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# Evidence / Justifiable Crimes: Working toward an End to Injustice for Battered Women Convicted of Crimes Spurred by Their Abusers

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## **Justifiable Crimes: Working Toward an End to Injustice for Battered Women Convicted of Crimes Spurred by their Abusers**

*Andrea E. Pelochino*

### *Code Sections Affected*

Evidence Code § 1107 (amended); Penal Code § 1473.5 (amended).  
SB 1385 (Romero); 2004 Stat. ch. 609.

### I. INTRODUCTION

[The] articulate narratives [of battered women convicted for killing their abusers] convey fear, fatigue, frustration, and resignation. Their collective voice describes a series of events and interactions that produces in each woman a firm belief that the unavoidable conclusion to the violent relationship is death—hers, his, or both, and perhaps other family members as well.<sup>1</sup>

In California, several hundred women are serving time for killing the men who abused them.<sup>2</sup> Research reveals that the majority of these women killed their partners in self-defense.<sup>3</sup> Despite the implementation of recent laws allowing for women to introduce evidence of the effects of intimate partner battering and its impact on the commission of their crimes<sup>4</sup> often little evidence of the abuse or how the abuse contributed to their crimes is presented at trial.<sup>5</sup>

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1. ELIZABETH DERMODY LEONARD, *CONVICTED SURVIVORS: THE IMPRISONMENT OF BATTERED WOMEN WHO KILL* 115 (2002).

2. FREE BATTERED WOMEN, FACT SHEETS, at <http://www.freebatteredwomen.org/resources/factsheets.html> (last visited July 7, 2004) (on file with the *McGeorge Law Review*).

3. See Mary E. Gilfus, *Women's Experiences of Abuse as a Risk Factor for Incarceration*, VAWNET APPLIED RESEARCH FORUM 5 (Dec. 2004), available at [http://www.vawnet.org/DomesticViolence/Research/VAWnetDocs/AR\\_incarceration.pdf](http://www.vawnet.org/DomesticViolence/Research/VAWnetDocs/AR_incarceration.pdf) (on file with the *McGeorge Law Review*) (noting that abused women may also be incarcerated for attempting to protect their children from the batterer); see also U.S. DEPARTMENT OF JUSTICE, *VIOLENCE BY INTIMATES: ANALYSIS OF DATA ON CRIMES BY CURRENT OR FORMER SPOUSES, BOYFRIENDS, AND GIRLFRIENDS* 4-5 (1998), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/vi.pdf> (on file with the *McGeorge Law Review*) (indicating that women are "5 to 8 times more likely than males to be victimized by an intimate" and that "female murder victims are substantially more likely than male murder victims to have been killed by an intimate").

4. CAL. EVID. CODE § 1107 (West 1995 & Supp. 2004).

5. See LEONARD, *supra* note 1, at 113-14 (explaining that there are several reasons why the impact of domestic violence on the commission of the offense may not be introduced at trial including: lack of financial resources barring expert testimony, neglect of defense attorneys in eliciting evidence of the abuse and accurately depicting the context in which the killing occurred, acceptance of plea bargains in order to spare families the humiliation of trial, and the minimization of the abuse or shame regarding the violence inhibiting abused women from speaking out about their experiences); see also *id.* at 101 (highlighting that several women were so highly medicated by jail officials that they were unable to effectively assist in their defense).

In 1996, the California Supreme Court definitively stated that women have a right to introduce evidence of battered women syndrome and that such evidence is relevant to all of the elements of a self-defense claim.<sup>6</sup> Current law only permits women convicted prior to 1992 to bring a writ of habeas corpus to address the fact that they were not allowed to introduce evidence of battered women syndrome.<sup>7</sup> Therefore, a large class of women have no legal remedy for the fact that they were convicted without being permitted to bring forth such evidence.<sup>8</sup> Additionally, limited time, resources, and attorneys willing to work with incarcerated women<sup>9</sup> have barred several eligible women from bringing their writs and there is a concern that they will not have time to do so prior to the sunset date of January 1, 2010. Finally, while the law provides that women may introduce evidence of battering and its effects in any situation where it contributed to the commission of the crime,<sup>10</sup> only women convicted of killing their abusive partners have writ authority.<sup>11</sup>

In 2002, the Habeas Project was formed by Free Battered Women, California Women's Law Center and the USC Post-Conviction Justice Project.<sup>12</sup> The Habeas Project worked to free battered women who would meet the criteria to file a writ of habeas corpus under California Penal Code section 1473.5.<sup>13</sup> Free Battered Women sponsored Chapter 609 to respond to concerns that inequities and inconsistencies in section 1473.5 had left the intended beneficiaries of the law without a legal remedy.<sup>14</sup>

## II. LEGAL BACKGROUND

### A. *Self-Defense*

California law provides that killing in self-defense is justified when a person is "resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person. . . ."<sup>15</sup> The three main components

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6. *People v. Humphrey*, 13 Cal. 4th 1073, 1084-89, 921 P.2d 1, 7-10 (1996).

