

BATTERED AUTONOMY: INCARCERATED DOMESTIC VIOLENCE SURVIVORS AND THE FETISHIZATION OF PERSONAL RESPONSIBILITY IN THE CALIFORNIA PAROLE SYSTEM

Marisa F. González^{a1}

I. Introduction

Feminists who work with battered women defendants have been critiquing the false dichotomy between autonomy and victimization that is frequently presented in scholarship about domestic violence survivors charged with crimes since at least 1986, when Elizabeth M. Schneider raised questions about the role of expert testimony on “battered woman syndrome” in her article *Describing and Changing: Women’s Self-Defense Work and the Problem of Expert Testimony on Battering*.¹ As Professor Schneider has described, neither autonomy nor victimization capture the reality of women’s lived experiences in abusive relationships: “an exclusive focus on women’s victimization (is) incomplete and limiting because it ignore(s) women’s active efforts to protect themselves and their children, and to mobilize their resources to survive,” while “an exclusive focus on women’s agency ... (is) shaped by liberal visions of autonomy, individual action, and individual control and mobility, which (are) equally unsatisfactory without the larger social context of victimization.”² Schneider’s 1986 article concluded that “[i]t is crucial for feminists and feminist legal theorists to understand and explore the role of victimization and agency in women’s lives, and to translate these understandings into the theory and practice that we develop.”³

In the decades since, lawyers representing battered women charged with crimes have tried to find that balance between victimization and autonomy when telling survivors’ stories to judges and other decision makers. Battered Woman Syndrome (BWS), with its roots in Lenore Walker’s work on “learned helplessness” and its connotations of women as passive victims with psychological problems, has been rejected in many jurisdictions in favor of “intimate partner battering and its effects,” (IPB) which seeks to shift the focus away from whether a survivor has a “syndrome” and toward the behavior of her abusive partner and the ways in which his exertion of power and control impacted her thoughts, perceptions and feelings at the time of

^{a1} Clinical Teaching Fellow and Supervising Attorney, Georgetown University Law Center, The Community Justice Project. Many thanks to Jane H. Aiken, Colleen F. Shanahan, Margaret E. Johnson, and Laila Hlass for their feedback and support.

¹ Elizabeth M. Schneider, *Describing and Changing: Women’s Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN’S RTS. L. REP. 195 (1986) (hereinafter *Describing and Changing*).

² Elizabeth M. Schneider, *Feminism and the False Dichotomy of Victimization and Agency*, 38 N.Y. L.SCH. L.REV. 387, 389 (1993) (hereinafter *Feminism and the False Dichotomy*).

³ *Id.* (citing Schneider, *Describing and Changing*, *supra* note 1, at 221).

the crime.⁴ Survivors' lawyers introduce expert testimony on IPB to explain the reasonableness of the battered woman's actions – and in cases of self-defense and duress, the reasonableness of her fear – at the time of the crime, given the abuse she had experienced at the hands of her partner.⁵ Thus attorneys for battered women seek to situate women's actions within the context of the violence they were experiencing at the time of the crime, balancing a narrative of victimization with one of autonomy by demonstrating that survivors' perceptions of available choices – or the actual choices available – were limited by the abuse to which they were victims.

In many states around the country, lawyers and advocates have even enacted legislation meant to take the context of battered women's experiences into account when examining their crimes. California, which has long been a leader on the issue of battered women criminal defendants, passed laws over the course of two decades explicitly allowing expert testimony on IPB to be received into evidence in criminal trials,⁶ permitting survivors convicted before the introduction of such testimony was routinely admitted to file writs of habeas corpus on the basis of a lack of expert testimony,⁷ and directing the parole board to take into account a history of abuse as a mitigating factor in favor of parole.⁸ Yet for battered women serving life-term sentences in California's prisons, the relief promised by these laws has been hard to achieve, particularly in the parole hearing context. Despite all of these efforts to tell battered women's stories in ways that highlight their autonomy within the context of the victimization they experienced, all too often convicted women are being denied parole by decision makers who seem unable to *hear* the nuanced stories they are trying to tell. While judges and jurors seem more willing to understand women's actions as arising within a context of victimization and to determine culpability accordingly, the parole authority's single-minded focus on autonomy and personal responsibility appears to render it incapable of taking into account how survivors' actions were shaped by the violent circumstances created by their batterers, leaving many incarcerated women without access to justice.

⁴ See Sue Osthoff & Holly Maguigan, *Explaining Without Pathologizing: Testimony on Battering and Its Effects*, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE (Mary M. Cavanaugh, Richard J. Gelles and Donileen R. Loseke, eds., Sage Publications 2004).

⁵ *Id.* at 234-35; Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. Rev. 520, 560 (1992) (“Expert testimony on battered woman syndrome was developed to explain the common experiences of, and the impact of, repeated assault on battered women. The goal was to assist the jury and the court in fairly evaluating the reasonableness of the battered woman's action.”). Schneider uses the term “battered woman syndrome” to describe the type of expert testimony that was originally offered in survivors' criminal cases but goes on to critique the subsequent focus on “passive, victimized aspects of battered women's experiences, their ‘learned helplessness,’” (*Id.* at 561) exactly the type of focus the shift to IPB is intended to discourage.

⁶ Cal. Evid. Code § 1107.

⁷ Cal. Penal Code § 1473.5.

⁸ Cal. Penal Code § 4801.

Part II of this paper explores the history of the movement to defend battered women charged with crimes and the tension that has long existed between notions of autonomy and victimization, as well as efforts to reconcile the two. Part III explores laws that were passed in California over the course of two decades to try to provide justice for domestic violence survivors charged with and convicted of crimes by creating more opportunities for decision makers to examine their actions within the context of the victimization they experienced, focusing particularly on the parole hearing context, where such legislative efforts have met with limited success. Part IV demonstrates the tension between autonomy and victimization that continues to exist in parole hearings through the story of Jennifer Johnson,⁹ a battered woman convicted of second degree murder and incarcerated for 27 years for her limited role in her abusive husband's crime. Part V offers possible explanations for the parole authority's continued focus on personal responsibility to the exclusion of battered women's claims for context, and concludes that, rather than a legislative solution, a cultural change is needed if incarcerated battered women are to achieve justice from California's parole system.

II. Victimization Versus Autonomy and Attempts by Scholars and Advocates to Reconcile the Two

The American criminal legal system is rooted in the idea of autonomy, that the normal human being is a rational actor capable of making choices. This definition of the normal human being is necessary in order to assign criminal blame for wrongdoing; "(j)ust punishment invariably depends on a careful definition of the punishable subject," and "(v)irtually all (criminal law) scholars agree that the responsible actor contemplated by the criminal law is a rational character capable of choosing for himself among alternative courses of action for good or evil."¹⁰ In order to avoid criminal blame, responsible actors who injure others must demonstrate that their actions were either justified – although the action violated the law it was the right thing to do under the circumstances faced by the actor – or excused – although the action violated the law the actor should not be held culpable because "some disability in [the actor's] freedom to choose the right (action) makes it inappropriate to punish" her.¹¹

Defense attorneys who represent battered women have long struggled to persuade judges and juries that although these women may have committed an act that violates the criminal law, the circumstances of the abuse they were experiencing should either justify or excuse their behavior. Much of the literature on battered women charged with and convicted of crimes is concerned with survivors who kill

⁹ Names and other identifying information have been changed to protect privacy.

¹⁰ Anne M. Coughlin, *Excusing Women*, 82 Cal. L. Rev. 1, 10-11 (1994).

