Commentary

Double Victims: Ending the Incarceration of California’s Battered Women

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ABSTRACT

This Comment focuses on the plight of incarcerated survivors of domestic violence—specifically, women who are eligible for habeas corpus relief under California Penal Code section 1473.5. Taking the position that these women should be released from prison, the author examines the range of relief potentially available before focusing on the advantages and shortcomings of the two most common paths to release: (1) parole and (2) habeas corpus under section 1473.5. This Comment illustrates how the politicization of California’s parole process and the technicalities of the habeas statute have limited survivors’ access to relief. Ultimately, this Comment concludes that increased resources and appropriate implementation of the habeas statute provide the most appropriate paths forward to guarantee justice for women victimized by both abusers and by California’s carceral system.

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INTRODUCTION

Who is a double victim? She has survived abuse at the hands of an intimate partner, and her reward for this survival is further abuse by the criminal justice system. She has survived twenty-five years of abuse from her husband, her boyfriend, her father, or her brother. She is now living through an additional twenty-five years of abuse in the form of prison walls and all the control and violence those walls exercise over her. She is white, she is black, she is Asian, Latina, Native American.¹ She can be any age, though she is likely now well into her forties.² She probably has at least a high school diploma and may have a graduate degree.³ Abused by her husband, the double victim now serves time for his death. Abused by her boyfriend, she now sits in prison for a crime he forced her to commit. A survivor of abuse, she is now serving time for sitting in the car with their baby while her husband, ten yards away, killed another man. She is serving fifteen years to life, twenty-five years to life, life without parole, or a death sentence.⁴

1. ELIZABETH DERMOXY LEONARD, CONVICTED SURVIVORS: THE IMPRISONMENT OF BATTERED WOMEN WHO KILL 60 (2002). In 1997, sociologist Elizabeth Dermody Leonard concluded an in-depth study of women convicted for the death of their abusive partners who were serving time in the California Institution for Women. Id. at 50, 52, 60. Of the 42 women who comprised the study sample, two-thirds identified themselves as white, 17 percent identified as black, 7 percent as Hispanic, 5 percent as Native American, and 2 percent as Asian/Pacific Islander. Id. at 60. These numbers can be contrasted against the study of California female prisoners as a whole that sociologist Barbara Bloom conducted in 1996. Id. The survey instrument used in Bloom’s study provided the basis for Leonard’s work. Id. at 58. Bloom found that, of the 294 women surveyed, 36 percent identified as white, 46 percent as black, 14 percent as Hispanic, and 4 percent as other. Id. at 60.

2. Id. Leonard found the ages of women who killed their abusers, at the time of the study, to be: 18-24, 4.8 percent; 25-34, 9.5 percent; 35-44, 21.4 percent; 45-54, 50 percent; and 55 and older, 14.3 percent. Id. at 60. This indicates an older demographic than for the general female prison population, as revealed in Bloom’s study: 18-24, 11.2 percent; 25-34, 48.2 percent; 35-44, 27.9 percent; 45-54, 10.5 percent; 55 and older, 2.2 percent. Id. at 60.

3. Id. (finding that the majority of women [64.3 percent] surveyed had some college education or more, as contrasted with the 13.5 percent of the general population in Bloom’s study).

4. Although California prisons house abuse survivors of all gender identities and sexual orientations, because the vast majority of documented domestic violence cases involve heterosexual female victims and their male batterers, this paper will speak mainly to that pattern of abuse. See, e.g., Joan Zorza, Women Battering: High Costs and the State of the Law, reprinted in
There are at least one hundred double victims in California prisons, and likely more, who have received life sentences for crimes related to the effects of intimate partner battering, but who did not have the full benefit of the protective laws available today.\(^5\) Thanks to hard-fought efforts of advocates, legislators, and incarcerated women themselves, these women can now obtain a second chance at justice in California through a special habeas corpus statute, Penal Code section 1473.5. The women who can utilize this statute form the focus of this Comment, though their experiences frequently will speak for incarcerated battered women as a whole.

This Comment will examine the two paths that most often lead to the release of a battered woman serving a life sentence for a crime related to her experience as a survivor of abuse: (1) release upon parole or (2) release through a petition for writ of habeas corpus pursuant to California Penal Code section 1473.5. Part I of this paper provides background on common obstacles faced by imprisoned battered women, laying the groundwork for and contextualizing the potential post-conviction remedies. Part II briefly outlines non-parole, non-habeas routes that women could follow to obtain their release from prison. Part III examines the unique obstacles posed by California's parole process, looking in particular at the Governor's extraordinary power with respect to these decisions. Part IV describes the habeas corpus law pertaining specifically to battered women, with a special focus on the law's 2005 amendments. The habeas statute came to be after the 1991 enactment of the California Evidence Code section expressly permitting expert witness testimony on intimate partner battering and its effects.\(^6\) Such testimony can prove critical for a battered woman on trial as a criminal defendant.\(^7\) California Penal Code section 1473.5 recognizes the plight of battered victims convicted before the change in law and permits women meeting certain requirements to file writs of habeas corpus "on the basis that expert witness testimony relating to intimate partner battering and its effects . . . was not received in evidence at the trial court proceedings . . . ."\(^8\) This Comment presents some of

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\(^{NANCY~K.D.~LEMON,~DOMESTIC~VIOLENCE~LAW~14-16~(3d~ed.~2009).~Note,~however,~that~all~laws~examined~in~this~paper~apply~regardless~of~gender.~}

\(^5\) Telephone Interview with Marisa Gonzalez, Coordinator, Habeas Project, Staff Attorney, Legal Services for Prisoners with Children (May 10, 2010) [hereinafter Telephone Interview with Marisa Gonzalez, May 10, 2010].

\(^6\) See CAL. EVID. CODE § 1107 (West 2005).

\(^7\) See infra Part IV.A (providing a full explanation of the habeas corpus requirements and the significance of the Evidence Code provisions).

\(^8\) CAL. PENAL CODE § 1473.5 (Deering Supp. 2010). California Penal Code section 1473.5 currently reads in full:

(a) A writ of habeas corpus also may be prosecuted on the basis that expert testimony relating to intimate partner battering and its effects, within the meaning of Section 1107 of the Evidence Code, was not received in evidence at the trial court proceedings relating to the prisoner's incarceration, and is of such substance that, had it been received in evidence, there is a reasonable probability, sufficient to undermine confidence in the judgment of conviction, that the result of the proceedings would have been different. Sections 1260 to 1262, inclusive, apply to the prosecution of a writ of habeas corpus pursuant to this section. As used in this section, "trial court
the lingering challenges that incarcerated battered women face when utilizing the habeas law, concluding that what California needs is not additional legislation but appropriate implementation of existing statutes and regulations. Ultimately, this Comment seeks to ensure that justice prevails for these women and urges the release of incarcerated double victims, so these women can gain control over their lives and continue their healing processes outside of prison walls.

I. THE DILEMMA OF IMPRISONED BATTERED WOMEN AND ITS IMPACT ON THE STATE

As of 2011, California has several laws that address the plight of women convicted of crimes related to their experiences of intimate partner battering; these laws represent initial steps in remediing the wrongs already experienced at the hands of various branches of the state. In most cases, these women ended up in prison because the system failed them at multiple points: police did not respond to 911 calls; shelters with few resources turned away women and their children after they encountered their abusers; and the criminal justice system failed them when they came into contact with it. These laws represent initial steps in remediing the wrongs already experienced at the hands of various branches of the state.

9. See id.; CAL. EVID. CODE § 1107 (West 2005) (permitting expert witness testimony on battering and its effects); CAL. PENAL CODE § 4801(a) (West 2010) (stating that the Board of Parole Hearings may report to the Governor the names of prisoners who ought to be granted a commutation of sentence or pardon due to evidence of intimate partner battering and its effects); CAL. PENAL CODE § 4801(b) (West 2010) (instructing the Board of Parole Hearings to investigate and consider evidence that a prisoner was experiencing intimate partner battering and its effects when the crime was committed); CAL. PENAL CODE § 5075.5 (West 2005) (requiring that Board of Parole Hearings commissioners and deputy commissioners receive domestic violence training); 15 C.C.R. § 2402(d)(5) (2001) (stating that evidence that a prisoner committed the crime because of her experience as a victim of abuse shall indicate her suitability for parole). Note that California Penal Code section 5075(a) replaced the Board of Prison Terms with the Board of Parole Hearings in July 2005. For consistency, and following the example of the California courts, this paper will refer to both agencies as “the Board.”

10. See LEONARD, supra note 1, at 26-27. In a horrific example of police inaction, Jessica Gonzales of Little Rock, Colorado, contacted law enforcement in her town nine times over a ten-hour period after her estranged husband, against whom she had a restraining order, abducted their three girls. The police failed to enforce the restraining order, and the man died in a
children;\textsuperscript{11} judges did not issue restraining orders;\textsuperscript{12} prosecutors failed to charge the batterers;\textsuperscript{13} or defense attorneys, for a variety of reasons, did not present evidence about the abuse history.\textsuperscript{14}

Injustice and sex-based discrimination plague the experiences of these women as they navigate the justice system. Women who kill their abusers receive harsher sentences on average for their crimes than either men who kill their female partners or men who kill in self-defense.\textsuperscript{15} Elizabeth Dermody Leonard, a sociology professor who conducted an in-depth study of forty-two women imprisoned in California for killing their abusive partners, determined that the legal system’s injustices converge to re-victimize battered criminal defendants:

When judges exclude evidence of past victimization and instruct juries in ways that give them little option but to convict, women become double victims, once again controlled and silenced, once again told that the violence they endured was insignificant. . . . Sexism in the criminal justice system dictates that women stay within their gender role expectations or face severe consequences, the same message communicated to women by their abusive mates. Following a battered woman’s conviction, she enters another world of total control.\textsuperscript{16}

A cruel irony thus exists for victims of intimate partner violence: when courts ignore these women’s experiences, the legal system risks replacing the abuse endured at the hands of a batterer with new abuses inflicted by the prison system. A Department of Justice-funded report finding that “[p]rior histories of intimate partner violence seem to be repeated in the prison environment” supports this conclusion.\textsuperscript{17} The report’s authors cite to numerous studies and their own findings documenting physical, sexual, and psychological abuse in prisons across the country. The findings include reporting rates as high as 20 percent for physical abuse by fellow female prisoners,\textsuperscript{18} reporting rates of 4.5 percent for sexual victimization across male and female prisons,\textsuperscript{19} and pervasive instances of

\textsuperscript{11} LEONARD, supra note 1, at 119.
\textsuperscript{12} See id. at 23.
\textsuperscript{13} Id. at 20-22.
\textsuperscript{14} See id. at 30.
\textsuperscript{15} Id. at 125.
\textsuperscript{16} Id. at 122, 125.
\textsuperscript{17} BARBARA OWEN ET AL., GENDERED VIOLENCE & SAFETY: A CONTEXTUAL APPROACH TO IMPROVING SECURITY IN WOMEN’S FACILITIES 34 (2008).
\textsuperscript{19} ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, DEP’T OF JUSTICE, PUB NO. NCJ 219414, SEXUAL VICTIMIZATION IN STATE AND FEDERAL PRISONS REPORTED BY INMATES 3 (2007).
economic exploitation.20

These arguments are particularly compelling for incarcerated victims of intimate partner battering housed in California’s prisons. A special report from the Department of Justice surveyed both men’s and women’s facilities across the country and found that Valley State Prison for Women—which houses roughly 37 percent of California’s female prisoners—has one of the highest reported rates of sexual victimization overall (10.3%) and one of the highest rates of sexual victimization by other prisoners (7.9%).21 Additionally, California law continues to allow male guards to watch female prisoners at all times, even while showering or going to the bathroom.22 These invasive practices mimic the total control wielded by abusive partners and reinforce victims’ experiences of abuse.

