

Proposition 57 only encompasses “nonviolent” offenders.<sup>100</sup> Per the regulations, a “nonviolent” offender is an individual who is not currently incarcerated for a “violent felony.”<sup>101</sup> California defines “violent felony” in Section 667.5(c) of the Penal Code.<sup>102</sup> Under this section, “violent” crimes include murder, arson, robbery, specific kinds of rape, various sex crimes, and carjacking, among others.<sup>103</sup> These crimes also count as “strikes”<sup>104</sup> in the California “Three Strikes”<sup>105</sup> sentencing scheme.<sup>106</sup>

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96. See CAL. CONST. art. I, § 32(b).

97. *Proposition 57 – Public Safety and Rehabilitation Act of 2016 Fact Sheet*, CAL. DEP’T OF CORR. AND REHAB. 1–2 (May 2018), <https://bit.ly/2LwQxMg>.

98. See Defendants’ Status Report, *supra* note 91.

99. See California Office of Administrative Law, Notice of Approval of Certificate of Compliance, OAL Matter No. 2018-0320-01C (May 1, 2018), <https://bit.ly/2wrAUQX>.

100. See CAL. CODE REGS. tit. 15, §§ 2449.1, 3490 (2018).

101. See *id.*

102. See CAL. PENAL CODE § 667.5 (West, Westlaw through 2017 Legis. Sess.); see also CAL. CODE REGS. tit. 15, §§ 2449.1(c), 3490(c).

103. See CAL. PENAL CODE § 667.5(c).

104. Compare CAL. PENAL CODE § 1192.7(c) (West, Westlaw through 2017 Legis. Sess.) (enumerating “serious felonies” that count as “strikes” for sentencing purposes), with CAL. PENAL CODE § 667.5 (enumerating “violent felonies” that preclude relief to convicts under Proposition 57).

105. See J. Richard Couzens & Tricia A. Bigelow, *The Amendment of the Three Strikes Sentencing Law*, CAL. COURTS (May 2017), <http://www.courts.ca.gov/documents/Three-Strikes-Amendment-Couzens-Bigelow.pdf>. Judge Couzens and Justice Bigelow explained:

Though the list of “violent” crimes includes some crimes that are traditionally seen as violent, this California Penal Code section does not include other crimes that generally shock the public conscience, including human trafficking, domestic violence, and rape of an unconscious person.<sup>107</sup> This failure has been criticized by numerous organizations and writers,<sup>108</sup> and was one of the main opposition points to the passage of Proposition 57.<sup>109</sup> In the next section, the author will examine exactly how the California Legislature has negatively affected the people of California by failing to classify domestic violence as a “violent” crime under the California Penal Code.

### III. ANALYSIS

Despite the prevalence and seriousness of domestic violence in American society, the California State Legislature has failed to codify domestic violence as a “violent” crime in the Penal Code. This oversight, coupled with the new Proposition 57 regulations, will have devastating effects on survivors of domestic violence.

#### A. *California Should Classify “Domestic Violence” as a “Violent” Crime under Penal Code Section 667.5(c)*

In April 2001, Kimberly Pipes, a mother of four, was at her California rental apartment when she and the defendant, her on-and-off boyfriend, got into an argument.<sup>110</sup> As Kimberly tried to leave the apartment, the defendant “put his arm around her neck and dragged her

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California’s Three Strikes sentencing law was originally enacted in 1994. . . . [T]he essence of the Three Strikes law was to require a defendant convicted of any new felony, having suffered one prior conviction of a serious felony as defined in section 1192.7(c), a violent felony as defined in section 667.5(c), or a qualified juvenile adjudication or out-of-state conviction (a “strike”), to be sentenced to state prison for twice the term otherwise provided for the crime. If the defendant was convicted of any felony with two or more prior strikes, the law mandated a state prison term of at least 25 years to life.

*Id.* at 5.

106. *Frequently Asked Questions: Three (3) Strikes*, L.A. CTY. PUB. DEF. OFFICE, <https://bit.ly/2PcqvX> (last visited Aug. 26, 2018).

107. *See* CAL. PENAL CODE § 667.5(c).

108. *See* Anne Marie Schubert, Opinion, *Concerns About Parole Measures are Coming True*, SACRAMENTO BEE (July 28, 2017), <https://bit.ly/2LsjusN>.