7. CAL. PENAL CODE § 1473.5 (West Supp. 2004).

8. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1385, at 8 (Mar. 30, 2004).

9. *See* SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 784, at 2-3 (Feb. 21, 2003) (justifying an extension of the previous sunset date from January 1, 2005 to January 1, 2010 by explaining that the amount of time needed to track down witnesses, police reports, and medical records was more time consuming than anticipated, and that finding pro bono legal assistance was difficult).

10. CAL. EVID. CODE § 1107 (West 1995 & Supp. 2004).

11. CAL. PENAL CODE § 1473.5 (West Supp. 2004).

12. THE CALIFORNIA HABEAS PROJECT, HISTORY, at <http://www.habeasproject.org/history.htm> (last visited July 6, 2004) (on file with the *McGeorge Law Review*).

13. *Id.*

14. THE CALIFORNIA HABEAS PROJECT, HELPING INCARCERATED SURVIVORS THROUGH LEGISLATION, at <http://www.freebatteredwomen.org/habeasproject.htm>. (last visited July 6, 2004) (on file with the *McGeorge Law Review*).

15. CAL. PENAL CODE § 197(1) (West 1999).

required to satisfy the legal standard for self-defense are reasonable belief, necessity, and proportionality.<sup>16</sup> The reasonable belief component is composed of a subjective and an objective element.<sup>17</sup> The subjective element requires a finding that the defendant had an honest or actual belief that his or her use of deadly force was necessary to prevent an unlawful attack or threat by the victim.<sup>18</sup> The objective element sets forth that the person must have objectively reasonable grounds for believing that such force is necessary to repel an imminent attack.<sup>19</sup> The necessity element requires that the victim's actions must present what the victim believes to be an imminent danger of death or serious bodily injury.<sup>20</sup> Finally, the proportionality requirement provides that a person cannot successfully propose a self-defense claim if he or she used excessive force in relation to the harm threatened.<sup>21</sup>

A claim of self-defense is considered to be "perfect" when all elements are satisfied and will result in an acquittal.<sup>22</sup> An "imperfect self-defense" claim results when the defendant is seen to have a subjectively honest but objectively unreasonable belief in the fear of imminent bodily harm or death and mitigates a charge of murder to involuntary homicide.<sup>23</sup>

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16. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 221 (3d ed. 2001) (stating that self-defense, as in other justification defenses, requires necessity and proportionality components along with a reasonable belief element).

17. See *People v. Flannel*, 25 Cal. 3d 668, 674-75, 160 Cal. Rptr. 84 (1979) (explaining that self-defense requires that the defendant actually and reasonably believed in the need to defend).

18. *People v. Aris*, 215 Cal. App. 3d 1178, 1186, 264 Cal. Rptr. 167, 172 (1989).

19. *E.g.*, CAL. PENAL CODE § 198 (West 1999) (stating "[t]he circumstances must be sufficient to excite the fears of a reasonable person").

20. *E.g.*, *Aris*, 215 Cal. App. 3d at 1189, 264 Cal. Rptr. at 174 (stating that California case and statutory law require that the defendant "perceives in the victim's behavior at the moment of the killing an indication that the victim is about to attempt, or is attempting, to fulfill the threat"); see also *People v. Scoggins*, 37 Cal. 676, 684 (1869) (setting forth the longstanding requirement of immediacy in meeting the imminence requirement in California)

A previous threat alone, and unaccompanied by any immediate demonstration of force at the time of the encounter will not justify or excuse an assault, because it may be that the party making the threat has relented or abandoned his purpose, or his courage may have failed, or the threat may have been only idle gasconade, made without any purpose to execute it.

*Id.*

21. DRESSLER, *supra* note 16, at 222.

22. Lisa S. Scheff, *People v. Humphrey: Justice for Battered Women or a License to Kill?* 32 U.S.F. L. REV. 225, 234 (1997).

23. See *In re Christian S.*, 7 Cal. 4th 768, 783, 30 Cal. Rptr. 2d 33 (1994) (declaring that in imperfect self-defense, "the defendant is deemed to have acted without malice and cannot be convicted of murder but can be convicted of manslaughter"); see also Cal. JIC 5.17 (West 2004) (instructing the jury that "[a] person who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully but does not harbor malice aforethought and is not guilty of murder").