¹¹ Sanford H. Kadish, *Excusing Crime*, 75 Cal. L. Rev. 257, 258 (1987).

their abusive partners,¹² and who present a self-defense claim to justify their acts. Prior to the 1970s, women accused of killing their intimate partners rarely introduced the issue of abuse at trial; defense attorneys believed that raising the abuse would provide the prosecution with a motive for the homicide, and it was questionable what jurors would make of partner abuse at a time when many states still had laws allowing men to “chastise” their wives.¹³ This began to change in the late 1970s, as feminist lawyers connected to the battered women’s movement sought to defend women charged with killing or assaulting their intimate partners.¹⁴ In 1978, the Center for Constitutional Rights and the National Jury Project founded the Women’s Self-Defense Law Project “to assist lawyers around the country to more effectively represent women victims of violence who had defended themselves.”¹⁵

Attorneys doing women’s self-defense work attempted to demonstrate the reasonableness of a woman’s actions to defend herself against her abuser; a successful claim of self-defense requires that the defendant show both that she had an actual belief that she was in imminent danger of great bodily harm or death, and that her fear was reasonable. “Historically, views of women as being unreasonable, sex-bias in the law of self-defense, and myths and misconceptions concerning battered women have operated to prevent battered women from presenting acts of homicide or assault committed against batterers as reasonable self-defense.”¹⁶ In order to overcome historical sex-bias, battered women and their attorneys sought to explain to judges and juries “women’s different experiences and the different

¹² See e.g. ELIZABETH DERMODY LEONARD, *CONVICTED SURVIVORS: THE IMPRISONMENT OF BATTERED WOMEN WHO KILL* (2002); ANGELA BROWNE, *WHEN BATTERED WOMEN KILL* (1987); CYNTHIA GILLESPIE, *JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF DEFENSE AND THE LAW* (1989). See also Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 Harv. Women’s L.J. 217, 254 (2003) (“Social science research indicates that women arrested for drug offenses, theft, and prostitution are overwhelmingly victimized by intimate partners, yet most feminist scholarship ignores this group of victims in favor of focusing on those who kill their abusers in self-defense.”)

¹³ EVAN STARK, *COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE* 135 (2007) (“Battered defendants traditionally concealed their abuse, fearing it would be identified as their motive for committing a crime against an abusive partner.”).

¹⁴ Elizabeth M. Schneider and Susan B. Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, 4 Women’s Rts. L. Rep. 149 (1978) (“Women charged with homicide in response to abuse formerly pled guilty or pled insanity and were routinely convicted. They are now speaking out about their circumstances, describing the reasons for their actions, and asserting an equal right with men to defend themselves.”)

¹⁵ Schneider, *Describing and Changing*, *supra* note 1, 195, note 3.

¹⁶ *Id.* at 198.

circumstances in which women kill,” including “the common experiences of, and the impact of repeated abuse on, battered women.”¹⁷

Defense attorneys began to introduce expert testimony on Battered Woman Syndrome (BWS), first theorized by psychologist Lenore Walker in the late 1970s, to explain women’s responses to domestic violence. “The goal was to assist the jury and the court in fairly evaluating the reasonableness of the battered woman’s action and to redress (the) historical imbalance (in self-defense law)....”¹⁸ Walker developed BWS as a way to explain the impacts of repeated abuse on the domestic violence survivor. She defined a battered woman as one who is “repeatedly subjected to any forceful physical, psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights,” and who has gone through the “cycle of abuse” – involving tension building, an acute incident of battering, and a “honeymoon stage” – at least twice.¹⁹ “Walker described BWS as ‘part of a recognized pattern of psychological symptoms called post-traumatic stress disorder (PTSD), reported in the psychological literature as produced by repeated exposure to trauma....’”²⁰ Her theory included the idea that battered women respond to these repeated and unpredictable cycles of violence by developing “‘learned helplessness,’ a sense of loss of predictability and control over her life,”²¹ which may eventually lead to “a level of resigned terror at which she can foresee only two possible exits from her tortured life – her own death or her abuser’s.”²² Although frequently introduced in cases where battered women were charged with assault or homicide for defending themselves against abusive partners, expert testimony on BWS has also been used to defend battered women against other criminal charges, including assault or homicide of a third party, conspiracy, robbery, and drug-related crimes.²³

While expert testimony on BWS was intended to educate judges and jurors and disabuse them of commonly held myths and misconceptions about battered women, feminist scholars soon became concerned that the testimony was having the opposite effect, emphasizing women’s victimization in ways that reasserted familiar stereotypes of women as passive, helpless, psychologically disabled, and

¹⁷ *Id.* at 197-98.

¹⁸ *Id.* at 198.

¹⁹ LENORE WALKER, *THE BATTERED WOMAN* xv (1979).

²⁰ Osthoff and Maguigan, *supra* note 4, 228 (citing Lenore Walker, *The Battered Woman Syndrome is a Psychological Consequence of Abuse* in *CURRENT CONTROVERSIES ON FAMILY VIOLENCE* (R.J. Gelles & D.R. Loseke, eds., 1993)).

²¹ Schneider, *Describing and Changing*, *supra* note 1, 202.

²² Jill E. Adams, Recent Development, *Unlocking Liberty: Is California’s Habeas Law the Key to Freeing Unjustly Imprisoned Battered Women?*, 19:1 *Berkeley Women’s L.J.* 217, 224 (2004).

²³ See Myrna S. Raeder, *Gender and Sentencing: Single Moms, Battered Women, and Other Anomalies in the Gender-Free World of the Federal Sentencing Guidelines*, 20 *Pepp. L. Rev.* 905, 969-77 and accompanying notes (1993).

unreasonable.²⁴ The focus on the word “syndrome” seemed to imply a psychological condition that all battered women are subject to, and Dr. Walker’s description of “learned helplessness” was often heard as defining a battered woman as passive in the face of her abuser’s violence. In the years since BWS was first introduced, advocates and scholars have pointed to many problems it creates for battered women charged with crimes: it puts the emphasis on the battered woman and whether or not she has a “syndrome” rather than on the batterer’s use of violence and coercion; it excludes women who do not fit the model of pure, passive victim, including both women who have actively resisted their abusers as well as women who because of their race or class are not traditionally understood as victims;²⁵ it encourages the mistaken belief that there is a separate BWS defense that can be invoked by battered women;²⁶ and it stigmatizes and pathologizes women in ways that detract from defense claims that their actions were reasonable.²⁷ Over the past few decades, battered women’s attorneys and feminist legal scholars have called for developing a theory and practice that balances the narrative of victimization epitomized by BWS with a focus on women’s autonomous agency and the reasonable actions they took in light of the violence they were experiencing.²⁸

This call appears to have been taken up. Articles discussing the use of expert testimony in defense of battered women highlight the broad nature of the testimony, beyond psychological testimony about the impacts of the victimization

²⁴ See, e.g., Schneider, *Describing and Changing*, *supra* note 1; Osthoff and Maguigan, *supra* note 4; STARK, *supra* note 13, 133-67.

²⁵ Stark, *supra* note 13, 156-58 (“In the eyes of the court, if a woman has responded violently to abuse in the past or has ostensibly gone about her life despite past abuse, the claim that current violence was traumatic is suspect.”); Buel, *supra* note 12, 297 (“By essentializing the definition of woman to exclude anyone who is not a white, middle-class, stay-at-home mom, traditional BWS invites the legal system to distinguish between the deserving and undeserving victims.”).

²⁶ Osthoff & Maguigan, *supra* note 4, 226-27. Schneider, *Describing and Changing*, *supra* note 1, 198-99 (“For both lawyers and judges the term ‘syndrome’ and the psychological description of battered women that predominates in battered woman syndrome descriptions appears to conjure up images of a psychological defense – a separate defense and/or an impaired mental state defense.”)

²⁷ Osthoff & Maguigan, *supra* note 4, 229 (“The ‘syndrome’ label may encourage jurors to perceive the defendant as pathological. Such a perception is at odds with a defense argument that the woman’s actions were actually reasonable in light of the circumstances.”).