109. *See California Proposition 57, Parole for Non-Violent Criminals and Juvenile Court Trial Requirements (2016)*, BALLOTEDIA, <http://bit.ly/2jbzeb5> (last visited Aug. 26, 2018) [hereinafter *BALLOTEDIA, Proposition 57*].

110. *See* *People v. Brown*, 94 P.3d 574, 575–76 (Cal. 2004).

to the bedroom.”<sup>111</sup> The defendant left the bedroom and returned with a steak knife and a barbeque fork, and threatened to kill Kimberly if she tried to leave.<sup>112</sup> Fearful for her life, Kimberly told the defendant that she wanted to leave the situation.<sup>113</sup> In retaliation, the defendant punched her in the stomach and threatened to kill her.<sup>114</sup> Despite the explicit physical violence exemplified by this defendant, he was only charged with misdemeanor domestic battery under Penal Code Section 243(e)(1),<sup>115</sup> and would qualify as a “nonviolent” offender under Proposition 57.<sup>116</sup>

During the 45-day public comment period prior to the latest amendment to the Proposition 57 regulations, one of the most frequently asked comments was for CDCR to expand the list of “violent” offenses.<sup>117</sup> CDCR decided against this, and explained that “although the public may debate whether additional offenses are inherently ‘violent’ and should be excluded from the NVPP, CDCR will defer to the Legislature to make any revisions to the list of violent offenses in Penal Code section 667.5(c).”<sup>118</sup> In doing this, CDCR effectively placed the responsibility to change the definition of the “violent” offender on the California State Legislature.<sup>119</sup>

In this Comment, the author argues that the California Legislature should add domestic violence to the list of “violent” crimes, as listed in Penal Code section 667.5(c), for multiple reasons. First, the plain language of the two most common domestic violence crimes clearly indicates the seriousness of these crimes and the dangers they pose to society. Second, the California Penal Code currently treats incidents of domestic violence with a gun differently than those without a gun. This disparity in treatment should not exist, as all incidents of domestic violence are inherently “violent.” Finally, the pervasive and long-lasting effects of domestic violence support its elevation to “violent” crime status. Many survivors suffer from debilitating physical and mental ailments that last long after the abuse has subsided.

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111. *Id.* at 576.

112. *See id.*

113. *See id.*

114. *See id.*

115. CAL. PENAL CODE § 243(e)(1) (West, Westlaw through 2017 Legis. Sess.).

116. *See Brown*, 94 P.3d at 577; CAL. PENAL CODE § 667.5(c) (West, Westlaw through 2017 Legis. Sess.).

117. *See Proposition 57 Regulations Public Comment Period: Responses to Frequent Comments*, CAL. DEP’T OF CORR. AND REHAB. 2, <https://bit.ly/2PDFiVH> (last updated Nov. 29, 2017).

118. *Id.*

119. *See id.*

### 1. Plain Language of the Crimes

The plain language of two of the most common domestic violence crimes in California,<sup>120</sup> Penal Code Section 243(e)(1),<sup>121</sup> domestic battery, and Penal Code Section 273.5(a),<sup>122</sup> willful infliction of corporal injury, support the elevation of these crimes to “violent” crime status. Domestic battery is a misdemeanor offense,<sup>123</sup> and willful corporal injury to a spouse can be charged as a misdemeanor or a felony depending on the circumstances of the case and the defendant’s prior criminal history.<sup>124</sup>

The crime of corporal injury to a spouse requires two elements: (1) that the defendant willfully inflicted physical injury on either a current or former spouse, a current or former cohabitant, a fiancé or fiancée, an individual whom the offender dated or is dating, or the parent of the offender’s child; *and* (2) that the injury resulted in a “traumatic condition.”<sup>125</sup> A traumatic condition is defined as “a condition of the body, such as a wound, or external or internal injury, including, but not limited to, injury as a result of strangulation or suffocation, whether of a minor or serious nature, caused by a physical force.”<sup>126</sup>