B. *Battered Women's Syndrome*

In 1979, Dr. Lenore Walker proposed that battered women's behaviors could be described by what she defined as "Battered Woman Syndrome" (BWS).<sup>24</sup> BWS "is the name given to the measurable psychological changes that occur after exposure to repeated abuse."<sup>25</sup> Dr. Walker defined the syndrome as a sub-category of Post Traumatic Stress Disorder (PTSD).<sup>26</sup> Dr. Walker noted that battered women, like those suffering from PTSD, often suffer from cognitive disturbances,<sup>27</sup> high arousal symptoms,<sup>28</sup> and high avoidance symptoms.<sup>29</sup> Additionally, abused women often develop "learned helplessness" or the belief that there is nothing they can do to escape or alleviate the abuse.<sup>30</sup>

Dr. Walker described three phases typical to battering relationships: a tension-building phase, the acute battering of the victim, and the reconciliation phase. During the reconciliation phase, the batterer often apologizes, promises to never be violent again, and offers gifts.<sup>31</sup> The third stage reinforces and maintains the relationship by giving the victim hope the violence will end.<sup>32</sup>

BWS explains why women remain in abusive relationships.<sup>33</sup> Threats from the partner (e.g. kidnapping, physical injury or death) often thwart attempts by

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24. See LENORE E. WALKER, *THE BATTERED WOMAN* xiv-xv (1979) (defining a battered woman as "a woman who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her right" if that man is an intimate partner and the woman stays beyond the first incident of abuse).

25. See Lenore E. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 326 (1992) (also stating, "[t]he use of trauma theory together with the psychological understanding of feminist psychology, oppression, powerlessness and intermittent reinforcement theories such as learned helplessness, all help us to understand the psychological impact of physical, social, and serious psychological abuse on the battered woman").

26. *Id.* at 327-28.

27. See *id.* (describing that cognitive disturbances consist of repetitive intrusive memories such as flashbacks of previous abusive incidents; the loss of memory such as denial, minimization and repression of battering incidents; and cognitive confusion, attention deficits and lack of concentration).

28. See *id.* at 328 (indicating that battered women become hyper vigilant to signs of danger and have little insight into the consequences of their actions).

29. See *id.* (providing that avoidance characteristics including depression, denial, minimization, and repression are often used to avoid dealing with the dangerousness of the situation and often cause battered women to become isolated).

30. See *People v. Aris*, 215 Cal. App. 3d 1178, 1195, 264 Cal. Rptr. 167, 178 (1990) (noting that because of the randomness of the abuse battered women often perceive that they are incapable of doing anything to escape and that previous unsuccessful attempts to defend themselves from the abuse add to the sense of helplessness).

31. See Walker, *supra* note 25, at 330 (indicating that even during the reconciliation phase the victim never feels completely safe).

32. *Developments in the Law—Legal Responses to Domestic Violence: V. Battered Women Who Kill Their Abusers*. 106 HARV. L. REV. 1574, 1578 (1993) [hereinafter *Legal Responses to Domestic Violence*] violence will end).

33. See CYNTHIA GILLESPIE, *JUSTIFIABLE HOMICIDE* 160 (1989) (noting that some of the common misconceptions about abused women are that they are masochists, that they deserve the abuse they have received, that they provoked their beatings, and that they could have left the relationship).

the woman to exit the battering relationship.<sup>34</sup> Furthermore, structural constraints such as economic and social isolation may pose significant barriers preventing escape from the relationship.<sup>35</sup> Separation is often the most dangerous time for a woman.<sup>36</sup> Even when women successfully leave an abusive relationship, the violence often does not end.<sup>37</sup> Furthermore, many women do not believe police intervention will offer effective assistance because law enforcement has been unsupportive or they believe that the battering will increase if they contact the police.<sup>38</sup> Finally, the development of learned helplessness often causes abused women to believe they cannot escape their partners.<sup>39</sup>

### C. BWS and Self-Defense

Previously, women who killed their abusive partners did not have a defense and were encouraged to plead guilty to murder.<sup>40</sup> Some women utilized the defense of temporary insanity.<sup>41</sup>

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34. See *Aris*, 215 Cal. App. 3d at 1195, 264 Cal. Rptr. at 178 (stating that batterers will sometimes threaten to kill the woman or kidnap the children if she attempts to leave the relationship).

35. See Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1233 (1993) (emphasizing that economic dependence can make it impossible for a woman to leave her partner because she cannot obtain housing, medical care, food, or clothing for her children and noting that women and their children sometimes become homeless when they leave).

36. See Walker, *supra* note 25, at 328 (stressing that the number of abused women killed by their partners when trying to separate has increased).

37. See Dutton, *supra* note 35, at 1232 (suggesting that women's fear of retaliation for leaving their partners is not unjustified because most women who are killed by their abusive partners are killed after separating from them).