²⁸ See e.g., Schneider, *Describing and Changing*, *supra* note 1, 199 (“The critical defense problem in representing battered women who kill and assert self-defense is how to explain the woman’s *action* as reasonable. The woman’s experience as a battered woman and her inability to leave the relationship – her victimization – is the context in which that action occurs.”).

on the battered woman's mental state.²⁹ Experts may discuss general dynamics of domestic violence, or the specific relationship dynamics in the particular case at hand.³⁰ They often focus on the physical, sexual, psychological, emotional, and social violence abusers perpetrate against their partners in order to establish power and control.³¹ They may talk about common responses of battered women to this violence, but may also address how the individual survivor responded to the abuse she was experiencing due to contextual factors specific to her life, such as "race, ethnicity, culture, class, sexual orientation, age, fear for her children, availability of economic and emotional support, faith or religious beliefs, mental or physical disabilities, substance abuse or criminal record, emotional or financial dependence on her partner, history of physical or sexual abuse, and fear of the abuser."³² Experts may describe the coping strategies women developed to survive the abuse, as well as "the survivor's prior help-seeking behaviors to change the jury's focus from wondering why she didn't leave her abuser to lauding her for the strategies she did try."³³ Most importantly, experts can testify about the impact of the abuse the woman experienced on her thoughts, perceptions and actions at the time of the crime by relating her past history of abuse to the fear she was experiencing at the moment in question, in order to demonstrate how reasonable that fear was and thus how reasonable were the actions she took.³⁴ Thus battered women and their advocates are bringing in narratives about survivors' victimization to contextualize their actions, creating nuanced stories that highlight the reasonableness of battered women's actions in light of the circumstances they were facing.

This strategy – balancing a validation of battered women's autonomous agency with a recognition of the victimization she did experience – may be working to educate judges and jurors and bring about just results in many cases where battered women are charged with crimes. However, a tension between the criminal legal system's traditional focus on autonomy and personal responsibility when judging the culpability of responsible actors on the one hand, and the mitigating circumstances of the survivor's history of abuse, on the other, continues to exist. As discussed below, this tension may most clearly be seen in the context of parole hearings for incarcerated survivors serving life-term sentences.

²⁹ See e.g., Osthoff & Maguigan, *supra* note 4, 235 ("Social science testimony is not offered merely to focus on her psychological makeup. Although a woman's psychological reactions may sometimes be critical pieces of information, psychology is clearly not the whole story.").

³⁰ *Id.*

³¹ NAT'L INST. JUST. & NAT'L INST. MENTAL HEALTH, *The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials: Report Responding to Section 40507 of the Violence Against Women Act 5-16* (May 1996) (hereinafter "Validity and Use"), available at <https://www.ncjrs.gov/pdffiles/batter.pdf>.

³² Buel, *supra* note 12, 278-79.

³³ *Id.*

³⁴ Osthoff & Maguigan, *supra* note 4, 235.

III. California's Legislative Attempts to Address the Needs of Battered Women Defendants

In the past two decades, California has been on the cutting edge of attempts to bring battered women's stories into the courtroom in ways that will account for the context of abuse in which their crimes were committed. Where the state has truly been a trend-setter is in extending these efforts to survivors already incarcerated for crimes related to a history of abuse, those who were tried and convicted before testimony on intimate partner battering and its effects was routinely admitted into evidence during criminal proceedings. Incarcerated battered women and their advocates have been the main forces for reform behind these legislative changes, and the evolution of the laws tells the story of the shift that has occurred within the anti-domestic violence movement between emphasizing battered women's victimization and telling a story that uses the narrative of victimization as the context in which to examine survivors' autonomous actions. However, despite lawyers' and legislators' best efforts, incarcerated battered women continue to serve unduly long sentences because the traditional liberal ideas of autonomy and personal responsibility that underlie the criminal legal system continue to prevent parole board members from hearing the nuanced stories survivors and their advocates are telling, and then acting to effect justice.

A. Evidence Code Section 1107 and Penal Code Section 1473.5: Expert Testimony During Trials and in Habeas Petitions

California's legislative changes on behalf of battered women charged with crimes begin with incarcerated battered women taking action to achieve justice for themselves and others like them. In 1989, prisoners at the California Institution for Women (CIW) – then California's only state prison for women – formed a support group for survivors of domestic violence, recognizing a common experience that many of them shared.³⁵ Convicted Women Against Abuse (CWAA) was one of the first prisoner-led battered women's support group in the country.³⁶ The group's advocacy efforts on behalf of incarcerated survivors led to the enactment of California Evidence Code section 1107 after women prisoners testified about their experiences of domestic violence at special legislative hearings held at CIW.³⁷ Evidence Code section 1107, enacted in 1992, authorized expert testimony on Battered Woman Syndrome to be received into evidence whenever "the proponent of the evidence establishes its relevancy and the proper qualifications of the expert

³⁵ *California Habeas Project History*, LEGAL SERVICES FOR PRISONERS WITH CHILDREN, <http://www.prisonerswithchildren.org/our-projects/california-habeas-project/about-the-project/>.

³⁶ *Id.*

³⁷ Jessica Bennett, *Women Who Kill the Men They Love*, THE DAILY BEAST, (Oct. 15, 2011), <http://www.thedailybeast.com/articles/2011/10/15/sin-by-silence-documentary-tells-story-of-a-group-of-women-in-prison-for-killing-their-husbands.html>.

witness.”³⁸ Expert testimony in California is thus not limited to cases where domestic violence survivors are charged with homicide of their abusive partners but is instead available to survivors charged with any type of crime, making this one of the most expansive laws in the country.³⁹ Prior to 1992, it was up to individual judges to decide whether or not to hear such expert testimony and it was frequently kept out of survivors’ trials.⁴⁰

When Evidence Code section 1107 passed, CWAA members began a clemency campaign to petition the governor for relief, citing the abuse they had experienced and the lack of expert testimony during their trial proceedings. Thirty-four women petitioned the governor for clemency, joined by outside activists and attorneys.⁴¹ Then-Governor Pete Wilson granted clemency to only three of the women, releasing an elderly woman who was terminally ill and shortening the sentences of the other two.⁴² Disappointed, battered women’s advocates began an effort to pass legislation that would allow these survivors to get back into court in the hopes that judges would provide the relief the Governor would not. In 2001, California became the first and only state to allow writs of *habeas corpus* to be sought on the basis that expert testimony on Battered Woman Syndrome was not received into evidence during survivors’ original trial proceedings.⁴³

³⁸ CAL. EVID. CODE § 1107 (b).

³⁹ See Stark, *supra* note 13, 135 (“Expert testimony on battering and its effects has been admitted, at least to some degree, in several thousand cases and in each of the 50 states plus the District of Columbia.”); Buel, *supra* note 12, 296 (“Sixty-nine percent of states admit expert testimony to explain the effects of battering and they dynamics of abusive relationships, and at least twelve states mandate by statute that expert testimony on battering be admissible in self-defense cases.”).

⁴⁰ CAL. EVID. CODE § 1107.

⁴¹ Adams, *supra* note 22, 237.

⁴² *Id.*

⁴³ CAL. PENAL CODE § 1473.5. As originally enacted in 2002, this section stated:

- (a) A writ of habeas corpus also may be prosecuted on the basis that evidence relating to battered women’s syndrome, within the meaning of Section 1107 of the Evidence Code, 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 is of such substance that, had it been introduced, 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.
- (b) This section is limited to judgments of conviction for a violation of Section 187 resulting from a plea entered, or a trial commenced, before January 1, 1992.
- (c) If a petitioner for habeas corpus under this section filed a petition for writ of habeas corpus prior to the effective date of this section, it is grounds

While this law represented a huge step forward for incarcerated battered women by providing the opportunity to have their stories heard, often for the first time ever, it also limited the stories that could be told. First, like Evidence Code section 1107, the law used the language of Battered Woman Syndrome, putting the focus on women's victimization and pathology as a result of the abuse they experienced. Second, despite the broad application of Evidence Code section 1107 to all criminal trials, Penal Code section 1473.5 applied only to domestic violence survivors convicted of killing their abusive partners.⁴⁴ Thus the new law denied relief to dozens of incarcerated battered women, in prison for other crimes related to their experiences of being abused.⁴⁵

In 2005, battered women's advocates were successful in amending Penal Code section 1473.5 to expand relief to survivors convicted of any violent felony, as defined by the Penal Code, including crimes against third parties.⁴⁶ Suddenly many more women – including those who had been convicted of failing to protect a child from an abuser's violence, or those who had been coerced into participating in the batterer's criminal behavior – were eligible for habeas relief. Importantly, the amendment also effected two other significant changes. First, it changed the date by which the survivor's crime must have occurred from 1992 – the year Evidence Code section 1107 was enacted – to August 29, 1996, the date of the California Supreme Court's decision in *People v. Humphrey*.⁴⁷ *Humphrey* was the first time that the court issued a ruling on the purpose and permitted uses of expert testimony under Evidence Code section 1107; in a case involving a woman charged with killing her abusive husband who introduced expert testimony to bolster her self-defense claim, the court found that expert testimony was admissible not just on the issue of whether she was actually in fear of her life when she killed her husband – the subjective prong of self-defense – but also on the issue of whether her fear was reasonable.⁴⁸ The court stated, "Because evidence of battered woman's syndrome may help the jury understand the circumstances in which the defendant found herself at the time of the killing, it is relevant to the reasonableness of her belief

for denial of the new petition if a court determined on the merits in the prior petition that the omission of evidence related to battered woman's syndrome at trial was not prejudicial and did not entitle the petitioner to the writ of habeas corpus.