Moreover, willful corporal injury of a spouse penalizes offenders for cumulative offenses in two ways.<sup>127</sup> First, if an offender has a prior conviction for either the same charge or another battery that occurred within seven years, the offender could be subject to a prison term of up to five years, a county jail term of up to a year, or both imprisonment and a fine up to \$10,000.<sup>128</sup> Conversely, if an offender has a prior conviction within seven years for domestic battery specifically, the offender could be subject to a prison sentence of up to four years, a county jail sentence of up to a year, a fine of up to \$10,000, or imprisonment and a fine.<sup>129</sup>

The lesser included domestic violence offense, domestic battery, requires two elements: (1) that “[t]he defendant willfully touched the

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120. See *Domestic Violence: Laws Related to Domestic Violence*, L.A. POLICE DEP’T, [http://www.lapdonline.org/get\\_informed/content\\_basic\\_view/8887](http://www.lapdonline.org/get_informed/content_basic_view/8887) (last visited Nov. 12, 2017).

121. CAL. PENAL CODE § 243(e)(1) (West, Westlaw through 2017 Legis. Sess.).

122. CAL. PENAL CODE § 273.5(a) (West, Westlaw through 2017 Legis. Sess.).

123. See CAL. PENAL CODE § 243(e)(1).

124. See CAL. PENAL CODE § 17(b) (West, Westlaw through 2017 Legis. Sess.); see also *People v. Vessell*, 42 Cal. Rptr. 2d 241, 243 (Cal. Ct. App. 1995).

125. See CAL. PENAL CODE § 273.5(a)–(b); see also JUDICIAL COUNCIL OF CALIFORNIA CRIMINAL JURY INSTRUCTIONS § 840 (West 2018).

126. CAL. PENAL CODE § 273.5(d).

127. See CAL. PENAL CODE § 273.5(f).

128. See CAL. PENAL CODE § 273.5(f)(1).

129. See CAL. PENAL CODE § 273.5(f)(2).



victim in a harmful or offensive manner”; *and* (2) that the victim is “a spouse, a person with whom the defendant is cohabiting, a person who is the parent of the defendant’s child, former spouse, fiancé or fiancée, or a person with whom the defendant currently has, or has previously had, a dating or engagement relationship.”<sup>130</sup> The California Penal Code notes that “the Legislature finds and declares that these specified crimes merit special consideration when imposing a sentence so as to display society’s condemnation for these crimes of violence upon victims with whom a close relationship has been formed.”<sup>131</sup> Despite this condemnation, however, these crimes are not classified as “violent” crimes under the California Penal Code.

When solely examining the words in Sections 243(e)(1) and 273.5(a) of the California Penal Code - “harmful,” “traumatic,” “wound,” “strangulation,” and “suffocation” — it is easily apparent that these are, in fact, violent crimes. These words indicate that the crimes are inherently violent, and the Legislature’s decision to use these specific words signals that these crimes were contemplated as violent when they were written. Compare this to the language of Penal Code Section 12022.7,<sup>132</sup> the crime of great bodily injury while committing or attempting to commit a felony, which merely requires a “a significant or substantial physical injury.”<sup>133</sup> This enhancement is codified as a “violent” crime,<sup>134</sup> despite being ambiguously written with no clear definition of what a “significant” or “substantial” injury requires.<sup>135</sup> The language of corporal injury to a spouse, however, uses specific, targeted language like “traumatic” to alert judges, attorneys, and the public that corporal injury to a spouse is, in fact, a crime of violence.<sup>136</sup>

Though this great bodily injury enhancement can be added to a corporal injury charge, it requires attorneys and judges to arbitrarily determine what a “significant” or “substantial” injury is.<sup>137</sup> The vague language contained in these Penal Code sections opens the door to a disparity in how similarly-situated survivors are treated. In the case of Proposition 57, this disparity will be devastating, as some batterers will be released while others remain in prison. Due to the plain language of

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130. JUDICIAL COUNCIL OF CALIFORNIA CRIMINAL JURY INSTRUCTIONS § 841 (West 2018); *see also* CAL. PENAL CODE § 243(e)(1) (West 2016).

131. CAL. PENAL CODE § 243(e)(1).

132. *See* CAL. PENAL CODE § 12022.7 (West, Westlaw through 2017 Legis. Sess.).

133. CAL. PENAL CODE § 12022.7(f).

134. *See* CAL. PENAL CODE § 667.5(c) (West, Westlaw through 2017 Legis. Sess.).