38. See MURRAY A. STRAUSS & RICHARD J. GELLES, *PHYSICAL VIOLENCE IN AMERICAN FAMILIES: RISK FACTORS AND ADAPTATIONS TO VIOLENCE IN 8,145 FAMILIES* 482-87 (1990) (explaining that abused women often do not call the police out of a perception that the battering was not "criminal" and that the police often uphold such stereotypes perhaps in response to a lack of judicial and prosecutorial action against batterers); see also Arlene Weisz, *Spouse Assault Replication Program: Studies of Effects of Arrest on Domestic Violence*, VAWNET APPLIED RESEARCH FORUM 2 (Nov. 2001), available at [http://www.vawnet.org/DomesticViolence/Research/VAWnetDocs/AR\\_arrest.php](http://www.vawnet.org/DomesticViolence/Research/VAWnetDocs/AR_arrest.php) (on file with the *McGeorge Law Review*) (examining studies that revealed that arrested abusers spent little or no time in jail and that few arrested men were prosecuted or found guilty).

39. See *People v. Day*, 2 Cal. App. 4th 405, 418, 2 Cal. Rptr. 2d 916, 921 (1992) (quoting domestic violence expert, Pat Cervelli's testimony that abused women perceive their batterers to be more powerful than he is in reality which, along with previous experiences of unsupportive law enforcement officials and fear of retaliation by the batterer, lead to a sense of futility in trying to escape the relationship).

40. See *Legal Responses to Domestic Violence* *supra* note 32, at 1577 (explaining that self-defense claims often appeared out of reach because women were perceived to have used deadly force in reaction to an attack that did not appear relatively dangerous); see also Walker, *supra* note 25, at 321 (explaining that self-defense claims were unavailable to abused women who killed their partners, often because several women will kill their partner following an abusive interaction or at a time when it may not appear there is an immediate threat of imminent serious bodily danger or death to the woman). *But see*, ANN JONES, *NEXT TIME, SHE'LL BE DEAD: BATTERING & HOW TO STOP IT* 102 (1994) (citing Holly Maguigan, *Battered Women and Self-Defense*, 396-97) (arguing that women are more likely to kill their partner during a confrontation and that claims that abused women are more likely to kill their partner during non-abusive situations is not supported by statistical data); FREE BATTERED WOMEN, *supra* note 2 (citing statistics indicating that seventy-five percent of the

After developing her theories on BWS, Dr. Walker began providing expert testimony to explain battered women's behaviors to jurors.<sup>42</sup> The admissibility of such testimony gained acceptance in several states in the late 1970s and early 1980s<sup>43</sup> and helped battered women to meet the legal standard of self-defense.<sup>44</sup>

Expert testimony on battered women's experiences is useful in helping abused women to meet the legal standards of self-defense.<sup>45</sup> Often, expert testimony helps female defendants meet the self-defense necessity or imminence requirements.<sup>46</sup> Additionally, testimony facilitates the defense by providing evidence that the defendant had the actual and subjective belief she was in danger.<sup>47</sup> Finally, expert testimony may help establish the reasonableness of the woman's belief that she was in imminent danger and that it was necessary for her to use deadly force.<sup>48</sup> The expert's testimony also is essential in deconstructing basic stereotypes surrounding abused women<sup>49</sup> and may be used to rehabilitate a witness.<sup>50</sup>

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appellate opinions involving cases where abused women killed their batterers, the killing occurred during a confrontation).

41. Walker, *supra* note 25, at 322.

42. Scheff, *supra* note 22, at 225.

43. Walker, *supra* note 25, at 322.

44. *Id.*

45. See GILLESPIE, *supra* note 33, at 159 (explaining that an expert is essential to provide evidence that the woman's belief that she was in imminent danger and needed to use deadly force was reasonable).

46. See *People v. Aris*, 215 Cal. App. 3d 1178, 1194-95, 264 Cal. Rptr. 167, 177-78 (1990) Abused women have a greater sensitivity to danger and therefore, when threatened with more abuse, will react to the danger more quickly and accurately perceive when an abusive episode is not over. Consequently, when an abused woman kills her partner while he is sleeping she recognizes that the abuse would otherwise continue when he awakes. *Id.*

47. See *id.* at 1198 (asserting that the expert testimony provides an explanation of how the defendant's experiences of abuse affected her perceptions of danger and the actions she could believe she need to take to protect herself).

48. See *People v. Humphrey*, 13 Cal. 4th 1073, 1088, 921 P.2d 1, 7 (1995) (noting that in determining reasonableness the jury must consider all of the relevant circumstances and that BWS evidence is relevant to explain behavior that otherwise may appear unreasonable and to describe how given her experiences, the abused woman's actions are understandable).

49. See GILLESPIE, *supra* note 33, at 159 (explaining that battered woman syndrome testimony can help by revealing how widespread domestic violence is and elucidating why some of the defendant's puzzling behaviors are present such as why she did not leave or seek assistance, therefore helping "the jurors to put themselves in the woman's shoes and see the situation the way she saw it").