(d) This section shall remain in effect only until January 1, 2005, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2005, deletes or extends that date.

2001 Cal. Legis. Serv. Ch. 858 (S.B. 799) (West).

⁴⁴ 2001 Cal. Legis. Serv. Ch. 858 (S.B. 799), subsection (a).

⁴⁵ See Adams, *supra* note 22, 230.

⁴⁶ 2004 Cal. Legis. Serv. Ch. 609 (S.B. 1385) (West).

⁴⁷ See *id.*

⁴⁸ *Humphrey*, 13 Cal. 4th 1073, 1076 (Cal. 1996).

(that she needed to kill her husband in self-defense).⁴⁹ Thus *Humphrey* represents a shift in the presentation of battered women's stories as narratives of victimization to narratives where the victimization provides needed context in which to understand and assess the reasonableness of survivors' autonomous acts. Penal Code section 1473.5's amended date requirement acknowledged the limitations courts put on expert testimony prior to *Humphrey* and provided relief for survivors whose stories might not reflect the victimization narrative previously emphasized.

Additionally, the 2005 amendment changed the language of Penal Code section 1473.5 and of Evidence Code section 1107 to replace the term "Battered Woman Syndrome" with the term "intimate partner battering and its effects." BWS had been falling out of favor nationally for at least the previous decade: in 1996 a National Institute of Justice report recommended "replacement of the counterproductive misnomer 'BWS' with the more appropriate description, 'battering and its effects,' in order to abate misunderstandings."⁵⁰ The same year, the court in *Humphrey*, citing an amicus curiae brief submitted by the California Alliance Against Domestic Violence, also criticized the term, noting that according to amici:

"Domestic violence experts have critiqued the phrase 'battered women'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 women'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.'"⁵¹

That advocates were successful in changing the language of the statutes to "intimate partner battering and its effects" further reflected the shift that had occurred among lawyers, judges, and legislators from a narrative of victimization to one that, as battered women's advocates and feminist legal scholars had previously called for, tried to strike a balance between survivors' victimization and their autonomous agency.⁵²

B. Evidence of Abuse in the Parole Context

In theory, California's parole laws provide a separate and additional avenue of relief for incarcerated survivors of domestic violence. Enacted in 2000, Penal Code section 4801 directs the parole board to "consider any information or evidence that, at the time of the commission of the crime, the prisoner had suffered from battered woman syndrome, but was convicted of the offense prior to the enactment of

⁴⁹ *Id.*

⁵⁰ Adams, *supra* note 22, 225.

⁵¹ *Humphrey*, 13 Cal. 4th at 1083, n. 3 (quoting amicus curiae brief by the California Alliance Against Domestic Violence).

⁵² See Part II, *supra*.

Section 1107 of the Evidence Code....”⁵³ The following year, the Board of Parole Hearings (Board) amended its regulations to provide that it is a factor in favor of parole suitability if at the time of the crime “the prisoner suffered from Battered Woman Syndrome ... and it appears the criminal behavior was the result of that victimization.”⁵⁴ However, survivors have had a difficult time achieving release through parole, in large part because of parole board members’ focus on their personal responsibility and rejection of attempts to contextualize women’s actions within a history of being abused. California law requires the Board to grant parole to eligible prisoners serving life sentences unless there is a finding that release from prison would pose a substantial risk to public safety.⁵⁵ For years, countless battered women were denied release by commissioners and Governors who cited the “heinousness” of the commitment offense in finding these prisoners unsuitable for parole.⁵⁶ This continued focus on the commitment offense, often decades after the underlying crime, demonstrates the importance of the concept of autonomy in the parole hearing context; life-term prisoners, or “lifers,” are seen as autonomous actors who made deliberate decisions at the time of the crime that make them a danger to public safety even after years of incarceration.

In 2008, in a case called *In re Lawrence*, the California Supreme Court dramatically reduced the power of the Board to rely on the commitment offense in denying parole.⁵⁷ The court held that the Board must show that “some evidence” of current dangerousness supports a denial of parole, and that the Board may only rely on the circumstances of the commitment offense if it can establish a rational nexus between the crime “and the necessary basis for the ultimate decision—the determination of current dangerousness.”⁵⁸ However, in a companion case to *Lawrence*, *In re Shaputis*, the court found that a prisoner’s current “lack of insight” into her crime can provide the rational nexus to the circumstances of the commitment offense to show that she remains a current risk to public safety.⁵⁹ For battered women lifers, this focus on “insight” can often amount to a commissioner’s finding that by raising the issue of abuse, the woman is minimizing her own responsibility for the crime, demonstrating her lack of insight into her criminal motivations and her consequent unsuitability for parole.⁶⁰ Thus parole board

⁵³ 2000 Cal. Legis. Serv. Ch. 652 (S.B. 499) (West).

⁵⁴ CAL. CODE REGS. tit. 15 § 2402(d)(5) (2001).

⁵⁵ CAL. PENAL CODE § 3041(b).

⁵⁶ See *In re Lawrence*, 44 Cal. 4th 1181, 1206 (2008) (“[I]n every published judicial opinion addressing the issue, the decision of the Board or the Governor to deny or reverse a grant of parole has been founded in part or in whole upon a finding that the inmate committed the offense in an especially heinous, atrocious or cruel manner....”)(internal citations omitted).

⁵⁷ *In re Lawrence*, 44 Cal. 4th 1181 (2008).

⁵⁸ *Id.* at 1210.

⁵⁹ *In re Shaputis*, 44 Cal. 4th 1241, 1255 (2008).

⁶⁰ See Erin Liotta, Commentary, *Double Victims: Ending the Incarceration of California’s Battered Women*, 26:2 BERKELEY J. GENDER, L. & JUST. 253, 269-75 (2011).

members have continued to rely on a model of autonomy in making decisions about a lifer's suitability for parole; by replacing a focus on the circumstances of the crime – the actions the lifer took at the time – with one on her insight into her motivations for taking those actions, and continuing to ignore the impact of the abuse she experienced on her perceptions of choice, these decision makers are privileging a narrative of autonomy and personal responsibility and disregarding the nuanced story the survivor and her advocate attempt to have heard.

Thus battered women are stuck in a catch-22 between regulations that encourage them to divulge a history of victimization in order to be found suitable for parole on the one hand, and decision makers who view criminal defendants as autonomous actors and use the survivors' focus on victimization as an indication that they refuse to take personal responsibility for their crimes on the other. Yet survivors' "insight" into their crimes includes an understanding of how the context of their victimization shaped their thoughts, feelings, and perceptions at the time of the commitment offense. As shall be described below, decision makers are prevented from hearing battered women's attempts to contextualize the actions they took at the time of the crime by their focus on criminal defendants as autonomous actors, solely responsible for the choices they made. Until this foundational concept of autonomy is changed, incarcerated battered women will continue to serve unjustly long prison sentences.

IV. Jennifer's Story: One Woman's Experience with California's "Battered Women's" Laws

In 1982, Jennifer Johnson,⁶¹ a scared 19-year-old survivor of incest and childhood abuse, watched her abusive husband shoot and kill a man. The youngest of four children and the only girl, Jennifer's parents divorced when she was six and Jennifer and her next-older brother Joseph moved with their mother to California, while her oldest brothers remained with their father. Around this time Joseph began to physically and sexually abuse Jennifer, hitting her, kicking her, and molesting her. He once hit her with so much force that he broke her arm. As she neared puberty, Joseph's sexual abuse grew more severe and he began raping her on a regular basis. Joseph stalked Jennifer at school, following her and publicly humiliating her. Initially a good student, Jennifer dropped out of school after eighth grade to avoid her brother's abuse.