135. *See id.*

136. *See* CAL. PENAL CODE § 273.5(d) (West, Westlaw through 2017 Legis. Sess.).

137. *See* CAL. PENAL CODE § 12022.7(f).

the corporal injury charge, it should be elevated to felony “violent” crime status.

## 2. Disparate Sentencing With or Without a Gun

Despite the California State Legislature’s stated condemnation of crimes of domestic violence,<sup>138</sup> the Legislature has failed to protect all survivors equally. For example, there is a discrepancy between domestic violence crimes committed with a gun and those committed without a gun.<sup>139</sup> If a gun is present during a domestic violence incident and is charged as a felony, the prosecutor has the option of adding a gun enhancement to the domestic violence charge, which could add up to ten years of prison time to a conviction.<sup>140</sup> Under the California Penal Code, this enhancement escalates a crime to “violent” felony status, thus excluding the offender from early parole consideration under Proposition 57.<sup>141</sup>

A felony domestic violence charge without the gun enhancement, however, is not treated as a “violent” crime and exposes perpetrators to early parole consideration under Proposition 57 simply because a gun was not present during the violent incident.<sup>142</sup> Under identical facts, the presence of a gun during one domestic violence incident, compared with an incident without the presence of firearms, creates a sentencing discrepancy of, at minimum, three years.<sup>143</sup> This discrepancy is also the difference between early parole or continued jail time under Proposition 57.<sup>144</sup>

This discrepancy in treatment between domestic violence with and without a gun should not exist. Though the presence of a gun is an extremely high-risk factor for domestic violence,<sup>145</sup> this bright-line rule of penalizing those who commit acts of violence with a gun with prison sentences, but discrepantly punishing those who commit the same acts without the presence of gun, does not treat all survivors equally. While the presence of a gun during a domestic violence incident is not and should not be tolerated, those who suffer from a domestic violence

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138. See CAL. PENAL CODE § 243(e)(1) (West, Westlaw through 2017 Legis. Sess.).

139. See *Guns and Domestic Violence*, EVERYTOWN, <https://everytownresearch.org/guns-domestic-violence/> (last visited Aug. 27, 2018).

140. See CAL. PENAL CODE § 12022.5 (West, Westlaw through 2017 Legis. Sess.).

141. See CAL. PENAL CODE § 667.5(c) (West, Westlaw through 2017 Legis. Sess.).

142. See CAL. PENAL CODE § 273.5 (West, Westlaw through 2017 Legis. Sess.).

143. See CAL. PENAL CODE § 12022.5.

144. See CAL. PENAL CODE § 667.5(c).

145. See *Domestic Violence & Firearms*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, <https://bit.ly/2Je65VA> (last visited Aug. 27, 2018).

incident without a gun should not receive different treatment. With or without a gun, domestic violence is a serious crime and all forms of it should be considered “violent.”

### 3. Harmful Nature and Lasting Effects

Survivors of domestic violence face a host of challenges and consequences as a result of a domestic violence incident or relationship.<sup>146</sup> These harmful and long-lasting effects also contribute to the elevation of domestic violence to “violent” crime status.

The cycle of violence is the key tenet of an abusive relationship.<sup>147</sup> The cycle typically begins with the “honeymoon” phase, which is when an aggressor is on his or her best behavior.<sup>148</sup> The aggressor is typically forgiving, wonderful, and, if further along in the cycle, sorry and remorseful.<sup>149</sup> The honeymoon phase is followed by the “tension building” phase, when the aggressor become controlling.<sup>150</sup> The aggressor typically begins to escalate his or her temper, and will threaten or talk down to the victim during this phase.<sup>151</sup> Finally, the “explosion” phase occurs, which is when the aggressor lashes out and breaks the tension of the second phase, generally through physical abuse.<sup>152</sup> The explosion may be followed by another honeymoon phase, this time in the form of an apology and a promise to be different.<sup>153</sup> This cycle is vicious, and has long-lasting effects on those who are trapped by it.<sup>154</sup>

One of the most visceral effects of domestic violence is the physical violence.<sup>155</sup> The physical effects of domestic violence can range from bruising or swelling to broken bones, sexual dysfunction, or even death.<sup>156</sup> Survivors are also more likely to suffer from chronic health problems, including arthritis, cancer, diabetes, heart problems, and stomach ulcers.<sup>157</sup> Female survivors of domestic violence are also three

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146. See *Cycle of Violence*, COMMUNITY BEYOND VIOLENCE, <http://cbv.org/cycles-of-violence/> (last visited Aug. 27, 2018).