50. See *People v. Day*, 2 Cal. App. 4th 405, 416-18, 2 Cal. Rptr. 2d 916, 922-24 (1992) (emphasizing that BWS evidence can assist the jury in objectively analyzing the defendant's testimony by providing that a woman who strikes back is not engaged in "mutual combat," dispelling the myth that the defendant would have left if she was actually experiencing the abuse she described, and illuminating the defendant's seemingly "guilty" behaviors following the death of her partner such as fleeing the scene out of intense fear and belief in the omniscient power of her partner); see also ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1944, at 4 (June 20, 2000) (relating that BWS evidence can rehabilitate the credibility of the witness by explaining inconsistencies between the defendant's testimony and prior inconsistent statements to authorities).

A majority of jurisdictions admit BWS evidence; however, the extent to which the evidence is admissible depends upon the jurisdiction's use and scope of expert testimony on the issue of self-defense.<sup>51</sup>

#### D. California and the Admissibility of BWS Evidence

California has gradually accepted battered women's testimony to support self-defense claims.<sup>52</sup> California first permitted testimony regarding battered women's syndrome as relevant to determining whether the defendant established the honest belief requirement for imperfect self-defense in 1989.<sup>53</sup> However, California specifically rejected the use of expert testimony to demonstrate the objective reasonableness of the defendant's use of deadly force,<sup>54</sup> barring the availability of a perfect self-defense claim. In 1992, decisional law permitting battered women's syndrome testimony when relevant was codified in California Evidence Code section 1107.<sup>55</sup> However, confusion about how and when to use expert testimony on battered women's syndrome and in which legal contexts led to inconsistencies in the application of the statute.<sup>56</sup> In 2002, the statute was amended to expand the use of battered women's syndrome testimony to expressly include expert testimony that describes the types of experiences victims face and the impact of those experiences.<sup>57</sup>

In 1996, the California Supreme Court expanded the use of battered women's syndrome testimony by permitting its introduction to determine reasonableness of perceiving imminent danger, as well as the defendant's subjective belief in the need for self-defense.<sup>58</sup> Thus, battered women could use expert testimony to prove perfect self-defense claims.<sup>59</sup>

In 1992, the legislature also amended California Penal Code section 4801 and expressly authorized the Board of Prison Terms to consider evidence of

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51. Erin M. Masson, Annotation, *Admissibility of Expert or Opinion Evidence of Battered-Woman Syndrome on Issue of Self-Defense*, 58 A.L.R. 749, 765 (2004).

52. Scheff, *supra* note 22, at 237-39.

53. *E.g.*, *People v. Aris*, 215 Cal. App. 3d 1178, 1198, 264 Cal. Rptr. 167, 181 (1990) (holding that battered women testimony could only be utilized to determine the honest belief requirement for self-defense but not to prove the reasonableness requirement for self-defense because that would permit an expert to predict the defendant's state of mind in violation of California law forbidding expert testimony on whether a defendant did or did not have the requisite mental state required to commit the charged crime).

54. *Id.*

55. CAL. PENAL CODE § 1107 (West 1995 & Supp. 2004).

56. Scheff, *supra* note 22, at 227.

57. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1944, at 4 (May 9, 2000).

58. *See People v. Humphrey*, 13 Cal. 4th 1073, 1081-82, 921 P.2d 1, 7 (1995) (noting that the Legislature, in Evidence Code section 1107, has determined that expert testimony regarding battered women's syndrome, when relevant, is admissible).

59. *See People v. Day*, 2 Cal. App. 4th 405, 419, 2 Cal. Rptr. 2d 916, 924 (1989) (Battered woman's syndrome expert testimony is relevant "to explain a behavior pattern that might otherwise appear unreasonable to the average person. Evidence of battered woman's syndrome not only explains how a battered woman might think, react, or behave, it places the behavior in an understandable light.").



battered women's syndrome in reviewing prisoners' requests for pardons or sentence commutations,<sup>60</sup> resolving inconsistencies between the Board's review procedures and California Evidence Code section 1107. In 1995, the statute was expanded to include prisoners' experiences of domestic violence<sup>61</sup> in order to ensure that the Board's review was not limited by the narrow definition of battered women syndrome.<sup>62</sup> That legislation also provided that the evidence of battered women's experiences could be considered in any case "where it appears the criminal behavior was the result of that victimization."<sup>63</sup>

In 2001, the legislature added section 1473.5 to the California Penal Code to permit women convicted of killing their abusers prior to 1992 to bring a writ of habeas corpus if expert testimony regarding the effects of battering would have been probative to the issue of the woman's culpability.<sup>64</sup> The initial version of the statute provided that it would only be available until January 1, 2005.<sup>65</sup> The sunset date was extended in 2003 to January 1, 2010 in response to concerns that the process for filing was taking longer than originally anticipated due to difficulty in obtaining necessary records and the lack of funding for inmates to obtain legal counsel to file their writs.<sup>66</sup>

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60. 1992 Cal. Stat. ch. 1138 (amending CAL. PENAL CODE § 4801).