The impact of the violence Jennifer experienced was exacerbated by the lack of response from her mother or any adult authorities. Jennifer's mother buried herself in work after her divorce, neglecting her daughter. Jennifer tried to press charges against her brother when he broke her arm, but law enforcement never followed up;

⁶¹ The story told here is based on several interviews with Jennifer, parole hearing transcripts, reports by mental health professionals and experts on battering and its effects, letters from family members, and sworn affidavits by witnesses to her husband's abuse.

she thus learned early that no one would protect her from the abuse she was experiencing. She never told anyone about the sexual abuse, feeling ashamed and “dirty;” she described showering and bathing frequently to try to wash away the feelings of shame and disgust. She started drinking and then using drugs as a way to cope with the pain she could not escape. After dropping out of school, Jennifer ran away from home to get away from her brother. She continued abusing drugs and alcohol and was hospitalized several times in response to suicide attempts; not a single doctor or therapist ever asked her about abuse, and she was too ashamed to disclose it.

Unfortunately, Jennifer’s story is all too common among women who are incarcerated. Studies find that between sixty and eighty percent of incarcerated women are survivors of abuse, whether childhood abuse or intimate partner violence.⁶² For many of these women, the violence they experienced began when they were very young, perpetrated against them by family members or friends of the family, and too often ignored or simply missed by the adult authorities who should have been protecting them. Similarly, medical professionals treating battered women frequently fail to recognize or report abuse. While battered women are “5 times more likely to attempt suicide” than non-battered women, and are “3 times more likely to be diagnosed as depressed or psychotic,”⁶³ one study found that “[o]f 429 visits battered women made to the psychiatric emergency services ... abuse was identified at only 25 and never listed as a diagnosis....”⁶⁴ Thus while Jennifer was hospitalized several times throughout her adolescence for severe depression leading to suicide attempts, doctors responded by seeking to treat the symptoms rather than asking about the causes, a not uncommon response that leaves abuse survivors without the resources they need to address the underlying reasons for their depression.

As a result, women and girls who are abused frequently turn to drugs and alcohol, as Jennifer did, to “self-medicate” from the trauma they experience; one study found that as compared to non-battered women, abuse survivors are “15 times more likely to abuse alcohol (and) 9 times more likely to abuse drugs....”⁶⁵ Running away from

⁶² Buel, *supra* note 12, 219 (“Estimates reveal that eighty to eighty-five percent of women imprisoned in the United States attribute their incarceration to their association with a batterer. The Department of Justice reports that six out of ten women incarcerated in state prisons are survivors of abuse, and more than a third have been abused by an intimate partner.”).

⁶³ STARK, *supra* note 13, 122.

⁶⁴ *Id.* at 123.

⁶⁵ STARK, *supra* note 13, 122. *See also* JOANNE BELKNAP, *THE INVISIBLE WOMAN: GENDER, CRIME AND JUSTICE* 118-119 (3rd ed. 2007) (citing studies finding that many women “started using (drugs) in response to a traumatic experience or series of traumatic experiences (e.g., death in the family, losing a child, rape)” and that “[w]omen are more likely than men to continue drug use in response to crises and psychological

home is also a common response to sexual abuse; according to a 1991 report by the U.S. Department of Health and Human Services, “20 percent of girls and 7 percent of boys seeking help from runaway and homeless centers reported sexual abuse as a reason for their predicament.”⁶⁶ For girls, running away from home due to sexual abuse can become a pathway to the criminal legal system; according to one study, “sexually abused runaway girls were more likely than the non-sexually abused runaway girls to report delinquent/criminal activities and to be arrested, to be placed in jail, and to participate in a violent act.”⁶⁷ Thus from an early age women’s involvement in and incarceration for crimes is directly related to their connections with family members.

Jennifer met Carl at a party when she was 18; the two started dating and Jennifer quickly became pregnant. Unbeknownst to her, Carl was a sometime drug dealer who had already served time in prison for assault with a firearm. When her mother found out about the pregnancy and kicked Jennifer out of the house, she moved in with Carl, who immediately sought to control Jennifer by isolating her from friends and family and preventing her from being financially independent. Carl’s attempts to control Jennifer were strikingly similar to control tactics reported by many incarcerated domestic violence survivors.⁶⁸ Initially Carl wouldn’t allow Jennifer to wear make-up and kept tabs on her whereabouts, constantly asking her where she was going or where she had been. He checked the odometer on the car when Jennifer returned from errands to make sure she had only gone to pre-approved places such as the store, and he would frequently disable the car and remove the phone from the apartment when he was away to prevent her from leaving or talking with family or friends. Such methods of isolation are common tactics used by batterers to control their partners.⁶⁹

Carl also controlled the couple’s finances and prevented Jennifer from holding a job. He came to the fast food restaurant where she worked so often that the management fired Jennifer. She next sought to work in a bar after completing bartending school, but Carl forbade her to enter bars, publicly humiliating her and threatening her with violence to assure her compliance. Jennifer then got a job selling Tupperware, work that allowed her to both build community with other women in the neighborhood and gain a small measure of economic independence. Carl soon confiscated her demonstration equipment, putting an end to her attempts at financial autonomy. Again, this type of economic control is frequently implemented by batterers to create their partners’ dependency on the relationship and thus further the batterer’s own power; Elizabeth Dermody Leonard, a professor of sociology, found in her study of women incarcerated for killing their abusive

stresses ... and are more likely than men to have been depressed before developing a drug problem”).

⁶⁶ BELKNAP, *supra* note 65, 109.

⁶⁷ *Id.*

⁶⁸ See LEONARD, *supra* note 12.

⁶⁹ LEONARD, *supra* note 12, 16.

partners that the women “lacked sufficient resources to escape their abusive partners, leaving them without alternatives.”⁷⁰

Carl began physically abusing Jennifer when she was six months pregnant, beating her with such force that she required gynecological care to stop her bleeding.⁷¹ He frequently beat her and he sexually abused her on a regular basis. He also pressured her to marry him. Although she was wary of his violence and didn’t want to agree to the marriage, she felt she had little choice: she had no money, no support system, and a child to care for. Jennifer and Carl were married when she was 19, shortly after their son was born. The day of the wedding, Jennifer later reported, Carl bragged to her that he “had papers on her,” an intimidating statement that she took to mean that his control over her was now legally sanctioned. When describing her relationship with Carl, Jennifer frequently said, “I felt like I had married my brother.” For Jennifer, the abuse she had experienced in childhood was continued in her adult relationship. Like many incarcerated women, violence was a normal part of her everyday life and her depression, fear, and perception of herself as having no choices colored her everyday experiences. Where once Jennifer had dropped out of school and run away from home as survival strategies for dealing with her brother’s violence, the threat of losing her child now made her feel trapped with Carl. Jennifer soon learned to comply with Carl’s demands in order to avoid additional abuse.

In early 1982, Carl had a party at their apartment. After a night of heavy drinking and drugs, he passed out on the couch. Jennifer, who was breast-feeding at the time and thus stayed sober, came out into the living room to find John, a drug associate of Carl’s, standing with his pants open, straddling and fondling her unconscious husband. Understandably upset, Jennifer told John to leave and the next day informed her husband of what she had seen. As a survivor of sexual abuse herself, Jennifer wanted to protect her husband from an untrustworthy “friend,” but she was also afraid that Carl might hear the story from John and beat her for not saying anything about the incident. Carl was furious and over the next week his anger grew in intensity.