One woman’s experience brings these statistics to light. Without the benefit of expert testimony on domestic violence, Linda Field was convicted of first-degree murder for the death of her abusive husband. Prison, she discovered, “just perpetuates the abuse that you went through in marriage.”23 She recounts being forced by guards to sit on the wet ground during an evacuation, despite her arthritis: “I was told to sit my ass down or I could shove my face [on the ground].”24 On another occasion, when a male guard raised his hand as if to slap her, she simply stood there and thought, “Go ahead. I’ve been married.”25 Other prisoners have suffered similar abuse: one woman she knew sustained a broken arm after a guard body-slammed her into a wall.26 A system that punishes a woman for defending herself against her abuser by condemning her to another abusive situation can only be described as perverse. After nineteen years in California’s corrections system, Ms. Field plainly concludes, “There is no justice in this state.”27

20. Owen et al., supra note 17, at 38.
23. Telephone Interview with Linda Field (Apr. 8, 2010).
24. Id.
25. Id.
26. Id.; see also Wolff et al., supra note 18. Linda Field spent most of her years at Central California Women’s Facility, where 7.1% of prisoners report having been sexually victimized in prison. Telephone Interview with Linda Field, supra note 23; Beck & Harrison, supra note 19, at 17.
27. Telephone Interview with Linda Field, supra note 23.
Beyond the prison walls, the incarceration of battered women impacts communities through its devastating effects on the family. Nearly 80 percent of women in California prisons are mothers with two or more children, and two-thirds of women living with their children at the time of arrest were raising these children as single parents. One study at the University of California, Berkeley, found that “incarcerating a mother is significantly more likely to disrupt the children’s lives than the incarceration of a father.” Children with incarcerated mothers, far more so than those with incarcerated fathers, are likely to be sent to live with another relative, to live alone, or to enter into the foster care system. Acknowledging this disparate effect, an independent state agency has called for a more gender-responsive post-conviction system that takes into account the fact that women are most often the primary caretaker in their families.

Ms. Field, who experienced these traumas herself as a mother and a grandmother, wonders whether incarceration of mothers also contributes to the perpetuation of the cycle of abuse. Having survived nineteen years in prison, she laments that she was not present to teach her daughters about the perils of domestic violence. During interactions in the prison visiting room, she was not allowed to change her grandchildren’s diapers and was at times prohibited from holding them on her lap. Essentially stripped of her ability to mother in meaningful ways, she could not impart to her daughters the lessons she had learned. She reports that they are both now in abusive relationships. “When moms go to prison,” she says, “kids go to prison too.” And the cycle of violence continues.

Additionally, the incarceration of battered women takes an economic toll on the state and the general public. The California prison population has skyrocketed in recent decades—from 22,632 in 1979 to 171,444 in 2007. The female prison population has undergone an even greater explosion. Between 1979 and 2007, the number of female prisoners in California increased nearly ten-fold.


29. Id. at 11.

30. Id. at 24.

31. Id. at 24.

32. Telephone Interview with Linda Field, supra note 23.

33. Id. Although California has the capacity to permit overnight family visits in its apartment-like Family Living Units, such benefit was denied to this woman because she was convicted of a violent crime against her husband and because she was serving a life sentence. See CAL. CODE REGS. tit. 15, § 3177(b)(1) (2011).

34. Id.

35. Id.

from 1,232 to 11,416.\textsuperscript{37} Incarcerating just one person now costs the state around $46,000 per year.\textsuperscript{38} The health care costs of incarcerating older female prisoners, who make up a large part of the population affected by the laws discussed in this Comment, typically total three times this amount.\textsuperscript{39} Not only does it make ethical sense to free these women, it makes economic sense as well. However, for these women, the routes to freedom under California law contain many obstacles.

II. ROUTES TO FREEDOM: A BRIEF OVERVIEW

On paper, battered women imprisoned in California for a life sentence may have up to six routes available for release. In addition to the habeas route laid out in Penal Code section 1473.5, there are possibilities of release via parole, clemency, resentencing, compassionate release, and a writ of error coram nobis or vobis.\textsuperscript{40} Statistics from the California-based advocacy group Free Battered Women (FBW) indicate the near futility of all the options except habeas and parole.\textsuperscript{41} Of the forty-three convicted battered women released from prison under FBW's watch between 1997 and 2010, thirty of those women obtained release through parole, eleven through 1473.5 habeas petitions, and two on other legal grounds.\textsuperscript{42} This Part explores paths other than parole and habeas relief and examines why they remain underutilized.

A. Clemency

Under the California Constitution, the Governor holds the key to clemency.\textsuperscript{43} A grant of clemency, however, does not automatically lead to release. Instead, clemency may result in (from most common to rarest): commutation (a reduction of sentence), reprieve (a stay of execution), or pardon (leading to release).\textsuperscript{44} In recent years, California governors have rarely used clemency to as-

\textsuperscript{37} OFFENDER INFO. SERVS., CAL. DEP'T OF CORR. & REHAB., CALIFORNIA PRISONERS AND PAROLEES 2007, at 8 tbl.2C (2008).
\textsuperscript{40} Jill E. Adams, Unlocking Liberty: Is California's Habeas Law the Key to Freeing Unjustly Imprisoned Battered Women?, 19 BERKELEY WOMEN'S L.J. 217, 234 (2004); CAL. PENAL CODE § 1265 (Deering Supp. 2010).
\textsuperscript{41} Free Battered Women no longer exists as an independent organization; it merged with the California Coalition for Women Prisoners in January 2010. E-mail from Marisa Gonzalez, Coordinator, Habeas Project, Staff Attorney, Legal Services for Prisoners with Children, to author (Sept. 30, 2010) (on file with author).
\textsuperscript{42} FREE BATTERED WOMEN, SURVIVORS SERVING LIFE TERMS RELEASED SINCE 1997 1 (2010) (on file with author).
\textsuperscript{43} CAL. CONST. art. V, § 8(a).
sist imprisoned battered women. In 1992, thirty-four women incarcerated at the California Institution for Women—one of California’s three correctional facilities for women—sent Governor Pete Wilson a mass clemency petition, but it yielded the release of only one woman. Meanwhile, in other states, the movement to free battered women gained real traction: Ohio’s Governor released twenty-eight similarly situated women in 1990; Maryland’s Governor granted clemency to eight in 1991; and Kentucky’s Governor released nine women through clemency in 1996. In California, however, clemency remained underutilized. During his time in office from 1999 to 2003, Governor Gray Davis did not use his clemency power to release any of the remaining women but instead returned their requests to the Board that oversees parole.

It is still somewhat unclear why clemency is used so infrequently, although former Department of Justice attorney Margaret C. Love observes that clemency grants have been declining in number since the Reagan administration: “It had been very much an operational part of the criminal justice system. Now clemency has been taken hostage in the war on crime.” Political considerations and fear of public retaliation permeate the clemency process, leading Professor Linda Ammons to comment that, “being perceived as too lenient toward killers can mean political suicide.”

Clemency in California may have fallen victim to intense political pressure. This would explain why Governor Arnold Schwarzenegger recently waited until his last day in office to rule on a clemency petition filed by a woman who, at age sixteen, was convicted for killing her thirty-seven-year-old pimp. Amid

45. Women at the California Institution for Women submitted this petition, which gained attention from advocates and attorneys who later helped the women pursue more individualized petitions. History of the Clemency Movement in California, FREE BATTERED WOMEN, http://www.freebatteredwomen.org/resources.html (last visited Apr. 7, 2011).

46. Adams, supra note 40, at 237. The very few releases obtained via clemency suggests that the Board and the Governor are not taking seriously the power granted under Penal Code § 4801(a), which states: “The Board of Prison Terms may report to the Governor... the names of any and all persons imprisoned in any state prison who... ought to have a commutation of sentence or be pardoned and set at liberty on account of good conduct, or unusual term of sentence, or any other cause, including evidence of intimate partner battering and its effects.” CAL. PENAL CODE § 4801(a) (West 2010). According to Marisa González, if this information is being communicated by the Board to the Governor, it is being done confidentially, without the knowledge of the prisoner or her attorney. Telephone Interview with Marisa González, May 10, 2010, supra note 5. The law, as it pertains to battered women, has been in effect since 1992. Adams, supra note 40, at 221.

47. Ammons, supra note 44, at 544, 552, 555.

48. Adams, supra note 40, at 237. For more on the difficulties plaguing the parole process, see infra Part III.


an outpouring of community and media support, Schwarzenegger granted the petition. Even in doing so, however, Schwarzenegger chose small incremental relief, commuting the woman’s sentence from life without parole to twenty-five years to life with the possibility of parole.

If advocates and experts cannot identify exactly why the promise of clemency has yielded so little for California prisoners, they are quick to point out the impact: longer incarceration and another route foreclosed. The lack of clemency as a viable path to release in California has led advocates to emphasize the acute necessity of the state’s unique habeas law.

B. Resentencing

In theory, a convicted woman can also obtain release via resentencing. This first requires that the Secretary of the California Department of Corrections and Rehabilitation (CDCR) or the Board of Parole Hearings issue a resentencing recommendation to the original sentencing court. Rarely will the Board initiate sua sponte the recommendation necessary to begin the resentencing process. Advocates can try to trigger the process themselves by writing to the Board directly, but most of the action occurs behind the scenes. Rather than reaching a conclusion independently, the Board typically will consult with the original sentencing court to ask whether the court wants to take the case back. If a woman obtains a new sentence, she will be released if her time already served in prison exceeds the length of the new sentence.


53. EXEC. DEPT., supra note 51 at 3. Ohio’s Governor also waited until the end of his term before releasing the twenty-eight women in 1990. Ammons, supra note 44, at 544. Still, his actions did not go without public uproar and media backlash. Id. Ammons notes that Andy Rooney, of CBS’s 60 Minutes, announced that “[i]n releasing these women, [the Governor of Ohio] effectively declared open season on husbands in his state.” Id. President Clinton likewise waited until his last day in office to grant clemency to 176 persons. Id. at 536.

54. See, e.g., Ammons, supra note 44; Interview with Marisa González, Coordinator, Habeas Project, Staff Attorney, Legal Services for Prisoners with Children, in Chowchilla, Cal. (Mar. 12, 2010) (on file with author) [hereinafter Interview with Marisa Gonzalez, Mar. 12, 2010].