61. See 1995 Cal. Stat. ch. 905, § 1 (amending CAL. PENAL CODE § 4801) (providing that "'evidence of battered woman syndrome' may include evidence of the effects of physical, emotional, or mental abuse upon the beliefs, perceptions, or behavior of victims of domestic violence").

62. See SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 231, at 1 (June 20, 1995) ("The purpose of this bill is to specify the authority of the Board of Prison Terms to consider a broader range of inmates' experiences as victims of domestic violence in commutation and pardon decisions."); see also Mary Ann Dutton, *Critique of the "Battered Woman Syndrome" Model*, VAWNET APPLIED RESEARCH FORUM 2 (Jan. 1997), available at [http://www.vawnet.org/DomesticViolence/Research/VAWnetDocs/AR\\_bws.pdf](http://www.vawnet.org/DomesticViolence/Research/VAWnetDocs/AR_bws.pdf) (on file with the *McGeorge Law Review*) (explaining that "'battered woman syndrome' has become a stereotype that often does not fit the current state of knowledge concerning battering and its effects").

63. 1995 Cal. Stat. ch. 905, § 1 (amending CAL. PENAL CODE § 4801).

64. See CAL. PENAL CODE § 1473.5a (West Supp. 2004).

A writ of habeas corpus may be prosecuted on the basis that evidence relating to battered women's syndrome . . . based on abuse committed on the perpetrator of a homicide by the victim of that homicide, was not introduced at the trial relating to the prisoner's incarceration, and . . . had it been introduced there is a reasonable probability. . . that the result of the proceedings would have been different.

*Id.*; see also SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 799, at 3 (Sept. 10, 2001) (explaining that women convicted prior to 1992 were not allowed to present a full defense and that consequently those women were serving substantially longer sentences than people convicted of identical offenses after 1992).

65. 2001 Cal. Stat. Ch. 858, § 1 (repealing and adding CAL. PENAL CODE § 1475.3).

66. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 784, at 2-3 (Feb. 21, 2003) (explaining that the amount of time needed to track down witnesses, police reports and medical records was more time consuming than anticipated and that finding pro bono legal assistance was difficult); Stefanie Frith, *'Battered Women' Deadline Approaches; Prison; Inmates Convicted of Murder Are Running out of time to Claim they were Victims of Abuse*, THE PRESS ENTERPRISE, June 13, 2003 (declaring that four hundred out of nine hundred women convicted of murder in California were convicted before 1992 and many would not have time to file their habeas corpus petitions before the 2005 deadline).

### III. CHAPTER 609

Chapter 609 changes the existing title of California Evidence Code section 1107 from the “Expert Testimony on Battered Women’s Experiences” to “Expert Witness Testimony on Intimate Partner Battering and Its Effects.”<sup>67</sup> The amendment replaces all references to “Battered Women’s Syndrome” with “intimate partner battering and its effects.”<sup>68</sup> Chapter 609 specifies that the changes are not to impact existing decisional law regarding the evidence code.<sup>69</sup>

Chapter 609 expands the class of offenders who may file a writ of habeas corpus for failure to consider evidence regarding intimate partner battering and its effects. The amendment extends the availability of a unit from persons convicted of a homicide to all persons convicted of a violent felony as defined by California Penal Code section 667.5.<sup>70</sup> Additionally, Chapter 609 extends the time frame for habeas corpus relief by allowing all persons convicted prior to August 26, 1996, as opposed to January 1, 1992, to be permitted to file a writ of habeas corpus when expert testimony would have been relevant to the defendant’s culpability.<sup>71</sup> Finally, Chapter 609 also expands the authority to file a writ of habeas corpus for the absence of expert testimony from the trial only to any trial proceeding relating to the woman’s incarceration.<sup>72</sup>

### IV. LEGAL ANALYSIS

Chapter 609 responds to concerns by advocates of abused women regarding the use of the term “Battered Women Syndrome”<sup>73</sup> by replacing all references to BWS with “intimate partner battering and its effects.”<sup>74</sup> The semantic change should eliminate the impression that the woman is mentally ill.<sup>75</sup> The change

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67. CAL. EVID. CODE § 1107(e) (amended by Chapter 609).

68. *Id.* § 1107(a)-(e).

69. *Id.* § 1107(f).

70. CAL. PENAL CODE § 1473.5(b) (amended by Chapter 609).

71. *Id.*

72. *Id.* § 1473.5(a).

73. *See e.g.*, *People v. Humphrey*, 13 Cal. 4th 1073, 1083, 921 P.2d 1, 7 (1995).