The following week, Jennifer came down to the garage to find Carl and two of his friends beating John. Carl told Jennifer to bring the men some alcohol and she complied; she initially wasn’t concerned about the beating as she thought John deserved it for his actions, and she was used to violence as a response to conflict. Over the course of the next couple of hours, however, as Carl demanded Jennifer bring more alcohol while he and his friends continued to beat John, Jennifer thought that the situation had gone too far but she was too terrified of her abusive husband to do anything to intervene. When Carl told Jennifer to participate in beating John

⁷⁰ *Id.* at 119-20 (“Batterers frequently prevent their female partners from gaining economic independence and limit or prevent a woman’s access to family or shared funds.”)

⁷¹ See BELKNAP, *supra* note 65, 239 (citing global studies finding that women’s risk of abuse increases during pregnancy).

by kicking him and hitting him with a metal chain Carl handed her, she saw no choice but to obey to avoid being beaten herself.

After a couple of hours, Carl demanded that Jennifer and the baby accompany him and his friends into the desert; Carl said he planned to scare John by leaving him in the middle of nowhere and forcing him to walk home. When they got to the desert, the three men made John dig his own grave while Jennifer sat in the car with the baby, still thinking the men's intention was simply to terrify John. When she heard the sound of shots being fired, Jennifer was so shocked she jumped out of the car. Carl shot John twice, killing him, and then buried the body. He threatened everyone present that if they said anything to the police they'd be next. Having just witnessed her husband kill a man, Jennifer believed his threats.

Over the next two years, Carl's abuse escalated, becoming more severe and more unpredictable. Jennifer considered seeking help from the police and informing them about the murder, but Carl made continual threats to kill her if she said anything to anyone. She tried leaving him several times, hiding out at friends' houses, but each time Carl would track her down and threaten to kill everyone there if she didn't return home with him. Jennifer felt trapped.

Eventually, Carl was arrested for a separate incident and confessed to the murder, implicating Jennifer as his accomplice. She was arrested and charged with the crime. By this point, Carl's mental instability was so advanced that he was declared unfit for trial; he was committed to a state mental hospital and killed himself before ever standing trial for his crime. One of his two male co-defendants fled the state and the other made a deal with the prosecution, receiving a short prison term in exchange for his testimony against the others. Jennifer was left to stand trial alone, and because her trial occurred seven years before California enacted Evidence Code section 1107, she had no expert to help contextualize her actions within the victimization she experienced from Carl. In fact, very little evidence of abuse was admitted during the trial at all. Despite her lack of criminal history and her limited role in the crime, Jennifer was convicted of second degree murder under a theory of accomplice liability and given an indeterminate sentence of 15 years to life. Jennifer Johnson ultimately served 27 years in prison before being released on parole.

As discussed above, the criminal legal system that charged, convicted, sentenced and incarcerated Jennifer has as its foundation the liberal legal ideal of autonomy: human beings are independent, rational actors who make choices to further their own good.⁷² Jennifer, a severely abused 19-year-old girl in fear for her life and the life of her child, does not fit the classical model of an independent autonomous actor in this system, solely responsible for her choices. Neither, however, does she fit the familiar narrative of a battered woman as victim: passive, helpless and hopeless to change her situation, who one day finally acts out against her abuser and kills him. Jennifer was an active participant in the crime and she made deliberate choices

⁷² See Part II, *supra*, notes 10-11.

about how to respond to Carl's violence, though her perception of her choices was limited by the context of the abuse she had experienced as a child and continued to experience with Carl. She chose to tell Carl about John's sexual acts in order to prevent the abuse she feared if Carl heard the story from someone else; she chose to bring Carl and his friends alcohol, even though she could see it was fueling their violence, in order to mitigate the threat of Carl lashing out at her; she chose to comply with Carl's order to participate in beating John because she was afraid of what Carl might do to her if she didn't; and she accompanied Carl and his friends into the desert where they eventually shot and killed John because she was afraid Carl would beat her if she refused. Most of all, Jennifer chose not to say anything to the police or anyone else about John's murder because she was terrified that Carl would kill her or their baby if she spoke up. It is possible that there are other choices Jennifer could have made, but the survival tactics she developed throughout her abusive childhood and relationship with Carl – to comply, to “just get things over with,” to use drugs and alcohol to numb the pain of her everyday life – limited her perception of the choices available to her. Thus neither autonomy nor victimization tell Jennifer's story; nor do they result in justice being done by the criminal legal system.

Jennifer's experience of coercive control in her relationship with Carl is one that is echoed by many incarcerated abuse survivors. “Females often enter the criminal justice system due to their attempts to survive victimization.”⁷³ Battered women are incarcerated for a whole host of crimes from killing their abusive partners to violent felonies against third parties, property crimes, welfare fraud, prostitution, and increasingly drug-related crimes including both possession and sales.⁷⁴ In each of these situations, battered women make conscious and deliberate choices, but like Jennifer, these women's choices are constrained by their limited perceptions of alternatives. The survival tactics they employ to escape violence frequently lead them to a criminal legal system where neither conventional understandings of autonomy and personal responsibility, nor a narrative of passive victimization result in true justice being served.

The story of Jennifer's struggles within the California legal system after her conviction illustrates the ways in which the underlying concepts of autonomy and personal responsibility on which the criminal legal system is founded prevents decision makers from being able to hear the nuanced story battered women's advocates seek to tell. Like many states, California prohibits duress as a defense to murder.⁷⁵ Thus though the 2005 amendment to Penal Code section 1473.5 made Jennifer eligible to pursue a habeas petition, the story her *pro bono* counsel could tell the court was severely limited. Rather than being able to demonstrate that Jennifer participated in the events that led to John's death out of a real and

⁷³ Myrna S. Raeder, *Gender-Related Issues in a Post-Booker Federal Guidelines World*, 37 McGeorge L. Rev. 691, 696 (2006).

⁷⁴ See *id*; Buel, *supra* note 12, 254.

⁷⁵ CAL. PENAL CODE § 26 (West 2008).

reasonable fear for her life and the life of her child, Jennifer's legal team instead focused on the more narrow issue of intent. They sought to prove that had an expert on intimate partner battering and its effects testified about the impact of Carl's abuse on Jennifer's thoughts, perceptions, and actions at the time of the crime the prosecution would not have been able to demonstrate beyond a reasonable doubt that Jennifer had the required intent to aid and abet Carl's crime and thus she would not have been convicted of second degree murder. In telling this story, the legal team sought to balance a narrative of victimization with one of autonomy. They were not making a diminished capacity claim, trying to convince the court that Jennifer was so victimized by Carl's abuse that she was mentally incapable of forming the intent to aid and abet his crime. Rather, they were trying to demonstrate to the court that when Jennifer took the actions she did – bringing Carl and his friends alcohol, kicking John and hitting him with the chain Carl provided, and not reporting the murder to the police – she had acted out of fear. Her intent had been to avoid Carl's abuse, not to assist in John's murder, and thus she lacked the requisite *mens rea* to be convicted of second degree murder. The court that heard Jennifer's 1473.5 habeas petition rejected it.

Jennifer's only other avenue for relief was parole, and her experience with the parole board highlights the Board's continuing focus on autonomy and personal responsibility when evaluating what course of action to take with a criminal defendant. Seeking to demonstrate Jennifer's suitability for parole by emphasizing her limited role in the crime, the fact that the crime occurred during a period of great stress in her life unlikely to recur,⁷⁶ and that she was a victim of domestic violence at the time of the crime, Jennifer and her counsel raised the issue of abuse in her parole hearing. In order to determine the veracity of a prisoner's statement that her commitment offense was related to her history of being abused, the Board has its investigations unit look into the prisoner's claims of abuse.⁷⁷ Investigators either substantiate, partially substantiate, or do not substantiate a prisoner's claims, or they decide that the facts available are too inconclusive to permit a determination. Jennifer was one of very few survivors to have her claims of abuse partially substantiated; substantiation requires that investigators working with limited budgets be able to track down witnesses to the abuse or documentation of the abuse from police departments, courts, or hospitals, corroboration that many survivors are unable to provide as abuse was often kept secret and any agency documentation destroyed after 7 to 10 years. In Jennifer's case, the Board's consulting expert on domestic violence found that she was indeed a victim of abuse and that Carl was "a sadist, not just a batterer." In fact, the expert stated that he had no doubt that BWS was a contributing factor in her life crime, and that due to the high level of control Carl exerted over her, he believed that Jennifer's culpability level at the time of the crime was close to zero. Citing to this report, the parole

⁷⁶ See CAL. CODE REGS. tit. 15 § 2402(d)(4) (2001) ("Motivation for Crime. The prisoner committed his crime as the result of significant stress in his life, especially if the stress has built over a long period of time.").