55. For more information on the origins and utility of the resentencing requirement in light of the history of California’s sentencing scheme, see Adams, supra note 40, at 237-39.

56. CAL. PENAL CODE § 1170(d) (West 2010). The court can initiate resentencing on its own motion within 120 days of the commitment date. Id.

57. Interview with Marisa González, Mar. 12, 2010, supra note 54.

58. Telephone interview with Carrie Hempel, Associate Dean of Clinical Education and Service Learning Programs, University of California, Irvine, School of Law (Feb. 8, 2011).

59. Id.

60. See CAL. PENAL CODE § 1170(d).
Broad discretion inheres in the resentencing process: for the Board, in deciding whether to issue a recommendation, and for the court, in deciding whether to issue a new sentence and in fixing the length of that sentence. As Professor Carrie Hempel explains, resentencing thus signifies a potentially promising reward, but one that may be impossible to realize. The discretion of the sentencing court means that broader relief may be available, but the complete discretion of the Board to issue a recommendation—with its accompanying political considerations—means that the process may never get off the ground.

Interestingly, the creation of the habeas petition under section 1473.5 has stunted efforts to utilize the resentencing statute. Today, advocates who try to initiate resentencing proceedings for their convicted battered clients will have to explain to the Board why they are not pursuing section 1473.5 petitions instead. The Board may prefer the habeas route because resentencing is discretionary, whereas habeas offers clearer legal standards for relief. In her years with the University of Southern California’s Post-Conviction Justice Project, Professor Hempel recalls only one case where resentencing came close to success. That case made it back to the original sentencing court and was fully briefed when section 1473.5 went into effect; at the court’s request the attorneys then pursued the habeas petition instead. Given the apparent preference for entertaining habeas petitions over resentencing, section 1473.5 may have superseded this form of relief for the women who can access it.

C. Compassionate Release

The route to compassionate release follows procedures similar to resentencing. Pursuant to Penal Code section 1170(e), such release is available for a prisoner who is "terminally ill with an incurable condition" and is not expected to live longer than six months, or one who is "permanently medically incapacitated," such as an individual in a coma. As with resentencing, compassionate release requires a recommendation from the Secretary of CDCR or from the Board, followed by a court order. Advocates report that such release is rarely granted, and statistical evidence bears this out: in 2009, California courts re-
leased only three prisoners on compassionate release.\textsuperscript{69} In addition to being rare, this route to release is not available for prisoners serving sentences of life without parole.\textsuperscript{70}

California’s experience with compassionate release—also known as “medical parole”—reflects that of the nation at large. As of 2009, thirty-nine states and the federal government offered some form of this relief, and in other jurisdictions this route is similarly underutilized.\textsuperscript{71} New York, for example, expanded its law in 2009 to cover those convicted of violent crimes.\textsuperscript{72} Nine months later, however, only seven prisoners had been released on medical parole, none of whom were the newly eligible violent offenders.\textsuperscript{73}

\textbf{D. Writ of Error Coram Nobis or Vobis}

Finally, release is available through a writ of \textit{error coram nobis} or \textit{vobis}, which seeks a new trial by alleging errors of fact.\textsuperscript{74} In 1965, the California Supreme Court laid out three elements for such writs, requiring: (1) newly discovered evidence (2) that does not go to the merits of the issue already tried (3) and that was not known to the petitioner and could not have been discovered at an earlier time.\textsuperscript{75} In 1993, the California legislature attempted to adjust the existing standard to fit the dilemma of incarcerated battered women.\textsuperscript{76} Assembly Bill 2295 proposed relaxing the burden of proof to a reasonable probability of factual innocence from the more onerous clear-and-convincing-evidence standard.\textsuperscript{77} The new law would have also suspended the existing prohibition on presenting evidence that addressed the merits of issues determined at trial.\textsuperscript{78} Ultimately, Governor Wilson vetoed the bill, and it failed to become law. Wilson questioned the appropriateness of carving out this relief for “a single class of defendants af-

\begin{enumerate}
\item \textsc{Cal. Penal Code} § 1170(c)(2)(C).
\item Buckley, \textit{supra} note 69.
\item Id.
\item See People v. Shipman, 397 P.2d 993, 995 (Cal. 1965); see also People v. Kim, 202 P.3d 436, 446 (Cal. 2009) (stating that “[t]hese factors set forth in \textit{Shipman continue to outline the modern limits of the writ}”).
\item Baker, \textit{supra} note 74, at 99, 115.
\item Memorandum from Nausheen Hassan, California Women’s Law Center, to Marjorie Sims, Vicky Barker, and Marci Fukuroda (on file with author) [hereinafter Hassan Memorandum].
\item Id.
\end{enumerate}
fected by one type of psychological defense.” The idea behind the bill, however, would be reincarnated in the form of habeas relief under section 1473.5. That advocates in the field do not utilize the writ of error nobis or vobis and that the legislature abandoned this approach in favor of a specific habeas law point to its limited utility.

III. PAROLE: A POLITICAL PROCESS

A. California, the Governor, and Parole

Parole has become the most successful route for battered women serving life sentences in California. The particularities of state law, however, render parole a difficult and uncertain option. The greatest obstacle may lie in the fact that parole depends heavily upon the whims of three individuals: the Governor, a Governor-appointed Board of Parole Hearings Commissioner, and a civil servant Deputy Board Commissioner. The Board has authority over prisoners serving indeterminate sentences. Prisoners sentenced to determinate sentences (sentences for a set number of years, such as for manslaughter convictions) do not need to go before the Board but instead gain release once they have fulfilled the court-imposed sentence. However, because most of the women who are eligible for section 1473.5 relief are serving life sentences with the possibility of parole, the Board and the Governor exercise great control over these women’s fates.

80. See Interview with Marisa González, Mar. 12, 2010, supra note 54; Hassan Memorandum, supra note 77.
81. Marisa González of the Habeas Project estimates that slightly over half of the Project’s clients who have been released have obtained release through parole. A somewhat smaller number have earned their freedom through 1473.5 petitions. Interview with Marisa González, Mar. 12, 2010, supra note 54.
82. See Board of Parole Hearings, http://www.cdr.ca.gov/BOPH/index.html (last visited Apr. 7, 2011). Of the twelve commissioners currently serving on the Board, nine are male and only two do not have backgrounds in law enforcement, corrections, or probation. Commissioners, BOARD OF PAROLE HEARINGS, http://www.cdr.ca.gov/BOPH/commissioners.html (last visited March 26, 2011). While the commissioners’ race is not evident from the profiles made available online, these characteristics alone seem to fly in the face of the statutory requirement that the Board composition “shall reflect as nearly as possible a cross section of the racial, sexual, economic, and geographic features of the population of the state.” See CAL. PENAL CODE § 5075 (West 2005). Despite the seemingly mandatory language, it does not appear that any enforcement mechanism exists except through the commissioner appointment process itself. Telephone Interview with Marisa González, May 10, 2010, supra note 5.
84. Id.
85. Nearly all of the individuals screened into the Habeas Project—a statewide collaboration that connects volunteer legal teams to abuse survivors eligible for section 1473.5 relief—are serving life sentences with the possibility of parole, though some serve sentences of life without the possibility of parole. Telephone Interview with Marisa González, May 10, 2010, supra note 5. This may be attributable to the disproportionately longer sentences that women who
The parole process in California is notoriously difficult. One journalist reports that “even one write-up for smoking a cigarette just one time in three decades can keep you from getting parole in California.” Obtaining a parole grant from the Board is rare enough: the Board grants parole at a rate of less than 10 percent. However, a prisoner’s journey does not end with the Board’s finding: California is one of only four states whose governor holds veto power over parole decisions, which allows him to reverse any Board decision for persons serving indeterminate terms on murder convictions.

Since the creation of the veto power through ballot initiative in 1988, California’s governors, whether Republican or Democrat, have exercised this discretion liberally, rendering the Board’s parole decisions all but meaningless. During his five years in office, Governor Davis reversed 99 percent of the Board’s parole approvals. When Governor Schwarzenegger took office in 2003, he sent a message that he would reverse Board decisions “[o]nly when he has a strong conviction that a clear error has been made.” Nevertheless, between the start of his administration and early 2009, he vetoed nearly 75 percent of the Board’s parole approvals. It is still too early in the term of Governor Jerry Brown to know how or whether California’s change in leadership will affect prisoners up for parole. Compounding the challenge for prisoner advocates, in those rare instances when a Governor allows a suitability finding to stand, he typically does so by “declining to review” the Board’s decision rather than actively affirming it. In so doing, he issues no accompanying statement, leaving advocates with little insight into which particular factors sway the Governor in any one case.

Surprisingly, although most women eligible for section 1473.5 relief have no previous criminal record and a demonstrably lower recidivism rate, governors kill their batterers receive: “battered women homicide defendants are treated... more harshly than men who kill their female partners.” LEONARD, supra note 1, at 125. Additionally, the habeas statute itself only provides relief for those convicted of “violent felonies,” which typically carry longer and indeterminate sentences. See CAL. PENAL CODE § 1473.5(b).

89. The California Constitution empowers the governor to “affirm, modify or reverse the decision of the parole authority.” See CAL. CONST. art. V, § 8(b). Oklahoma, Maryland and Ohio also grant such powers to their governors. Adams, supra note 40, at 235 n. 138; Executive Clemency, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, http://www.drc.ohio.gov/web/ExecClemency.htm (last visited April 15, 2011).
90. The state continues to spend over $100 million on the Board’s operations annually. DEPT. OF FIN., STATE OF CAL., 2010-11 FINAL BUDGET SUMMARY 462 (2010).
91. Long Shot, supra note 86.
92. Adams, supra note 40, at 243 (citing Chiang, supra note 87).
94. Telephone Interview with Marisa González, May 10, 2010, supra note 5.
have not used their veto power to benefit this segment of prisoners. Of the women tracked by Free Battered Women since 1997, Governor Davis reversed the Board suitability findings of thirteen, allowing release for only three of thirty-four women whose cases he reviewed. Similarly, Governor Schwarzenegger reversed Board suitability findings for at least seventeen of these women. A closer examination of the political pressures bearing on governors may explain their reluctance to free prisoners, even when legal standards dictate their release.

B. Navigating the Political Current

Despite the clear guidelines and evidentiary standards laid out by statute, regulations, and case law, the ultimate parole decision-makers appear to take greater heed of political winds than they do of legal rules. The man who served as Schwarzenegger’s Legal Affairs Secretary from 2003 to 2005, and who advised the Governor on hundreds of parole decisions, admitted to a journalist that:

Part of a Governor’s job is to be responsive to the constituents who elected him. The fact that the Governor thinks a lot of people would be upset if this person got out of prison, it is [sic] a Governor paying attention to the preference of a large constituency of California. And that’s what Governors do.

According to the law, however, that is not what the Governor should do. The statute and the California Supreme Court have made clear that evaluating a prisoner’s parole suitability should not depend upon the reviewer’s personal opinion, political pressures, or attitudes of the public at large. “[A]s specified by statute,
current dangerousness is the fundamental and overriding question for the Board and the Governor . . . whose decisions must be supported by some evidence, not merely by a hunch or intuition.”