147. See *id.*

148. See *id.*

149. See *id.*

150. See *id.*

151. See *id.*

152. See *id.*

153. See *id.*

154. See *id.*

155. See *Effects of Domestic Violence*, JOYFUL HEART FOUND., <http://www.joyfulheartfoundation.org/learn/domestic-violence/effects-domestic-violence> (last visited Aug. 27, 2018).

156. See *id.*

157. See *The Facts on Health Care and Domestic Violence*, FUTURES WITHOUT VIOLENCE, <https://bit.ly/1jptqCI> (last visited Aug. 27, 2018); see also *Current Evidence:*

times more likely to contract AIDS or HIV when compared to females who have not experienced domestic violence.<sup>158</sup>

Additionally, domestic violence has a lasting mental effect on survivors.<sup>159</sup> These mental effects include a higher risk of post-traumatic stress disorder, with symptoms such as “flashbacks, nightmares, severe anxiety, and uncontrollable thoughts.”<sup>160</sup> Survivors are also at a higher risk for depression, deliberate self-harm, eating disorders, anxiety and other mood disorders, alcohol abuse, and substance abuse.<sup>161</sup> In addition, survivors of domestic violence have a higher risk for suicidal thoughts and suicide attempts.<sup>162</sup>

These are just some of the ways that domestic violence affects survivors. Every survivor experiences abuse in their own way, and each survivor reacts to that abuse differently. What should not be different, however, is the way these survivors are treated. Thus, the long-lasting and extremely pervasive effects of domestic violence listed above should elevate the crimes to “violent” crime status in California.

*B. California’s Failure to Classify Domestic Violence as A “Violent” Crime Will Be Detrimental to Survivors and California at Large*

Despite Proposition 57’s promise to “keep[] the most dangerous criminals behind bars,”<sup>163</sup> the lack of protection for domestic violence survivors, coupled with Proposition 57’s failure to classify domestic batterers as “violent,” will likely result in an increase of domestic violence in the state of California.

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*Intimate Partner Violence, Trauma-Related Mental Health Conditions & Chronic Illness Fact Sheet*, NAT’L CTR. ON DOMESTIC VIOLENCE, TRAUMA & MENTAL HEALTH 5 (2014), <http://bit.ly/1UrC7j5> [hereinafter NCDVTMH, *Current Evidence*].

158. See NCDVTMH, *Current Evidence*, *supra* note 157, at 4 (citing Jitender Sareen et al., *Is Intimate Partner Violence Associated With HIV Infection Among Women In The United States?*, 31 GEN. HOSP. PSYCHIATRY 274 (2009)).

159. See *Effects of Domestic Violence*, *supra* note 155.

160. *Id.*

161. See *id.*; see also NCDVTMH, *Current Evidence*, *supra* note 157, at 1–4; see also *The Facts on Health Care and Domestic Violence*, *supra* note 157.

162. See *Domestic Violence Survivors at Higher Risk for Suicide*, DOMESTIC SHELTERS (June 8, 2016), <http://bit.ly/2nXVK62>.

163. BALLOTPEdia, *Proposition 57*, *supra* note 109.

### 1. The Regulations Created by Proposition 57

Proposition 57 allows for certain “nonviolent” offenders to seek early parole.<sup>164</sup> The passage of Proposition 57 added and amended various regulations in Title 15 of the California Code of Regulations concerning parole consideration of these so-called “nonviolent” offenders.<sup>165</sup>

Sections 2449.1 and 3490 define the “nonviolent” offender. Per subsection (a) of these regulations:

An inmate is a “nonviolent offender” if none of the following are true:

- (1) The inmate is condemned to death;
- (2) The inmate is currently incarcerated for a term of life without the possibility of parole;
- (3) The inmate is currently incarcerated for a term of life with the possibility of parole for a “violent felony;”
- (4) The inmate is currently serving a determinate term prior to beginning a term of life with the possibility of parole for a “violent felony” or prior to beginning a term for an in-prison offense that is a “violent felony;”
- (5) The inmate is currently serving a term of incarceration for a “violent felony;” or
- (6) The inmate is currently serving a term of incarceration for a nonviolent felony offense after completing a concurrent determinate term for a “violent felony.”<sup>166</sup>