⁷⁷ See CAL. CODE REGS. tit. 15 §2269.1(a)(2); § 2830.

commissioner at her 2004 Board hearing found Jennifer suitable for parole for the first time since she had become eligible for parole nearly ten years earlier, but this finding was reversed by then-Governor Schwarzenegger, who stated that Jennifer's commitment offense made her too big of a safety risk to release from prison, twenty-two years after the crime took place.⁷⁸

Essentially, the Governor's finding put the focus of the parole decision on Jennifer's actions during the commitment offense and her personal responsibility for the crime. He did not acknowledge the abuse she had experienced, and characterized her actions as "especially heinous." He completely ignored the evidence in the record that showed that Jennifer was afraid for her life and only participated in the crime, to the limited extent that she did, because she was terrified that Carl would hurt her or the baby if she did not comply with his demands. In fact, the Governor pointed to Jennifer's continual denial of any intent to participate in John's death as evidence that she "fail(ed) to grasp the nature and magnitude of her murderous actions," and found that she was "unwilling or unable to fully come to grips with her true culpability." The Governor also pointed to Jennifer's history of drug use as a risk factor, finding that although she had maintained sobriety for over 15 years while incarcerated, "her lack of insight into her drug problem and the associated risk of relapse" weighed against her release on parole. Ultimately, however, the Governor put the weight of his decision on the commitment offense, stating, "The nature and gravity of this atrocious murder and Ms. (Johnson)'s active and knowing participation in it is enough for me to conclude that her release from prison at this time would pose an unreasonable public safety-risk."

The Governor's findings only make sense if the abuse that Jennifer experienced is completely removed from her story. His decision focused on her agency, treating her as if she were the liberal ideal, the fully autonomous actor freely making choices between right and wrong. This view of Jennifer's participation in the crime is incomplete.⁷⁹ By ignoring Carl's abuse, the Governor failed to take into account the ways in which Jennifer's agency was limited by victimization, and how her perception of alternative courses of action was subsequently limited as well. The Governor's mention of her drug use similarly ignored the contextual factors at play; his finding that Jennifer lacked insight into her drug use completely disregarded her stated reasons for using drugs, to numb the emotional pain of years of abuse by first her brother and then her husband. The Governor in fact referred to Jennifer's hospitalizations as a teenager for substance abuse and suicide attempts as reasons that her release from prison would create a risk to public safety, with no mention of

⁷⁸ Under the California Constitution, the Governor has the power to "affirm, modify, or reverse the decision of the parole authority." Cal. Const. art. V, § 8(b). Oklahoma, Maryland, and Ohio are the only other states to grant this power to their governors. See Adams, *supra* note 22, 235 n. 138.

⁷⁹ See Schneider, *Describing and Changing*, *supra* note 1, 221-22 ("The notion of agency carries with it assumptions of liberal visions of autonomy, individual action, individual control and mobility that are also inadequate and incomplete.").

their connection to the abuse she was experiencing at the time. The nuanced story Jennifer and her counsel had related to the Board, placing the actions she took in participation in the crime within the context of the victimization she was experiencing, was not heard by the Governor, who instead relied on a traditional narrative of autonomy to demand that Jennifer take complete responsibility for her actions.

The California Supreme Court's 2008 decision in *Lawrence* prohibited future parole board panels and governors from relying as heavily on the commitment offense to deny parole as Governor Schwarzenegger did in his 2005 reversal.⁸⁰ But Jennifer's 2008 parole hearing demonstrates how the replacement of a focus on commitment offense with one on insight left in place decision makers' insistence on personal responsibility in the parole context.⁸¹ At her 2008 parole hearing, Jennifer and her counsel again sought to convey that the actions Jennifer took during the crime occurred within the context of the extreme abuse Jennifer had experienced for the majority of her life. During the hearing, Jennifer clearly expressed remorse and responsibility for her role in John's death, acknowledging that she is a murderer because her actions and inactions led to John's killing. Jennifer explained to the panel that *at the time of the commitment offense*, she felt that she "didn't have any choices and ... (did) whatever [she] had to do to just survive." She stated that she would use drugs to numb herself so she "wouldn't feel anything" and would "push everything out of [her] mind like it just doesn't happen." She told the commissioners that through her participation in a battered women's support group, as well as through other self-help programming and personal reflection, she was now able to see that she did have choices at that time, and to take responsibility for her role in John's death.

The 2008 Board panel denied Jennifer parole, finding that the "only thing ... weighing heavily against (her) suitability" was her "attitude and (her) mental state about the crime, past and present." While the commissioners acknowledged Jennifer's history of abuse, they completely ignored the impact of that abuse on Jennifer's feelings, perceptions, and actions during the commitment offense. While Jennifer had stated that her motivation for participating in the crime was her fear of what Carl would do to her if she refused, the commissioners disagreed, finding that she intentionally wanted to hurt John. The head commissioner focused on her choice to tell Carl about John's attempted molestation, stating:

You had a choice to make and by making that choice, telling your husband, this is what (John) did to you while you were unconscious and you should know, whether you (Jennifer) consciously did this or not, I don't know, but what I do know is that during this period of time, your husband wasn't abusing you. He was abusing (John) and it took the heat off of you and put it on somebody else who you didn't like. You knew your husband. You knew what he was capable

⁸⁰ See *Lawrence*, 44 Cal. 4th 1181.

⁸¹ See *Shaputis*, 44 Cal. 4th 1241.

of. You knew what he had done to you in times of rage and anger. You knew that he had not treated others well in the past and, quite frankly, ma'am, any woman who has a, what appears to be a strongly heterosexual husband or man knows that if you tell that person this man made homosexual advances towards you when you were passed out and I saved you. I made him go away. I made him stop. What man wouldn't be upset? I think you knew that. And in that way, you minimized your conduct because I think there was some intention there on your part.

The commissioners thus took Jennifer's story of abuse and turned it into her motivation for intentionally wishing to hurt John. Rather than seeing Jennifer as the victim of Carl's abuse, they saw her as responsible for his violence.⁸² Because she had experienced Carl's abuse, she should have known what his response would be to being told about John's attempted molestation, and therefore once she told Carl about John's act, Jennifer became responsible for every one of Carl's actions that followed. Jennifer's refusal to take responsibility for Carl's actions, or to substitute her own intention to avoid further abuse by Carl with the commissioner's opinion that her intention was to deliberately harm John, demonstrated to the commissioners that she lacked insight into her criminal motivations and thus remained a danger to public safety.

The commissioners' focus on Jennifer's alleged intent to harm John highlights the parole authority's belief that people who participate in crimes are autonomous actors who must take personal responsibility for their actions, rather than being people who are motivated by the circumstances in which they find themselves and may do things they don't intend for a host of reasons, including fear.⁸³ The commissioners further demonstrated this focus on autonomy when they asked Jennifer why she didn't just leave Carl if the abuse was as bad as she said. The head commissioner pointed out that Jennifer ran away from home when she was a teenager to escape her brother's abuse, and that this had been a successful strategy, ignoring Jennifer's various hospitalizations for suicide attempts and her extreme substance abuse at the time. She then expressed incredulity that Jennifer didn't just run away again to escape Carl's abuse:

You left at 16 years old which is so young.... So you knew how to do that and yet, later, a few years later, you're with your husband, you say you had no choices. You could have ran (sic) away. You knew how to do that. I will tell you that authorities look for 16 year old girls. They

⁸² This type of blaming the victim for the batterer's violence is exactly why defense attorneys first sought to introduce expert testimony to educate judges and jurors. *See Schneider, Describing and Changing, supra* note 1, 199 ("(T)he rationale for admission of expert testimony on battered woman syndrome was to counteract stereotypes of battered women as solely responsible for the violence....").