Lower courts, which see the bulk of petitions challenging the Governor’s decisions, have recently begun to publicly express their frustration with what they see as an arbitrary and illegal use of power. After overturning a Governor’s parole veto, the Second Appellate District concluded its opinion with a plea: “We implore the Governor and his staff to pause and reflect upon these miniature constitutional crises foisted upon the judiciary. We take no pleasure in ‘overruling’ the Governor in a parole case. But we are obligated to follow the law. . .” Although judicial acknowledgement of the problem provides a promising start, it by no means will prove enough for prisoners without the financial means to challenge their denials through the court system. For these prisoners, parole remains a thorny game of navigating political will, veiled motivations, and arbitrarily applied standards. And for those who can access the courts, the means for doing so are severely limited in the wake of a recent United States Supreme Court decision that effectively withdrew the federal court system as a venue for challenging parole denials.

Removing the Governor’s parole reversal power would be a key step in making parole a more accessible remedy for imprisoned battered women. Even those within state government recognize that this power has taken on a life of its own. Jeanne Woodford, who served for two years under Schwarzenegger as head of the California Department of Corrections and Rehabilitation, recalls:

I don’t know that inmates believed, or even practitioners believed, that the Governor would reject as many cases as they [sic] did when [the amendment] initially passed. I remember some concern, but still people believing that there would be a fair process. It just didn’t turn out that way. It ended up where

weapon.html?scp=1&sq=Willie+Horton+is+Democrats%27+Weapon&st-nyt.

100. Lawrence, 190 P.3d at 554 (emphasis in original). The tension between political will and veto power perhaps points to the greater problems inherent in legal enactments—such as the vesting of the parole veto in the Governor—through voter referendum. The voters who enacted the law may have intended that the Governor take heed of majority opinion, but the legal standards were not adjusted accordingly. The relevant provision granting the Governor this power reads:

No decision of the parole authority . . . of a person sentenced to an indeterminate term upon conviction of murder shall become effective for a period of 30 days, during which the Governor may review the decision subject to procedures provided by statute. The Governor may only affirm, modify, or reverse the decision of the parole authority on the basis of the same factors which the parole authority is required to consider. . .

CAL. CONST. art. V, § 8(b).


103. Interview with Emily Harris, Former Coordinator, Free Battered Women, in S.F., Cal. (Feb. 17, 2010) (on file with author).
Governors were turning down just every case.104

From her perspective as Coordinator of the Habeas Project, Marisa González echoes this concern: “[T]he biggest problem with this whole process is that it’s so politicized at every level. . . . It’s all about political perceptions and not about what’s best for our communities, for the people whose lives are at stake.”105 Public misperceptions about battered women feed into this politicization; no governor wants to be labeled as one who “declared open season on husbands,” as the media once labeled Ohio’s Governor Celeste after he released twenty-eight abuse survivors through clemency.106

The Board and the Governor’s departures from the legal standard have severely impacted incarcerated survivors of domestic violence and have even greater potential to do so since the passage of Proposition 9 in November 2008. “Marsy’s Law,” also known as the “Victims’ Bill of Rights,” changes, among other things, the default rehearing date for parole denials from one year to fifteen years.107 Proposition 9 also shifts the burden for these denials, so that while previously the Board had to justify why it was deferring the next hearing for longer than the standard one year, the Board now must go to lengths (using the clear-and-convincing evidence standard) to justify its decision whenever it chooses to deny parole for anything less than fifteen years.108 The minimum deferral period under Proposition 9 is now three years.109 For battered women—and indeed all parole-eligible prisoners—the stakes are high. One woman, who has already served sixteen years in prison for the death of her abusive husband, recently received a ten-year parole denial from the Board.110 By the time of her next hearing in 2020, she will be sixty-nine-years old.111

C. The Danger of the Shaputis Doctrine

The judiciary’s actions have somewhat mitigated the politicized parole process, but it is unclear whether recent changes in case law will help battered women. Anecdotally, it appears that this case law has not borne fruit for these women.112 In 2008, the Supreme Court of California handed down the compa-
nion decisions of In re Lawrence and In re Shaputis. Lawrence clarified the proper standard for judicial review of a parole denial, and it made clear that the gravity of the commitment offense will "not... eternally provide adequate support for a decision that a prisoner is unsuitable for parole." In Shaputis, however, the Court demonstrated the limits of Lawrence by finding that the petitioner's "lack of insight" supported the Governor's reversal of the Board's suitability finding. This decision created a curious twist in the legal authority, since "insight" is not listed among the enumerated factors indicating parole suitability or unsuitability, and the term hardly lends itself to concrete interpretation. The court offered no definition of the term but appeared to equate "insight" with an "understanding" of the motivation and circumstances that led the prisoner to commit the crime.

Rather than having the effect of creating fewer parole denials, the two decisions together seem to have prompted the Board and Governor to continue denying parole with regularity while simply tweaking the language of their denials. State officials appear to have taken Lawrence and Shaputis to mean that it is no longer permissible to deny parole based on the gravity of the commitment offense alone, but that it is now valid to deny parole based on lack of insight.

An unpublished appellate case illustrates this new trend. The Board granted parole to a man convicted of second-degree murder in the death of his wife, but the Governor reversed that grant in 2007. The Governor based his decision solely on the nature of the shooting that occurred nearly twenty-three years earlier. When the man next went before the Board, after Lawrence made clear that the shooting alone could not form the basis for denial, the Board denied parole based on his "lack of in-depth insight into his life crime." The man had a number of recent and supportive psychological evaluations, and nothing had changed in the interim since his prior successful hearing, except that he had served more time, participated in more programming, and the commitment of-
fense had grown more temporally distant. The court’s decision contains this summary of the Board’s justification:

The presiding commissioner commented that de Vries had not “done the kind of work [developing insight into why he committed his life crime] that we think you may have done, but we didn’t get a sense about it, and I’ll just give you an example.” As an example, the commissioner pointed out that while de Vries was an accomplished artist, his art did not include any human figures.

In vacating the Board’s decision, the court observed that “it is evident that the Board members merely intoned the conclusory phrase ‘lack of insight,’ without offering any explanation of what was lacking, or referencing anything in [the petitioner’s] record supporting the conclusion.” The Board and Governor seem to be ignoring the significant amount of support on which the Shaputis court relied, instead viewing “insight” as some talismanic key for summarily denying parole. Noting that “insight” was rarely cited to justify parole denials in the past, the appellate court could only conclude that the new interest in insight “is likely attributable to the belief of parole authorities that, as in Shaputis, ‘lack of insight’ is more likely than any other factor to induce courts to affirm the denial of parole.”

D. Battered Women’s Stereotypes: One Woman’s Story

The recent emphasis on insight poses a particular danger for convicted battered women navigating the parole process, for the stereotypes concerning abuse victims create a quick and easy way for the state to deny parole based on “lack of insight.” The recent parole denial for one Habeas Project client illustrates these difficulties. This woman had been convicted of second-degree murder for a crime that her abusive husband committed while she sat, some ten yards away, in the car with their infant. She has now served over twenty-five years in prison for her purported role in the crime.

In 2004 and 2006, the Board and the Governor found her unsuitable for parole based on the gravity of the offense. In 2008, after Lawrence and Shaputis, the Board cited a new reason for denying parole: her alleged lack of insight. In so finding, the Board reinforced a number of stereotypes that plague battered women. At the parole hearing, the Board first disbelieved the woman about her own state of mind when the crime occurred; it did not believe she was involved in the crime out of her own fear and feelings of powerlessness, but insisted that

124. Id. at *9.
125. de Vries, 2010 WL 781299, at *2.
126. Id. at *8-9.
127. See Shaputis, 190 P.3d at 584-85; Calderon, 109 Cal. Rptr. 3d at 242.
128. Calderon, 109 Cal. Rptr. 3d at 243.
129. To preserve the client’s anonymity during this pending case, her name and case number are being withheld. All information is on file with the Habeas Project.
she must have intentionally wanted the victim harmed in order to “take some of the heat off” herself. They wanted her to confess to some other motivation they felt she must have had.

The Deputy District Attorney, present at the hearing in order to represent the view of the State, similarly accused this battered woman of playing the “blame game.” He construed her self-identification as an abuse survivor as evidence that she was minimizing responsibility for her role in the crime. At one point during the parole hearing he told her, “[s]top blaming everyone around you. . . . This is not your husband’s fault.”

Insensitive to the fact that she had already spent the majority of her life in prison and had engaged in intensive therapy during that time, the prosecutor said that she should “go back to her cell, drop the BS and really think about what she did intentionally.” Ultimately, the prosecutor’s argument prevailed. By denying parole, the Board showed it was not convinced that decades of individual and group therapy, working to identify and address the cycles of abuse that had patterned this woman’s life since the age of six, constituted sufficient insight to merit parole. Apparently unable to reconcile the woman’s interpretation of the role that abuse played in her crime with its own rigid construction of insight, remorse, and responsibility, the Board returned a decision of parole unsuitability.

In explaining the parole denial, the Board relied on a fundamental and common misunderstanding about the effects of intimate partner abuse, which comes in the form of a question: “Why didn’t she just leave?” When asked by the general public, the question reflects an ignorance of the effects of abuse or of the very real danger an abused woman faces when she tries to, or after she actually does, leave the relationship. When the question comes from the mouth of a Board commissioner or the Governor, it carries the added weight of basing a woman’s freedom on one individual’s misunderstanding. A woman’s reasons for not leaving may be financial, social, cultural, or fear-based. Women face a significantly heightened risk of assault or death during the time immediately after they leave an abusive relationship, and that period of risk typically endures for approximately two years following the separation.

130. Transcript of Parole Hearing of Anonymous Client at 91. Note, again, that her husband killed the victim.
131. Id.
132. With respect to this particular question, Nancy Lemon explains that expert witness testimony at trial is relevant and necessary to establish the victim’s credibility and to demonstrate that her staying with the abuser does not mean that the abuse did not occur. Nancy K. D. Lemon, A Transformative Process: Working As a Domestic Violence Expert Witness, 24 BERKELEY J. GENDER L. JUST. 208, 214, 219 (2010).
134. Women separated from their husbands are victimized at a rate twenty-five times higher than married women. LEONARD, supra note 1, at 7. Attacks and homicide are so common during this period that they have their own terminology: “separation assault.” See Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 MICH. L. REV. 1, 6 (1991).
may worry about the impact of a separation or about raising children without a father figure. Those who question an abused woman’s decision to remain should also consider the words of one domestic violence expert, who notes that abusive relationships rarely start off as such. Instead most begin with the promise of love, romance, and/or passion. Usually, it is over time that domination, exploitation, and violence surface and, in many cases, intensify. In between, there may be acts of remorse, resolves to change, and acts of tenderness and kindness, which make life more complicated. . . .