Domestic violence experts have critiqued the phrase ‘battered woman’s syndrome’ because (1) it implies that there is one syndrome which all battered women develop, (2) it has pathological connotations which suggest that battered women suffer from some sort of sickness, (3) expert testimony on domestic violence refers to more than woman’s psychological reactions to violence, (4) it focuses attention on the battered woman rather than on the batterer’s coercive and controlling behavior and (5) it creates an image of battered women as suffering victims rather than as active survivors.

*Id.*

74. CAL. EVID. CODE § 1107 (a)-(e) (amended by Chapter 609).

75. *See Dutton, supra* note 35, at 1195-96 (explaining that the term “Battered Woman Syndrome” does not accurately reflect the wide diversity of experiences battered women face or the range of legal contexts in which “Battered Women Syndrome” evidence is introduced, has presented confusion in the legal literature, and often causes an inaccurate impression that the woman in question is mentally ill).

illustrates that BWS is itself a defense rather than an explanation of how an abused woman's actions meet the legal standards of self-defense.<sup>76</sup> Additionally, the use of the term BWS has led to the impression that battered women have a monolithic profile, and the change in terminology should reflect the reality of the diversity of experiences faced by battered women.<sup>77</sup>

In addition to affecting the use of evidence of the experiences of battered women, the change in terminology should provide consistency in the law. Given that the title of Evidence Code section 1107(e) is "Expert Witness Testimony on Battered Women's Experience" this amendment provides uniformity and alleviates confusion by deleting the retained BWS terminology in Evidence Code section 1007 and Penal Code section 1475.3.<sup>78</sup> However, while Chapter 609 provides that the amendments to Evidence Code Section 1107 are not intended to affect any decisional law it leaves questions as to how other sections referencing battered women's syndrome are to be interpreted.<sup>79</sup>

Chapter 609 takes steps to remedy the fact that many of the intended beneficiaries of the laws allowing for expert testimony have not had access to habeas relief. It allows for women convicted between 1992 and 1996 to have writ authority if the admission of the expert testimony on battering would be probative on the issue of culpability.<sup>80</sup> Chapter 609 also provides for uniformity in the law by extending writ authority from persons convicted of a homicide to all persons convicted of a violent felony as defined by California Penal Code section 667.5.<sup>81</sup> However, the amendments fall short of providing complete consistency within the law by failing to authorize a writ for prisoners convicted

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76. See Scheff, *supra* note 22, at 249 (noting that the term "syndrome" suggests that it is a defense itself rather than an explanation of how an abused women's actions meet the legal standards of self-defense).

77. Dutton, *supra* note 34, at 1195-96.

78. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1385, at 3 (Apr. 13, 2004).

79. See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB1385, at 6 (Mar. 30, 2004) (explaining that California Penal Code section 4801 is not affected by the bill).

80. See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1385, at 7-8 (Mar. 30, 2004) (stressing that current law, by only permitting writs to be filed for those convicted prior to January 1, 1992, eliminates a large class of women who were denied the introduction of BWS evidence because after 1992 the statute permitting the introduction was inconsistently applied and it was not until 1996 that the California Supreme Court definitively stated that women had a constitutional right to introduce BWS evidence); 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, 231 (2004).

80. CAL. PENAL CODE § 1 (West 2004).

81. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1385, at 4 (June 8, 2004) (noting that the law permits expert testimony on the effects of battering in all types of crimes and explaining that the amendment will provide consistency in the law by allowing writs of habeas corpus to be filed by women convicted of violent felonies as well as homicide). *But see* THE CALIFORNIA HABEAS PROJECT, *supra* note 14 (indicating that the initial version of the bill would permit a writ of habeas corpus for all types of crimes in which domestic violence impacted the defendant but, in response to opposition from the Attorney General and the California District Attorney, the bill was limited to allow a writ of habeas corpus only for violent felonies).

of any crime in which domestic violence was a contributing factor.<sup>82</sup> In order to promote justice, the law should provide a remedy for all incarcerated women where domestic violence was a contributing factor in their culpability.<sup>83</sup>

There are limitations to Chapter 609. Given the limited resources of incarcerated women, along with high costs and time required to file a writ of habeas corpus, it is likely that not all of the unfairly incarcerated women will be able to file their writs prior to the sunset date of January 1, 2010.<sup>84</sup> Furthermore, Chapter 609 can only be effective if incarcerated women know their right to the possibility of habeas relief and prison officials have not been cooperative.<sup>85</sup> Additionally, even when identified, there are not enough domestic violence experts to meet the needs of the number of incarcerated battered women.<sup>86</sup> There is also a need for additional training on how to effectively use and admit expert testimony regarding battering and its effects.<sup>87</sup> Finally, the provisions of California Evidence Code section 1107 can only be effective if, once women are arrested, they are allowed to participate fully in their defense.<sup>88</sup>