Subsection (b) adds to subsection (a), stating that “a ‘nonviolent offender’ includes an inmate who has completed a determinate or indeterminate term of incarceration and is currently serving a determinate term for an in-prison offense that is not a ‘violent felony.’”<sup>167</sup>

Proposition 57 further defines a “violent felony” as “a crime or enhancement as defined in subdivision (c) of section 667.5 of the Penal Code.”<sup>168</sup>

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164. See *Proposition 57: Public Safety and Rehabilitation Act of 2016 Frequently Asked Questions*, CAL. DEP’T OF CORR. AND REHAB., <https://bit.ly/2Mwwjrz> (last updated May 2018) [hereinafter CDCR, *Proposition 57 FAQ*].

165. See CAL. CODE REGS. tit. 15, §§ 2449.1–.5, 3490–93 (2018).

166. CAL. CODE REGS. tit. 15, §§ 2449.1(a), 3490(a).

167. CAL. CODE REGS. tit. 15, §§ 2449.1(b), 3490(b).

168. CAL. CODE REGS. tit. 15, §§ 2449.1(c), 3490(c); see also CAL. PENAL CODE § 667.5(c) (West, Westlaw through 2017 Legis. Sess.)(enumerating “violent felony” crimes).

The next portion of the law, Section 3491, details additional eligibility criteria that must be met before an inmate can be referred to the Board of Parole Hearings, including that an inmate must not be serving a life sentence or be a registered Sex Offender.<sup>169</sup> Section 3492 provides that an inmate who meets the requirements of Section 3491 must, in addition to fulfilling other criteria, also undergo a “public safety” screening, which requires that the inmate not currently be in a Security Housing Unit,<sup>170</sup> and have been convicted of a drug-related offense while in prison in the last year.<sup>171</sup>

In addition, Sections 2449.4 and 2449.5 define the process for review and factors for consideration.<sup>172</sup> In order for an inmate to be found suitable for early release, the hearing officer must determine that, based on the totality of the circumstances,<sup>173</sup> the inmate “does not pose a current, unreasonable risk of violence or a current, unreasonable risk of significant criminal activity.”<sup>174</sup> To determine this, the officer may examine a variety of aggravating and mitigating factors<sup>175</sup> and may consider “all relevant and reliable information,” including information in the inmate’s Record of Arrests and Prosecutions (“RAP”) sheets, central file, and documented criminal history, as well as any written statements by the inmate, victim, or prosecuting agency.<sup>176</sup> If the officer determines that “factors aggravating the inmate’s risk do not exist or if they are outweighed by factors mitigating the inmate’s risk,” the inmate must be released.<sup>177</sup> If the inmate’s release will be more than two years away

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169. See CAL. CODE REGS. tit. 15, § 3491.

170. See *Security Housing Units Fact Sheet*, CAL. DEP’T OF CORR. AND REHAB. (Oct. 2013), <https://bit.ly/2ogY2hq> (explaining that a Security Housing Unit is “specifically designed to house offenders whose conduct endangers the safety of others or the security of the prison”).

171. See CAL. CODE REGS. tit. 15, § 3492 (2018).

172. See CAL. CODE REGS. tit. 15, § 2449.4 (2018).

173. See CAL. CODE REGS. tit. 15, § 2449.5 (2018).

174. *Id.*; see also CAL. CODE REGS. tit. 15, § 2449.4.

175. See CAL. CODE REGS. tit. 15, § 2449.5. This section of the regulations outlines the factors that can be considered aggravating or mitigating the inmate’s risk. *Id.* Aggravating factors regarding the inmate’s current conviction include the use of a deadly weapon during the commission of the crime and the degree of injury to the victims. *Id.* Mitigating factors include the absence of a deadly weapon and the lack of injury to the victims. *Id.* Aggravating factors regarding the inmate’s prior criminal history include a conviction for a violent felony in the past fifteen years, a pattern of criminal conduct, and poor conduct while on parole. *Id.* Mitigating factors include the absence or decrease of criminal behavior. *Id.* Other factors include the inmate’s institutional behavior, work history, and rehabilitative programming while incarcerated, as well as statements from the prosecuting agency the notified victims. *Id.*