A seemingly simple question—"Why didn’t she just leave?"—thus reveals a host of stereotypes and misconceptions about the multiple and complex obstacles that battered women face. In the case of the Habeas Project client described above, the Board wondered why, if she had run away from home at the age of sixteen because of her brother’s abuse, she was not able to do so later in life when her husband was abusing her. This line of questioning did not take into account that she was married to him, had a newborn child in her care, and had nowhere else to turn because her mother forced her out of the house when she became pregnant. The Commissioner told the abuse survivor: “[y]ou could have ran [sic] away. You knew how to do it. I will tell you that authorities look for sixteen-year-old girls. They don’t really care so much if a nineteen, twenty-year-old girl runs away with a baby. You’re an adult. Do what you want.”

The Board’s inability to understand the range of reasons a woman might remain in an abusive relationship translated directly to a denial of parole. The abuse could not have been so bad, the Board reasoned, if she stayed in the relationship. Thus, she must be lying about her motivation, thus she lacks insight into her crime, thus she is still a danger to society, thus she cannot be granted parole. By misapprehending the complexity of a struggle common to many battered women, the Board demonstrated either its disconcerting ignorance of abuse patterns or a conscious disregard for abuse survivors’ experiences. Given the large number of women who enter prison with histories of abuse, this calls into question the competency of a Board whose decisions directly determine the outcome of these women’s lives. Surmounting the stereotypes on which the Board appears to rely would prove a daunting task for even the most competent attor-

136. Fraser, supra note 135, at 14.
137. Transcript of Parole Hearing of Anonymous Client at 116. Among other misconceptions, the commissioner at the very least did not seem to grasp that absconding with a child against the other parent’s wishes may provide grounds for kidnapping and child abduction charges. See CAL. PENAL CODE §§ 207, 278 (West 2010).
138. The Little Hoover Commission cites the reporting rates of physical and sexual abuse histories at 57% of California’s incarcerated women. LITTLE HOOVER COMM’N, supra note 28, at vii, 15.
ney.139

The difficulty of the task doubles with the additional layer of Governor approval required. In a similar display of misunderstanding, Governor Wilson once developed a test for battered women that involved asking this very question: “Why didn’t she just leave?”140 Though his test applied to clemency, it demonstrates how the biases of one individual can systemically operate to re-victimize an entire class of women. Wilson described his new legal standard to reporters as follows:

The test of whether clemency should be considered in cases where the request is based on [battered women syndrome] must be: Did the petitioner have the option to leave her abuser, or was the homicide realistically her only chance to escape?141

When the Board and Governor issue denials because the woman’s version of insight does not comport with their own, they are potentially violating several state statutes. First, California law specifically prohibits the Board or the Governor from requiring admissions of guilt as a prerequisite to parole.142 Further, state regulations governing parole suitability list “Battered Woman Syndrome”143 among the enumerated factors favoring parole, not as a harmful factor weighing against it, as the Board sometimes seems to use it.144 Finally, in circumstances where the petitioner had no trial or did not receive the benefit of expert testimony on intimate partner battering at her trial, the Board must conduct an investigation into the abuse and consider any information or evidence therein revealed.145 Finding documents to prove the abuse occurred is challenging. For women convicted prior to the current expert testimony laws, the incidents of abuse would have occurred at least fourteen years, if not decades, earlier.146 Further, abusers and abused individuals often go to great lengths to hide the abuse from the public. But even in cases where the Board’s Investigations Unit subs-

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139. Assuming that a battered woman’s attorney understands the dynamics of domestic violence, the attorney may have inadequate time in which to learn the specifics of each case and to undo the preconceived notions of the Board. The Board reimburses court-appointed counsel for eight hours of work per parole hearing, which includes client interviewing, actual parole hearing time, and travel to and from the prison. BOARD OF PAROLE HEARINGS, ATTORNEY PACKET 3, available at http://www.cdc.gov/BOPH/docs/attorneypacket_010803.pdf (last visited March 26, 2011).
140. Ammons, supra note 44, at 553-54.
141. Id.
143. See explanation in Part IV.C, infra.
144. See CAL. CODE REGS. tit. 15, § 2402(d)(5) (West 2011). The Board does use this factor appropriately at times, though typically in instances where it has found the prisoner suitable for parole and is trying to bolster its decision.
145. CAL. PENAL CODE § 4801(b) (West 2010).
146. Interview with Marisa González, Mar. 12, 2010, supra note 54.
tantiates the abuse claims, the Board might still not consider such findings in its decision. In handing down a parole denial to one woman, for example, the Board commissioner stated, “there was an investigation done . . . and [the abuse] was partially substantiated at that time. However, not enough impact to make a difference in today’s rendering.”\textsuperscript{147} With legal, social, and political obstacles preventing women from accessing parole, many double victims will need to turn to the habeas statute to seek relief.

IV. WRITS OF HABEAS CORPUS UNDER CALIFORNIA PENAL CODE § 1473.5

A. Relevant Evidentiary Standards

Under authority granted by the California Penal Code, “[e]very person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint.”\textsuperscript{148} Habeas corpus can be used as a means of obtaining a new trial, which can serve as a route to release if the new trial results in acquittal or in a sentence term shorter than the time the individual has already spent imprisoned.\textsuperscript{149} Alternatively, a successful habeas petition can lead to a reduction in sentence, a vacation of the conviction, or a new plea bargain, all of which can result in immediate release depending on the new sentence and the time already served.\textsuperscript{150}

Due to recent changes in the law and an increasing understanding of the unique obstacles that battered women face, convicted battered women have a specific form of habeas relief available to them under California Penal Code section 1473.5. This statute allows imprisoned women to file habeas petitions if they did not present expert testimony on the effects of intimate partner battering at their criminal trials.\textsuperscript{151} At the heart of this habeas relief lies section 1107 of the Evidence Code, which expressly permits expert witness testimony on intimate partner battering and its effects.\textsuperscript{152} In a case involving a woman charged with a

\textsuperscript{147} See supra note 129.
\textsuperscript{148} CAL. PENAL CODE § 1473(a) (Deering Supp. 2010). The phrase “habeas corpus” translates from the Latin as “that you have the body.” BLACK’S LAW DICTIONARY (9th ed. 2009).
\textsuperscript{149} See, e.g., Andrew Cohen, The Historic Legal Journey of Domestic Violence Victim Cheryl Jones, BERKELEY LAW (Mar. 21, 2010), http://www.law.berkeley.edu/3176.htm (describing the case of Cheryl Jones, the first woman to be retried and acquitted under 1473.5 after spending twenty-one years in prison).
\textsuperscript{150} For examples of the range of ways in which women have earned release under section 1473.5, see Hempel, supra note 88, at 8. For the statutes governing remedies available through habeas corpus, see CAL. PENAL CODE §§ 1260-1262 (West 2010).
\textsuperscript{151} CAL. PENAL CODE § 1473.5 (Deering Supp. 2010).
\textsuperscript{152} The statute reads, in full:

(a) In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding intimate partner battering and its effects, including the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge.
crime committed against or at the coercion of her batterer, such expert testimony can save her from spending her life in prison.\textsuperscript{153} This evidentiary rule has been in effect since 1992; the habeas corpus statute that affords relief to women convicted prior to the change in law went into effect in 2001.\textsuperscript{154}

To appreciate the significance of Evidence Code section 1107, one must first understand how self-defense operates in California. Under state law, a criminal defendant who has committed homicide can be acquitted upon a showing that she feared imminent danger to her life or great bodily harm.\textsuperscript{155} This fear must be both something she actually experienced (the subjective prong) and something that was reasonable or "sufficient to excite the fears of a reasonable person" (the objective prong).\textsuperscript{156} A defendant can be acquitted when both prongs of the test are met, constituting what is known as perfect self-defense. Imperfect self-defense, by contrast, exists when the defendant subjectively believed that her life was in danger, but the fact-finder determines that her belief was not objectively reasonable.\textsuperscript{157}

While a finding of imperfect self-defense will not result in acquittal, it can make an enormous difference in the amount of time someone will serve in prison. By negating the element of malice necessary for a murder conviction, imperfect self-defense can lead to a voluntary manslaughter conviction,\textsuperscript{158} which carries a sentence of three, six, or eleven years in prison, depending on the presence

\textsuperscript{153}See, e.g., Lemon, supra note 132, at 233 (stating that, in her experience as an expert witness, prosecutors have sometimes offered manslaughter pleas—which carry a determinate sentence—rather than murder—which carries a life sentence—after the submission of expert testimony).

\textsuperscript{154}CAL. EVID. CODE § 1107 (West 2005); CAL. PENAL CODE § 1473.5 (Deering Supp. 2010).

\textsuperscript{155}People v. Humphrey, 921 P.2d 1, 6 (Cal. 1996).

\textsuperscript{156}Id.

\textsuperscript{157}Id.

\textsuperscript{158}See CAL. PENAL CODE §§ 187 ("Murder is the unlawful killing of a human being . . . with malice aforethought"), 192 ("Manslaughter is the unlawful killing of a human being without malice.")
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of mitigating or aggravating circumstances.\footnote{159} Most significantly, manslaughter carries a determinate sentence, meaning that the prisoner will be released after she serves a set number of years and will not have to wait for a parole suitability finding. First-degree murder, by contrast, carries a minimum indeterminate sentence of twenty-five years in prison, with a maximum sentence of death.\footnote{160} Most people convicted of murder receive an indeterminate life sentence, meaning that they must serve a minimum of the base sentence (such as twenty-five years in a first-degree murder case, with possible lengthy enhancements for the use of a knife or gun).\footnote{161} Ultimately, release depends on the Board and the Governor finding them suitable for parole, which may never happen.

Expert testimony on battering and its effects, admissible under Evidence Code section 1107, often plays a critical role in helping a woman prove either imperfect or perfect self-defense, which can greatly reduce or eliminate prison time.\footnote{162} Expert witnesses can educate the judge and jury; dispel myths; help them understand the woman’s mindset; bolster her credibility; and contextualize her actions in the scheme of what are often years of physical, psychological, and sexual abuse.\footnote{163} Elizabeth Dermody Leonard cites the three most common stereotypes held by judges, juries, and attorneys that can harm an abused woman in her defense case:

(1) a belief that battered women can and should leave their abusers; (2) a belief that if the woman on trial does not fit the person’s stereotype of a battered woman, she is not a ‘real battered woman’; and (3) a belief in the mutuality of abuse (that women are just as violent as, or even more violent than, men).\footnote{164}

Presenting expert testimony to counteract and dismantle these stereotypes can make the difference between a woman going to prison or going free, or between a woman receiving an indeterminate sentence or a determinate one.\footnote{165}

\footnote{159} CAL. PENAL CODE § 193(a) (Deering Supp. 2010).
\footnote{160} CAL. PENAL CODE § 190(a) (Deering Supp. 2010).
\footnote{161} Use of a firearm, for example, carries a three to ten year sentence enhancement or may alternatively result in “an additional and consecutive term of imprisonment in the state prison for 25 years to life.” CAL. PENAL CODE §§ 12022.5(a), 12022.53(d) (Deering Supp. 2010). It is worth considering how weapon enhancements may disproportionately impact women defending themselves against abusive male partners. While a larger man may use his bare hands to abuse his wife, women might stand little chance defending themselves without a weapon of some sort.
\footnote{162} See Lemon, supra note 132, at 220; see also U.S. DEP’T OF JUSTICE & U.S. DEP’T OF HEALTH & HUMAN SERVS., VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS: REPORT RESPONDING TO SECTION 40507 OF THE VIOLENCE AGAINST WOMEN ACT (1996) (a report to Congress supporting the use of expert testimony on battering and its effects); Sue Osthoff & Holly Maguigan, Explaining Without Pathologizing: Testimony on Battering and Its Effects, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE 225 (Mary M. Cavanaugh et al. eds., 2005).
\footnote{163} LEONARD, supra note 1, at 33.
\footnote{164} Id. at 30 (citing Sue Osthoff, When Victims Become Defendants: Battered Women Charged with Crimes, reprinted in WOMEN, CRIME, AND CRIMINAL JUSTICE 234 (2001)).
\footnote{165} Lemon, supra note 132, at 223. For a survey of California case law relating to expert witness
Two California Supreme Court decisions issued after the enactment of section 1107 explain how women may use expert testimony on battering at their criminal trials. In 1995, the Court decided People v. Barton. Though that case did not involve issues of domestic violence, it has proved useful for clarifying that the trial court in a murder case has a duty to instruct the jury on voluntary manslaughter "whenever the evidence is such that a jury could reasonably conclude that the defendant killed the victim in the unreasonable but good faith belief in having to act in self-defense." For a woman on trial for killing her abuser, this means that regardless of whether her attorney decides to pursue a self-defense theory, and regardless of any arguments presented by the prosecution, if the requisite evidence exists that the defendant believed she was acting in self-defense, the court must instruct the jury that voluntary manslaughter is an option. Without this instruction, juries may incorrectly believe that they must choose between acquittal and a verdict of murder.