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82. See also SENATE COMMITTEE ON PUBLIC SAFETY, SENATE BILL ANALYSIS OF SB1385, at 6 (Mar. 30, 2004) (noting that an earlier provision of the bill which authorized a writ for prisoners convicted of all crimes would provide uniformity in the law because expert testimony is permitted in all criminal cases where relevant). Compare CAL. EVID. CODE § 1107 (amended by Chapter 609) (providing that evidence of battering and its effects can be introduced in any crime where domestic violence was a contributing factor) with CAL. PENAL CODE § 1473.5 (amended by Chapter 609) (authorizing writ authority when there was an absence of evidence of battering only when a homicide or violent felony was committed).

83. See Christina M. Vogt, *Women in the Criminal Justice System: An Ex-Lifer's Account Part One*, Interview of Gloria Killian, 3 EXPOSITORY MAGAZINE, Issue 1, 2004, available at [http://www.expositorymagazine.net/women\\_in\\_cj\\_system.php](http://www.expositorymagazine.net/women_in_cj_system.php) (on file with the *McGeorge Law Review*) ("One of the worst inequities that you see in women's convictions is in the cases where they were actually just an accessory or even had a lesser part in the crime."); see also FREE BATTERED WOMEN, *supra* note 2 (reporting that hundreds, and possibly thousands, of women are serving time for crimes where domestic violence was a contributing factor).

84. See *supra* Part III (explaining that earlier bills raised concerns that the prior provision would not provide enough time for all eligible women to bring their writs). But see SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB1385, at 5 (Apr. 13, 2004) (citing the California District Attorneys Association's opposition, which stated that eliminating the sunset date would "open the floodgates to habeas corpus petitions not previously cognizable" and "undermine the longstanding policy favoring finality of judgment under the law").

85. See 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, 231 (2004) (citing Interview with Johanna Hoffman, Co-Coordinator, Free Battered Women, in San Francisco, Cal. (Nov. 19, 2003)) (explaining that prison officials have not permitted legal teams to present information to large groups of prisoners and have denied access to prisoners).

86. *Id.* at 232.

87. Telephone Interview with Johanna Hoffman, Coordinator, Free Battered Women (July 30, 2004) (notes on file with *McGeorge Law Review*).

88. See LEONARD, *supra* note 1, at 101 (discussing the problems the overuse of prescription drugs in the jails pose for battered women in preparing an adequate legal defense).

## V. CONCLUSION

“Women have got to get out of abusive relationships. We all need to understand that any violent relationship is potentially lethal.”<sup>89</sup> While Chapter 609’s provisions increase the likelihood that wrongly incarcerated battered women will be released from prison, remaining inconsistencies within the law leave several women who should be eligible to file a writ of habeas corpus with no legal remedy.<sup>90</sup> Additional measures are needed to ensure that the intended beneficiaries of the law have access to information concerning their right to habeas relief.<sup>91</sup> Furthermore, training is needed to ensure that attorneys and the courts understand how to use evidence of the effects of battering and when it is necessary and appropriate.<sup>92</sup>

When battered women kill they are acting to help themselves out of a situation to which they see no other options.<sup>93</sup> Therefore, it is important to note that Chapter 609’s amendments are retroactive provisions and efforts to provide abused women with viable options to successfully leave abusive situations must continue.<sup>94</sup>

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89. *See id.* at 128 (quoting the founder of Convicted Women Against Abuse founder Brenda Clubine); *see also* WALKER, *supra* note 24, at xv (emphasizing that a commonality among battered women is the belief that their partner is capable of killing them).

90. *See supra* Part IV.

91. *Id.*

92. *Id.*

93. *See* JONES, *supra* note 40, at 101 (indicating that women who kill their abusers act with the intent to escape rather than to injure them which is demonstrated by a decrease in the number of women who kill since the opening of domestic violence safe houses).

94. *SEE* AMERICAN BAR ASSOCIATION, COMMISSION ON DOMESTIC VIOLENCE, *available at* <http://www.abanet.org/domviol/stats.html> (last visited July 26, 2004) (on file with the *McGeorge Law Review*) (indicating that police and court system responses to domestic violence need improvement, that protective orders do not eliminate violence, the risk of serious violence to a woman increases dramatically when she attempts to leave, and that homicide in domestic situations is often the result of an “escalating history of abuse”); LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* 140 (1984) (explaining the need for improvements in the legal response to violence and recommending community-wide task forces); *see also* Gilfus, *supra* note 3 (explaining that the number of women convicted for homicide of their partners has decreased possibly as a result of improvements in domestic violence services for women); Vogt, *supra* note 83, at 10 (additionally emphasizing that there need to be services to assist women who have successfully overturned their convictions in transitioning back into society as they often have nowhere to go).