176. See CAL. CODE REGS. tit. 15, § 2449.4.

177. See CAL. CODE REGS. tit. 15, § 2449.5.

from their earliest possible release date, the decision must be reviewed for a second opinion.<sup>178</sup>

The last portion of the regulations, Section 3493, outlines the process for an inmate’s release and provides that if the inmate is found to be fit for parole, they must be released within 60 days and the Board must notify victims and law enforcement agencies.<sup>179</sup> The language of these regulations highlights how subjective the process of early parole can be. Each hearing officer has an enormous amount of discretion, which opens the possibility of disparate treatment for similarly-situated offenders.

## 2. Proposition 57’s Undermining of Survivors’ Rights and Public Safety

Currently, survivors of domestic violence in California are protected by the Victims’ Bill of Rights, commonly known as “Marsy’s Law.”<sup>180</sup> Marsy’s Law was on the 2008 California ballot as Proposition 9 and passed by 54 percent.<sup>181</sup> The purpose of Marsy’s Law is to “provide victims with rights to justice and due process,”<sup>182</sup> and has come to include various rights and protections for victims of crime in California.<sup>183</sup> These rights are enumerated in the California Constitution, which states that:

Victims of crime have a collectively shared right to expect that persons convicted of committing criminal acts are sufficiently punished in both the manner and the length of the sentences imposed by the courts of the State of California. This right includes the right to expect that the punitive and deterrent effect of custodial sentences imposed by the courts *will not be undercut or diminished* by the granting of rights and privileges to prisoners that are not required by any provision of the United States Constitution or by the laws of this State to be granted to any person incarcerated in a penal or other custodial facility in this State as a punishment or correction for the commission of a crime.<sup>184</sup>

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178. See CAL. CODE REGS. tit. 15, § 2449.4.

179. See CAL. CODE REGS. tit. 15, § 3493 (2018).

180. See CAL. CONST. art. I, § 28; see also *Victims’ Bill of Rights*, CAL. OFFICE OF THE ATT’Y GEN., [https://oag.ca.gov/victimservices/content/bill\\_of\\_rights](https://oag.ca.gov/victimservices/content/bill_of_rights) (last visited Aug. 27, 2018).

181. See *California Proposition 9, Marsy’s Law Crime Victims Rights Amendment (2008)*, BALLOTEDIA, <http://bit.ly/2DceKbG> (last visited Aug. 27, 2018).

182. *Victims’ Bill of Rights Act of 2008: Marsy’s Law*, CAL. OFFICE OF THE ATT’Y GEN., [https://oag.ca.gov/victimservices/marsys\\_law](https://oag.ca.gov/victimservices/marsys_law) (last visited Aug. 27, 2018).

183. See *id.*

184. CAL. CONST. art. I, § 28(a)(5) (emphasis added).

Among the many rights accorded to victims,<sup>185</sup> the California Constitution grants victims the right “to have the safety of the victim, the victim’s family, and the general public considered before any parole or other post-judgment release decision is made.”<sup>186</sup> The California Constitution and Marsy’s Law explicitly promise victims of crime in California that, unless required by the Constitution, they would not enact early release policies that would “undercut or diminish” the punitive and deterrent effect of prison sentences.<sup>187</sup>

With the current status of Proposition 57, however, this is exactly what will happen. The goal behind Proposition 57 is not to enhance prisoners’ rights or rectify a constitutional violation to prisoners—the goal is to relieve prison overcrowding.<sup>188</sup> Criminals who commit “nonviolent” crimes will be able to seek early parole, despite California’s explicit promise not to do so.<sup>189</sup> Thus, Proposition 57 does a disservice to victims of crime, and is clearly in opposition to the California Legislature’s statement that “[t]he rights of victims of crime and their families in criminal prosecutions are a subject of grave statewide concern.”<sup>190</sup>