In 1996, in People v. Humphrey, the Court clarified that expert testimony under section 1107 is relevant not only to the subjective prong of self-defense but also to the objective prong. Expert testimony can thus complete the theory of self-defense so that a woman who would otherwise go to prison may instead be acquitted for the actions taken against her batterer.

This Evidence Code section places California at the more advanced end of the spectrum nationally. Some states limit expert testimony in ways that prevent battered women defendants from introducing evidence of the abuse, even if the defendants or their attorneys identified the role that battering played in their crimes. New Jersey's highest court, for example, has taken a pre-Humphrey approach and limits such expert testimony in duress cases to the subjective prong alone. Juries are not allowed to consider the expert's testimony in considering whether "a person of reasonable firmness" would have feared great bodily injury if she did not comply with her batterer's demands. And in Ohio, another pre-

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167. Id. at 539.
169. Expert testimony is also relevant to the requirement of imminence. For example, if a woman kills her abusive partner while he is asleep, expert testimony can illustrate that she may have harbored a fear of imminent harm based on his past abuse. For example, Brenda Aris's abusive husband beat her severely one night. Before going to bed he declared that he "didn't think he was going to let [her] live till the morning." People v. Aris, 264 Cal. Rptr. 167, 171-72 (Ct. App. 1989). Aris's conviction for shooting him while he was asleep was first upheld in the court of appeal but was disapproved when the Supreme Court issued Humphrey. See Humphrey, 921 P.2d at 10.
170. State v. B.H., 870 A.2d 273, 289-90 (N.J. 2005) ("Because [New Jersey's duress statute] embodies an objective standard for the evaluation of a defendant's conduct in response to a threat by another, we can discern no place for battered woman syndrome evidence in that assessment."). In its opinion, the Supreme Court of New Jersey also continued to utilize the term "battered woman syndrome," which advocates have criticized.
171. 870 A.2d at 290.
**Humphrey** state, the relevant statute limits a battered defendant’s use of expert testimony to self-defense cases and permits juries to consider the testimony only for the element of whether the woman’s fear was subjectively reasonable.\(^{172}\) Indiana’s “effects of battery” statute applies only to defendants forwarding self-defense or insanity theories.\(^{173}\)

California’s unique habeas remedy thus represents an outgrowth of California’s already advanced expert witness admissibility laws. Penal Code section 1473.5 exists to provide redress for women who were convicted for crimes related to their experiences of intimate partner battering prior to the enactment of Evidence Code section 1107.\(^{174}\) The first incarnation of section 1473.5 extended relief to persons convicted for the murder of an abusive partner, whose trials began or who entered into pleas before 1992, and who did not present expert witness testimony on intimate partner battering and its effects. The testimony must be “of such substance that, had it been received into evidence, there is a reasonable probability, sufficient to undermine confidence in the judgment of conviction, that the result of the proceedings would have been different.”\(^{175}\) The technical statutory requirements circumscribed a narrow class of beneficiaries that left habeas relief outside the grasp of many women. For a select few, however, this relief would provide the long elusive key to release.

**B. Joyce Walker: An Illustrative Case**

Hudie Joyce Walker’s case, which produced the first and only published appellate decision to date interpreting the section 1473.5 habeas statute, illustrates what the legislature envisioned when it originally enacted the law. Until her imprisonment at the age of forty-nine, Ms. Walker’s life consisted of a series of abusive relationships, beginning with sexual abuse as a child and culminating in marriage to a man whose regular beatings sometimes caused Ms. Walker to lose consciousness.\(^{176}\) On one particular night in May 1990, her intoxicated husband returned home, pointed a gun at Ms. Walker, and told her, “today will be your last goddamned day on this Earth.”\(^{177}\) Ms. Walker fled the house, but on the advice of the local Deputy Sheriff returned home later that night while her husband was away to collect her medications and other personal belongings.\(^{178}\) Her

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175. *Id.*
176. The appellate decision gives very little treatment to Ms. Walker’s years of abuse, but these details can be found in other sources. *See*, e.g., Elizabeth Fernandez, *A Life Without Bars*, S.F. Chron., July 15, 2007, at A1.
177. *In re Walker*, 54 Cal. Rptr. 3d 411, 415 (Ct. App. 2007).
178. *Id.*
husband returned home unexpectedly. When he threw a gun down on the table, both parties reached for it simultaneously—Mr. Walker presumably in order to kill his wife, and Ms. Walker to prevent him from doing so. The gun discharged as they were grappling and Mr. Walker died.

At her trial, Ms. Walker’s attorney chose not to present expert testimony on battering and its effects. The attorney’s case rested on the argument that Ms. Walker shot her husband accidentally; he believed that presenting expert testimony regarding Ms. Walker’s history of abuse would undermine this legal theory. He may have worried, as sometimes happens, that evidence of battering would give the jury reason to think Ms. Walker had a motive for the crime. The court heard Ms. Walker’s case in 1991, prior to the enactment of Evidence Code section 1107, prior to the decision in Barton that would have made a voluntary manslaughter instruction mandatory, and prior to the decision in Humphrey that would have made expert testimony on battering clearly relevant and admissible for both subjective and objective self-defense prongs. Having received insufficient instructions and no expert testimony, the jury convicted Ms. Walker of second-degree murder. The court imposed a sentence of nineteen years to life in prison.

Ms. Walker made numerous legal attempts to obtain her freedom before her section 1473.5 writ succeeded. The initial appeal of her conviction failed despite her having included a declaration from her defense counsel that he was wrong not to have presented expert testimony on her experiences of abuse. Ms. Walker’s subsequent federal habeas petitions failed for similar reasons: the court did not find her counsel ineffective where he made a tactical decision not to include expert testimony on battering. A state trial court rejected Ms. Walker’s first section 1473.5 writ in 2004, based partly on its finding—mirroring the reasoning of the appellate court during Ms. Walker’s initial appeal—that any expert testimony would be “irrelevant” given her claim that the shooting was an accident.

179. Id. (recounting Ms. Walker’s version of the circumstances of the shooting). It is worth noting that this entire episode and the ensuing aftermath may have been avoided had the police accompanied Ms. Walker—employing “civil standby”—rather than sending her to retrieve her items from her house alone. See Self-Help Center, CALIFORNIA COURTS, http://www.courthelp.ca.gov/selfhelp/protection/dv/respolice.htm#civil (last visited Apr. 7, 2011).
180. Walker, 54 Cal. Rptr. 3d at 415.
181. Id.
182. Id. at 413.
183. Id.
184. LEONARD, supra note 1, at 30-31.
185. Walker, 54 Cal. Rptr. 3d at 417.
186. Id.
187. Id.
188. Id. at 417-18.
189. Id. at 418-19.
190. Id. at 419.
Ms. Walker then filed her section 1473.5 petition with the state court of appeals.\textsuperscript{191} That court exercised its power to review the petition on the merits and found that exclusion of expert testimony on battering, particularly in light of \textit{Barton} and \textit{Humphrey}, had prejudiced Ms. Walker at her first trial.\textsuperscript{192} The court thus vacated her conviction and ordered a new trial.\textsuperscript{193} Ms. Walker subsequently pled no contest to voluntary manslaughter, which carried a shorter prison term than the time she had already served.\textsuperscript{194} Finally, on May 29, 2007, after sixteen years of incarceration, Ms. Walker became a free woman.\textsuperscript{195}

Ms. Walker’s case illustrates the overarching purpose of section 1473.5: to grant justice to abused women whose imprisonment or lengthy sentences would not have occurred had today’s laws been in effect at the time of their trials.\textsuperscript{196} As originally enacted, however, this relief did not benefit the scores of women who fit into the spirit, but not the letter, of the habeas statute. The original version of section 1473.5, passed into law in 2001, applied only to prisoners charged with murder of their abusive partners and who entered into plea agreements or whose trials began prior to 1992, when section 1107 went into effect.\textsuperscript{197} However, because of misunderstandings about the admissibility and applicability of expert witness testimony under section 1107, numerous women did not have the opportunity to present expert testimony for years after the section was enacted.\textsuperscript{198} Further, by limiting the habeas statute to first- or second-degree murder of the abusive partner, the legislature excluded battered survivors imprisoned for acts committed under duress or at the coercion of their abusers and those convicted of attempted murder or manslaughter of their abusers. Though surely these people should have found equal relief in light of the purpose of section 1473.5, statutory amendments were needed to ensure that this relief could be realized.

\textbf{C. Expanding the Law, Embracing More Women}

In 2004, Senator John Burton introduced Senate Bill 1385 in the California legislature with the purpose of expanding section 1473.5’s coverage, correcting its outdated terminology, and eliminating filing deadlines.\textsuperscript{199} At legislative hear-

\textsuperscript{191} Id.
\textsuperscript{192} Id. at 424, 426.
\textsuperscript{193} Id. at 427.
\textsuperscript{194} Fernandez, \textit{supra} note 176.
\textsuperscript{196} See \textit{S. COMM. ON PUB. SAFETY, BATTERED WOMAN SYNDROME: WRIT HABEAS CORPUS, 2001-2002 REG. SESS., available at} \url{http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_0751-0800/sb_799_cfa_20010418_114017Sen_comm.html}. According to the bill’s author, Senator Betty Karnette, “[t]here is simply no reason to penalize women who had a good defense to killing their abusive spouses simply because at the time their convictions became final, the factual basis for the defense was so little understood that the courts are not willing to fault trial counsel for not presenting it.” \textit{Id}.
\textsuperscript{197} See \textit{CAL. PENAL CODE § 1473.5(b)} (Deering Supp. 2004).
\textsuperscript{198} Interview with Marisa González, Mar. 12, 2010, \textit{supra} note 54.
\textsuperscript{199} \textit{S. COMM. ON PUB. SAFETY, 2D READING ANALYSIS OF S.B. 1385, 2003-2004 Reg. Sess., as
ings, Senator Burton emphasized that the first incarnation of section 1473.5 was "unduly restrictive [and] exclude[d] many in the intended beneficiary class: incarcerated survivors who were not able to use evidence of battering even though their crimes were directly related to their experience of being battered." The bill faced little opposition, and passed with strong bipartisan support.

The new version of section 1473.5 went into effect January 1, 2005. In its final form, S.B. 1385 made three major changes to previous law. First, it expanded the law's beneficiaries to include people convicted of any violent felonies as defined under Penal Code section 667.5(c)—not just those convicted of first- or second-degree murder in the deaths of their abusive partners, as originally prescribed. Because battering may play a role in any range of crimes, whether as a result of the abuser's coercion or otherwise, this change was particularly critical in ensuring that Evidence Code section 1107 achieves its purpose. In California, at least 60 percent of incarcerated women are survivors of domestic violence. As of 1997, just after the new eligibility cut-off date (explained further infra), there were over 10,000 women serving time in California prisons for felonies, equating to roughly 6,000 or more survivors of domestic vi-


201. The bill passed the Assembly on August 9, 2004, with a vote of seventy-one to two; eight days later, it passed the Senate by a vote of twenty-two to three. Complete Bill History, S.B. 1385, 2003-2004 Reg. Sess., available at http://info.sen.ca.gov/pub/03-04/bill/sen/sb_1351-1400/sb_1385_bill_20040920_history.html. This was achieved through collaboration among over 320 incarcerated women, forty-four sponsoring organizations, and ninety non-incarcerated individuals. For the list of sponsoring organizations, see Governor Signs Habeas Bill into Law!, FREE BATTERED WOMEN, www.freebatteredwomen.org/resources/hist_sb1385.html (last visited March 26, 2011).


203. California Penal Code section 667.5(c) defines "violent felony" as: murder or voluntary manslaughter; mayhem; rape; sodomy; oral copulation; lewd or lascivious act; any felony punishable by death or imprisonment in the state prison for life; any felony in which the defendant inflicts great bodily injury on any person other than an accomplice; any felony in which the defendant uses a firearm; robbery; arson; sexual penetration through forcible act or with a minor as outlined in Penal Code § 289(j); attempted murder; explosion as defined by statute; kidnapping; assault with intent to commit a felony as outlined in Penal Code § 220; continuous sexual abuse of a child; carjacking; rape, spousal rape, or sexual penetration, in concert; extortion; threats to victims or witnesses; burglary of the first degree when someone is present in the home at the time of the burglary; the use of a firearm during the commission of a felony outlined in Penal Code § 12022.53; or the use of a weapon of mass destruction. CAL. PENAL CODE § 667.5(c) (Deering Supp. 2010).

204. Adams, supra note 40, at 230 (citing BARBARA BLOOM ET AL., CENTER ON JUVENILE CRIME AND CRIMINAL JUSTICE REPORT, WOMEN IN CALIFORNIA PRISONS: HIDDEN VICTIMS OF THE WAR ON DRUGS 3 (May 1994)); see also OWEN ET AL., supra note 17, at 8 (citing to several 1999 studies that uncovered a 26 to 59 percent rate of sexual abuse and 25 to 70 percent rate of physical abuse as children, among female prisoners across the country).
olence. If current statistics are any indication, the vast majority of their felo-
nies were crimes other than murder. For these women, relief under the
amended section 1473.5 may now be available.

The second major extension in S.B. 1385 shifted the eligibility cut-off date
from January 1, 1992, to August 29, 1996. Where previously section 1473.5
included only women who had entered into plea agreements or whose trials be-
gan before 1992 (when the new Evidence Code section went into effect), it now
would include women whose crimes occurred prior to the date the California Su-
preme Court issued Humphrey, August 29, 1996. It was not until this latter date
that judges and attorneys understood, via the Court’s clarification, that the law
permitted expert testimony on battering for both the subjective and objective
prongs of self-defense. Because of this gap between enactment and appropri-
ate interpretation, many women who should have benefited from the new Evi-
dence Code section at their trials did not. Counsel might have chosen not to
present such testimony or testimony may have been improperly excluded. In
some cases counsel might not have thought to ask whether the client had been
abused, and the woman did not volunteer the information. Other women simply
did not identify themselves as battered women, even after living through years of
severe abuse. As Marisa González of the Habeas Project explains, the original
cut-off date was “based on an assumption . . . that after 1107 came into effect
that every judge understood that they were supposed to admit expert testimony,
when it was relevant, and how it was to be admitted, and every attorney under-
stood, okay, now I need to be investigating. And that clearly wasn’t true.”

Finally, the amended statute changed terminology to eliminate references
to “battered woman’s syndrome” (BWS) and substitute “battering and its ef-
facts.” The BWS terminology first appeared in the literature when psycholo-

205. Data Analysis Unit, Estimates and Statistical Analysis Section, Offender Info.
Services Branch, Cal. Dep’t. of Corrections & Rehabilitation, California

206. Currently, nearly 10,000 of the 11,033 women in California state prisons are serving time for
offenses other than first- or second-degree murder. The most common non-murder offenses
for women are: possession of a controlled substance (11.2%); robbery (8.3%); possession of
a controlled substance for sale, etc. (8.2%); second degree burglary (7.1%); forgery/fraud
(6.8%); petty theft with prior offense (6.8%); and other assault/battery (5.7%). Data
Analysis Unit, Estimates and Statistical Analysis Section, Offender Info.
Services Branch, Dep’t. of Corrections & Rehabilitation, Prison Census Data

1473.5(b) (Deering Supp. 2010).

208. See People v. Humphrey, 921 P.2d 1, 10 (Cal. 1996).

209. Leonard, supra note 1, at 79-83 (offering compelling narratives of women discovering the
moment they realized they were “battered women”; one woman explains, “I never con-
dered myself a battered woman. If someone had asked me then if I was a victim of domestic
violence, I would have said no. Believe it or not, even during my trial, I still didn’t think I
was a battered woman.” It was not until she came to prison that she realized: “I heard other
people’s stories, like, well, that’s just like mine!”).


gist Lenore Walker published her book *The Battered Woman* in 1979. Though notable for its landmark identification of the effects and costs of battering, the BWS term has since raised concern with advocates. Among the main critiques, advocates fear that the label "battered woman's syndrome" can mislead judges and jurors into believing that all battered women (or men, for that matter) manifest the effects of intimate partner battering in the same way. Further, the use of the word "syndrome" implies a pathologizing of the victim that may harm the jury's or the court's image of her, while also shifting the focus away from the perverse acts of the abuser. Perpetuating these already pervasive stereotypes can thereby harm the very women that the BWS term was originally intended to help, particularly when she is a criminal defendant whose entire experience of abuse may be called into question if she dared to fight back.

However, not all desired changes appeared in the final version of S.B. 1385. Due to opposition from the California District Attorneys Association (CDAA), the authors eventually added the term "intimate partner" before "battering and its effects" and reinserted the sunset date, which has the effect of automatically repealing the statute on January 1, 2020, so that no petitioners may use it as a means into the courtroom thereafter. The first addition meant that those in other types of battering relationships, such as parental or sibling battering, could not benefit from section 1473.5. CDAA objected that such an expansion would "open the floodgates... by allowing all of those persons with a relationship specified [in] Family Code section 2611 to revise their convictions." The sunset date of January 1, 2010 also remained in the final version because of CDAA concern. Advocates and legislators have been steadily working to push back the sunset date, originally set for 2005, after realizing exactly how lengthy the habeas process can be. Thanks to a later bill, A.B. 2306, the current date is


215. *Id.*

216. *See Governor Signs Habeas Bill Into Law!, supra* note 201.

217. This will happen "unless a later enacted statute... deletes or extends that date" as the legislature already has done several times for section 1473.5. *See* CAL. PENAL CODE § 1473.5(e) (West 2010).


220. The process alone of identifying eligible petitioners when section 1473.5 passed took over
2020, though resource constraints may make even this deadline unachievable.221

D. The Limits of Habeas

The habeas story does not end with the above expansions. Whether the promise of the law manifests itself in the lived experiences of the double victims warrants further study. With the amendments, the habeas statute now encompasses more than one hundred women.222 As Marisa González warns, however, the habeas law “is not a perfect remedy.”223 Ideally, a prisoner would pursue the habeas route in conjunction with the other remedies available to her—such as clemency and parole challenges—in order to maximize her chances for release. If the woman lacks the resources to pursue a multi-pronged approach, she and her attorney will need to look carefully at whether a habeas petition presents the most promising use of available time and money. To that end, this Comment concludes with an examination of the success (or lack thereof) that habeas petitions have received thus far and explores the practical limitations of section 1473.5.

To date, petitions filed under the amended habeas statute have met with mixed results in the courts. November 2009 saw the release of the first Habeas Project client under the expansions brought by S.B. 1385.224 That woman, represented by a large private law firm, had been convicted for her role in the death of a third party and not for the death of her abuser, which precluded her habeas eligibility under the pre-2005 version of section 1473.5.225 After her attorneys filed the habeas petition, the District Attorney’s office conceded that she should not have been convicted of murder. The court granted the petition and vacated her original conviction, and the woman then pled no contest to a lower sentence of voluntary manslaughter. Because she had served far longer than the eleven-year maximum sentence that voluntary manslaughter carries, she was released from prison.226

Unfortunately, the federal habeas process generally remains unavailable for state prisoners. Two male petitioners, both filing in pro per (i.e., on their own behalves without an attorney) pursuant to the section 1473.5 expansions, demonstrate the challenges of these stringent federal court requirements.227 State pris-
oners who have federal as well as state law habeas claims may choose to seek relief through the federal court system, provided they meet a number of restrictions, including the exhaustion of state court remedies. This has set up the federal courts as a type of secondary process where prisoners whose petitions are rejected at state superior, appellate, and supreme court levels will file a petition anew in the federal district court.

Of the California petitioners who have attempted this route, one individual, convicted of killing his ex-girlfriend, was newly eligible for the petition under section 1473.5 because his conviction was entered in March 1996. Another petitioner argued for relief based on his experience as the son of an abuser. The district court denied each petition for untimeliness. Although California provides no statute of limitations for habeas petitions filed under section 1473.5 in state court, a one-year statute of limitations restricts these petitions in federal court. There is some debate as to when the statute of limitations begins to toll: it may be from the date the petitioner committed the crime (by definition, prior to August 29, 1996), or from the date the California Supreme Court decided Humphrey (August 29, 1996), or from the date the legislature expanded section 1473.5 (September 20, 2004). Under any of these scenarios, however, it is likely too late at this juncture for prisoners to file habeas petitions based on intimate partner battering in the federal courts.