Furthermore, individuals convicted of domestic violence are likely to reoffend,<sup>191</sup> which poses another significant danger to victims of crime. The Ninth Circuit noted in *United States v. Chovan*<sup>192</sup> that “a high rate of domestic violence recidivism exists,” falling somewhere between 35 percent and 80 percent.<sup>193</sup> Recidivism in domestic violence offenses occurs at a higher rate than other violent crimes,<sup>194</sup> and if these offenders are released under Proposition 57, this oversight could prove disastrous. Many relationships in which domestic violence occur are cyclical,<sup>195</sup> so if an abuser is released without remedying or recognizing his or her violent

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185. See CAL. CONST. art. I, § 28(b) (including the right to be treated with freedom and respect throughout the criminal justice process, to be reasonably protected, to prevent the disclosure of confidential information, to refuse to provide certain information, to notice of charges, court dates, parole hearings, to be present at any such proceedings, to a speedy trial, and to restitution, among others).

186. CAL. CONST. art. I, § 28(b)(16).

187. See CAL. CONST. art. I, § 28(a)(5).

188. See CDCR, *Proposition 57 FAQ*, *supra* note 164.

189. See CAL. CONST. art. I, § 28(a)(5).

190. CAL. CONST. art. I, § 28(a)(1).

191. See Tamika L. Payne, *Domestic Violence Recidivism: Restorative Justice Intervention Programs for First-Time Domestic Violence* 6–8 (June 2017) (unpublished Ph.D. dissertation, Walden University), <https://bit.ly/2wr9hr7>.

192. *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013).

193. *Id.* at 1140.

194. See Payne, *supra* note 191, at 1.

195. See *Cycle of Violence*, *supra* note 146; see also *supra* Section III.A.3.



behavior, another possibly more dangerous domestic violence incident could happen, even with sanctions in place.<sup>196</sup>

### C. Recommendation

In order to remedy this flaw caused by Proposition 57, the California State Legislature should add domestic violence to the list of “violent” crimes under Penal Code 667.5(c).<sup>197</sup> Additionally, if California truly wants to achieve its goals of reducing recidivism while also adhering to the federal mandate of lowering prison populations, the Legislature and CDCR must invest time and resources into developing evidence-based practices and strategies that help batterers restructure their cognitive and behavioral mental structures to recognize and remedy the cycle of abuse.<sup>198</sup> In addition, CDCR should place an emphasis on restorative justice programs that can be used to mend both offenders and victims alike.<sup>199</sup> Such practices should be mandatory for incarcerated batterers so that upon release, batterers will be able to re-enter society and not succumb to the violent cycle of recidivism.

In addition, California’s current position of placing the burdens and responsibilities of a domestic violence incident onto victims’ shoulders must change. The California State Legislature and CDCR need to prioritize the rehabilitative aspect of prison commitment for batterers if they truly want to show the citizens of California that domestic violence, and the rehabilitation of such offenders, is a priority.

## IV. CONCLUSION

Proposition 57’s assurance that it “keeps the most dangerous criminals behind bars”<sup>200</sup> is a grossly inaccurate statement. Despite California’s assertions that domestic violence is, in fact, a serious problem,<sup>201</sup> the California Legislature’s failure to classify domestic violence crimes as “violent” under California Penal Code section 667.5(c) says otherwise.<sup>202</sup> Domestic violence is an epidemic,<sup>203</sup> both in

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196. See Tjaden & Thoennes, *supra* note 13, at 53 (finding that approximately half of all temporary restraining orders obtained by female victims against defendants who physically assaulted them were violated).

197. See CAL. PENAL CODE § 667.5(c) (West, Westlaw through 2017 Legis. Sess.).

198. See Payne, *supra* note 191, at 1, 4–5 (explaining that batterer intervention programs and other restorative justice programs are more effective at reducing recidivism than restraining orders, probation, or incarceration).

199. See *id.* at 7.

200. BALLOTPEdia, *Proposition 57*, *supra* note 109.

201. See *People v. Brown*, 94 P.3d 574, 577 (Cal. 2004).

202. See *supra* Section III.A.1.

203. See Sproul, *supra* note 57, at 5.

California and in the greater United States, and batterers should not be permitted to reap the benefits of being “nonviolent” offenders under Proposition 57.<sup>204</sup> Batterers are part of a larger, systematic cycle of abuse, and until California can recognize that and find programs to rehabilitate offenders, California’s failure to classify these crimes as “violent” will lead to repercussions for the California criminal justice system and survivors of domestic violence at large.

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204. *See supra* Section III.B.