Even when a petitioner can meet the procedural and merit-based requirements, a successful petition does not necessarily lead to release. A new trial, following a successful petition, may still carry the same risks inherent in the first one. Patricia Joellen Johnson, for example, was serving a sentence on a first-degree murder conviction for the death of her abusive husband when she was granted a new trial. At her new trial, held following the granting of her section

229. See id. at *1.
230. See Williams, 2009 WL 735153, at *2; E-mail from Nancy K.D. Lemon, Lecturer, University of California, Berkeley, School of Law, to author (Mar. 24, 2010) (on file with author).
234. See id. at *5. Had their cases proceeded, these men may have faced additional obstacles because they did not fit the traditional model of a battered woman who killed her abusive husband. Former Free Battered Women Coordinator Emily Harris conjectures that the "classic" paradigm "of a battered woman defending herself against an abusive partner ... potentially make[s] it more complicated for other people" to win habeas relief. Interview with Emily Harris, supra note 103. At least one man, however, has successfully won release based on a judge's finding that he should have been able to present expert testimony on intimate partner battering. Larry Welborn & Rachanee Srisavasdi, Man Who Killed Roommate to Be Set Free, ORANGE COUNTY REG. (Jan. 8, 2010), http://www.ocregister.com/common/printer/view.php?db=ocregister&id=227645.
1473.5 petition, the prosecution highlighted a perceived inconsistency: the woman stated in her habeas petition that her husband had physically and psychologically abused her that night, but she testified in the courtroom that he was on the other side of the room at the moment she shot him, which to the prosecutor implied that he did not pose a physical threat. The jury found Ms. Johnson guilty of second-degree murder, with a sentence of eighteen years to life, for the then-sixty-two-year-old woman. The Board found her suitable for parole in 2010, but the Governor reversed the Board’s finding. Winning her habeas petition, therefore, only sent her to forge ahead on the difficult path to parole.

The numerous pitfalls of section 1473.5 highlight the need for private counsel and for resources more broadly. Emily Harris contends that resources—not changes to the existing law—should be advocates’ focus right now: “There’s no money attached to [section 1473.5], and there are so many survivors who aren’t represented yet. That should be the focus. Then maybe we can come back to thinking about other things.” As of April 2011, the Habeas Project has a waiting list of roughly eighteen prisoners who are eligible for habeas relief but lack representation to pursue their cases. As a remedy, Professor Hempel suggests a statutory amendment that would provide a right to counsel, with accompanying public funding, for women who can demonstrate they have met the initial statutory requirements. The legislature appears to have acknowledged this problem, even if it has not allocated more money toward the solution. When it extended the sunset clause again from 2010 to the current 2020 date, the sponsoring Assembly member noted that nearly half of the original sixty-four habeas cases worked on by legal teams had taken over five years to be filed in court.

237. Id. Such tactics may be part of a larger trend Leonard identifies: “Systematically, attorneys and judges disconnect the woman’s lethal action from the batterer’s ongoing, escalating violence and threats.” See LEONARD, supra note 1, at 114.


239. E-mail from Deirdre Wilson, Program Coordinator, California Coalition for Women Prisoners, to author (May 13, 2010) (on file with author); E-mail from Deirdre Wilson, Program Coordinator, California Coalition for Women Prisoners, to author (Oct. 11, 2010) (on file with author).

240. The two pro per petitioners whose claims the district court rejected in Rosser and Williams illustrate this challenge. Rosser v. Scribner, No. CV-07-4980-DDP, 2008 WL 2502145, at *10 (C.D. Cal. June 20, 2008); Williams v. Campbell, No. 1:08-CV-0325 AWI WMW HC, 2009 WL 735153, at *1 (E.D. Cal. Mar. 17, 2009). Marisa González states that the Habeas Project does not file claims in federal court precisely because these claims are so difficult to win. E-mail from Marisa González, Coordinator, Habeas Project, Staff Attorney, Legal Services for Prisoners with Children, to author (Feb. 17, 2011) (on file with author).

241. Interview with Emily Harris, supra note 103.

242. E-mail from Marisa González, Coordinator, Habeas Project, to author (Apr. 8, 2011) (on file with author).


244. ASSEMB. COMM. ON PUB. SAFETY, BILL ANALYSIS: A.B. 2306 (2008), available at http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_2301-2350/ab_2306_cfa_20080428_102329_asm_comm.html. The same concerns appear to have
The legislature responded to the dilemma by giving advocates more time.\textsuperscript{245} But time and money are inextricably linked, and the lack of financial support continues to loom large. Because section 1473.5 requires a demonstration of a reasonable probability that the prisoner would have received a different sentence had expert testimony on battering been presented, a successful habeas petition requires the hiring of both an investigator to substantiate the history of abuse and an expert to speak to the effects of the abuse.\textsuperscript{246} One attorney with the California Women's Law Center testified before the Assembly Committee on Public Safety that “[e]xpert fees are the largest expense for these habeas petitions,” though Marisa González notes that many experts charge on a sliding fee scale.\textsuperscript{247} Investigations can also prove to be lengthy and expensive, which is understandable considering the challenges that accompany tracking down documents and interviewing witnesses tied to events that occurred at least fourteen years, and in many cases decades, ago.\textsuperscript{248}

A tough economy has trickled down to affect women who have already spent decades in prison and now sit waiting for an attorney to take up their petitions and help them utilize the new laws. The high costs involved in filing a section 1473.5 petition make this work feasible primarily for large law firms.\textsuperscript{249} But firms do not necessarily want to allocate their resources toward a single section 1473.5 petition. As law firms cut back their costs, some are choosing to take on the far less resource-intensive route of parole representation and related appeals rather than section 1473.5 work.\textsuperscript{250} With court-appointed counsel receiving pay for only eight hours of work,\textsuperscript{251} private or pro bono representation at parole hearings can increase chances of a suitability finding and help to create a good record should a challenge to the decision become necessary later.\textsuperscript{252} The shift in re-

\begin{footnotesize}
\begin{itemize}
\item See Assemb. B. 2306, Ch. 146 (Cal. 2008) (extending the sunset date from January 1, 2010, to January 1, 2020).
\item See CAL. PENAL CODE § 1473.5 (Deering Supp. 2010).
\item Hassan Testimony, S.B. 784, supra note 244; Interview with Marisa González, Mar. 12, 2010, supra note 54.
\item Interview with Marisa González, Mar. 12, 2010, supra note 54.
\item Id.
\item Id. Parole requires a showing that the prisoner currently poses no danger to society and courts will review Board decisions for “some evidence” to support the Board’s conclusion. In re Lawrence, 190 P.3d 535, 553 (Cal. 2008). The lower evidentiary standard and the focus on current dangerousness – as opposed to the introduction of new evidence and expert testimony “sufficient to undermine confidence in the judgment of conviction” make challenges to parole denials less time consuming than section 1473.5 petitions. See CAL. PENAL CODE § 1473.5.
\item BOARD OF PAROLE HEARINGS, supra note 139, at 3.
\item The USC Post-Conviction Justice Project, for example, provides representation at parole hearings. One battered woman was recently released after twenty-nine years of incarceration and five prior unsuccessful Board hearings; she was represented at her successful hearing by
\end{itemize}
\end{footnotesize}
source allocation is therefore not necessarily an unwise one, particularly if more women continue to gain release through the parole process than through habeas. The shift does, however, leave without remedy those women serving the harshest sentences of all: life without the possibility of parole and the death sentence. Because they are excluded from the parole and compassionate release processes, section 1473.5 petitions are critical for wrongly imprisoned women serving these extreme sentences.

While it provides much needed relief to a select few, the habeas law inevitably excludes others. Some abuse survivors fall just outside the letter of the law because of the remaining difficulty with the section 1473.5 cut-off date. Other women cannot pursue the habeas option because they received some expert testimony at their trials, even if that testimony was inadequate or otherwise not truly expert. Marisa González reports that she receives requests for pro bono assistance from women who fit every requirement of the habeas law except that their crimes occurred after the August 29, 1996, cut-off date. As with the initial 1992 cut-off date, the amended date assumes that as soon as the Court handed down the Humphrey decision, every attorney at once understood the standard and began to use expert witnesses to prove perfect self-defense. González can verify that this is untrue but she holds out little hope the legislature will be willing to extend the eligibility date further still.

The California habeas statute is unique in this country. The statute addresses the plight of women convicted during a time when the law did not formally recognize the experiences of abuse survivors and, more importantly, the statute has resulted in the release of at least sixteen people as of March 2011. It also serves a critical role in California, where advocates speculate that section 1473.5 may not serve the same function in other states where alternative routes to release have more traction. But its limits—high procedural burdens, eligibility cut-off dates, resource demands, and a perhaps tenuous relationship to release—should prompt advocates to reexamine more traditional routes, which can

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254. Though these women are not eligible for habeas relief under section 1473.5, the Habeas Project will try if possible to match them with resources that can assist with parole representation or other avenues of relief. Interview with Marisa González, Mar. 12, 2010, supra note 54.

255. Id.

256. Id.

257. See E-mail from Andrea Bible, Special Projects Coordinator, National Clearinghouse for the Defense of Battered Women, to author (Mar. 18, 2010) (on file with author).

258. E-mail from Marisa González, Coordinator, Habeas Project, to author (Apr. 8, 2011) (on file with author).

259. See, e.g., Ammons, supra note 44; Interview with Marisa González, Mar. 12, 2010, supra note 54.
benefit both women who can and cannot utilize section 1473.5.

CONCLUSION

When it appeared on the ballot in November 2008, Proposition 9—which significantly altered the parole process and the effects of a parole denial—bore the title of “Victims’ Bill of Rights.” As California moves deeper into its budget crisis, and as its prisons bulge under the weight of a population reaching roughly 165,000, it is worthwhile for the state and its voters to stop and ask who should be deemed a victim. Like the shift away from clemency and other formal and informal state responses to post-conviction remedies, Proposition 9 has substantially harmed incarcerated battered women. These women have been convicted of crimes. But they too are victims: victims of abuse from their partners and then victims of injustice from a state that provided no safeguards to ensure that their experiences were heard at trial. By imprisoning these women for unimaginable amounts of time, the state perpetuates the cycle of abuse and re-victimizes them. Few people understand this better than Linda Field, who spent nearly nineteen years of her life in a prison run by the very state that failed to allow her to present an expert witness at her trial to speak about the years of abuse she and her children endured at her husband’s hands. In her words, “[t]hey talk about [the deceased partners] as the victims but in reality we’re victims too because we’re part of a system that didn’t protect women, didn’t protect us. There was nothing for us.” California law has come a long way since Ms. Field’s conviction, and Ms. Field herself, with the help of a pro bono attorney, eventually won release through a successful section 1473.5 petition. The legal framework now exists to allow a woman like Ms. Field to receive the fair trial she was denied so many years ago. With compassion and resources, we can turn these legal tools into real justice—and freedom—for battered women and their families.

260. See supra Part III.B.
262. Telephone Interview with Linda Field, supra note 23.
263. Linda Field & Andrea Bible, Free Battered Women, in INTERRUPTED LIFE: EXPERIENCES OF INCARCERATED WOMEN IN THE UNITED STATES 339-40 (Rickie Solinger et. al. eds., 2010).