⁸³ This is true despite the Board's own regulations that direct it to consider as mitigating in favor of parole evidence that at the time of the crime the prisoner was experiencing unusual stress or was a victim of domestic violence. *See CAL. CODE REGS. tit. 15 § 2402(d)(4); § 2402(d)(5).*

don't really care so much if a 19, 20 year old girl runs away with a baby.
You're an adult. Do what you want.

The commissioner's statement displays her belief that Jennifer was a completely autonomous actor who could have made the choice to leave Carl at any time and must therefore take responsibility for her choice not to leave. This belief ignores the context in which Jennifer was making choices, including Carl's severe abuse, Jennifer's dependency on him because of the baby, and the ways in which his control limited her ability to be financially independent enough to leave him. There were several ways in which Carl's abuse and its impact on Jennifer's choices was different from the previous abuse by her brother, particularly that while Jennifer's strategy of running away from Joseph's abuse had worked, when she tried to leave Carl he tracked her down and threatened everyone around until she agreed to come back to him, rendering that strategy not only ineffective but in fact dangerous. Additionally, the commissioner's statement that authorities don't look for young women who run away with babies shows an ignorance of parental kidnapping laws, a further obstacle to Jennifer's ability to leave Carl.⁸⁴

Ultimately, the parole board's 2008 denial highlights the injustice Jennifer experienced throughout the criminal legal system. Denied the opportunity to present evidence of abuse during her criminal trial, California's legislative efforts to provide incarcerated battered women the chance to explain the context of abuse in which their criminal actions took place did not result in relief for Jennifer. Her attempts to tell a story that balanced the agency she had during the commitment offense with the ways in which Joseph's and Carl's victimization of her limited that agency fell on deaf ears. Particularly in the parole arena, the criminal legal system's focus on autonomy and personal responsibility prevented decision makers from truly contemplating Jennifer's experiences of abuse and the ways in which they mitigated her culpability for the crime.⁸⁵

V. Conclusions: A Call for More Education and Research in the Parole Context

⁸⁴ See CAL. PENAL CODE §§ 207, 278 (West 2010).

⁸⁵ Jennifer was finally released from prison in 2011, after being incarcerated for nearly 27 years. A successful habeas challenge to the 2008 denial of parole resulted in a new parole hearing in 2011, at which commissioners were obliged to follow the findings of the court, which held that there was no evidence to support a finding of unsuitability based on the commitment offense or a lack of insight. Jennifer was fortunate to have a pro bono attorney file a habeas challenge on her behalf; while California law mandates attorney representation for lifers at parole hearings, the law does not provide access to counsel for subsequent challenges to denial of parole. See CAL. PENAL CODE §3041.7. See Part V, *infra*, for some theories as to why courts may understand domestic violence and its impact on battered women charged with and convicted of crimes better than does the parole authority.

The parole authority's decisions in regards to Jennifer's suitability for release exemplify its continuing reliance on concepts of autonomy and personal responsibility to deny battered women relief. While advocates may be achieving justice for battered women charged with crimes by successfully educating judges and juries on the ways in which survivors' experiences of abuse impact their autonomous agency at the time of the crime, incarcerated battered women and their attorneys continue to meet with limited success in front of parole boards and governors who are only interested in survivors' personal responsibility for the crime and don't believe their stories of victimization or refuse to see the relevance to the parole decision. Below are some potential reasons for the parole authority's continuing focus on personal responsibility to the detriment of battered women:

1. Cultural beliefs about criminal defendants and victimization. As Professor Martha Minow writes, "Criminal justice reformers and criminal defense attorneys have argued for more than two centuries that individual defendants--or defendants as a group--violate legal rules because of their own histories of deprivation. Further, goes the argument, criminal defendants suffer victimization at the hands of the state."⁸⁶ Professor Minow describes the protections created for criminal defendants during the Warren Court era and the subsequent backlash against criminal defendants during the 1970s and 80s with the creation of the victims' rights movement, which sought to recast public sympathy for crime victims, rather than their offenders.⁸⁷ Thus while criminal defendants' claims of victimization may be "powerful appeals for sympathy, solidarity, compassion and attention,"⁸⁸ they can also "be interpreted as attempts to avoid responsibility...."⁸⁹ Indeed, the head commissioner at Jennifer's 2008 parole hearing explicitly described Jennifer's story of abuse as an attempt to avoid responsibility for her participation in the crime: "If we are to believe all that (story of abuse), it kind of gives you a reason to just use your abuse by your brother, your abuse by your husband. ... And so I'm not really sure how much insight you have into what you actually did." By raising the abuse, even though the Board's own regulations direct commissioners to consider it as a mitigating factor in favor of parole, battered women risk commissioners' belief that they are trying to minimize or avoid responsibility for their actions.

Professor Schneider cautions that claims of victimization may be particularly problematic for women. "Victim claims for women trigger deep stereotypical assumptions of passivity, purity, and protectiveness, as well as deep resentment."⁹⁰ While battered women who can demonstrate that they fit the model of pure victim – i.e., white, middle-class stay-at-home mothers with no previous record of criminal behavior or substance abuse – may be able to effectively use a narrative of victimization to engender sympathy on the part of the parole board, women who fall

⁸⁶ Martha Minow, *Surviving Victim Talk*, 40 U.C.L.A. L. Rev. 1411, 1415 (1993).

⁸⁷ *Id.* at 1415-17.

⁸⁸ Schneider, *Feminism and the False Dichotomy*, *supra* note 2, 395.

⁸⁹ *Id.*

⁹⁰ *Id.*

outside this model – which is to say most battered women – may instead provoke feelings of resentment at their perceived attempts to deny personal responsibility.⁹¹

2. Personal and Professional Backgrounds of Parole Commissioners. California Penal Code section 5075 directs that in choosing Board members, “The selection of persons and their appointment by the Governor and confirmation by the Senate shall reflect as nearly as possible a cross section of the racial, sexual, economic, and geographic features of the population of the state.”⁹² There has been some debate among advocates about what this means and whether it is enforceable,⁹³ but a glance at the profiles of current commissioners shows that there is little to no diversity in the backgrounds of parole commissioners. Of the twelve commissioners currently sitting on the Board, almost all have had long professional careers in law enforcement, whether as police officers, sheriffs, correctional officers, or prosecuting attorneys.⁹⁴ A previous chairperson of the Board and later gubernatorial adviser on victims’ rights, Susan L. Fisher, had formerly been head of the Doris Tate Crime Victim’s Bureau; her brother was fatally shot by his girlfriend.⁹⁵ With this composition of commissioners, the Parole Board has granted parole at a rate somewhere between three and ten percent.⁹⁶ It is not difficult to imagine that a background in law enforcement or crime victims’ advocacy would make one unsympathetic to victimization claims made by “criminals.”

3. Education. A third possibility for the continuing reliance on a belief in autonomy and personal responsibility is a lack of education on domestic violence issues. California Rule of Court 10.462 sets out the minimal education requirements for trial court judges and subordinate judicial officers, requiring that they cover certain

⁹¹ See STARK, *supra* note 13, 144-67 (describing how historically, women who are better able to fit gender stereotypes about female innocence and passivity fare better in the legal system).

⁹² CAL. PENAL CODE § 5075(b) (West 2005).

⁹³ Liotta, *supra* note 60, 265, note 82.

⁹⁴ *Commissioners*, BOARD OF PAROLE HEARINGS, <http://www.cdcr.ca.gov/BOPH/commissioners.html> (last visited Feb. 24, 2013).

⁹⁵ Angela Woodall, *Oakland Singer Who Killed Club Owner Granted Parole on 12th Try*, OAKLAND TRIB., Feb. 4, 2010, available at

http://www.insidebayarea.com/ci_14338313?source=most_viewed (last visited Feb. 24, 2013); *Oceanside Woman Appointed to State Prison Board*, S.D. UNION-TRIB., Feb. 26, 2004, available at

<http://legacy.utsandiego.com/news/northcounty/20040226-1605-prisonboard.html> (last visited Feb. 24, 2013).

⁹⁶ *Long Shot*, This American Life (Jan. 8, 2010),

<http://www.thisamericanlife.org/radio-archives/episode/398/long-shot> (stating that of the six thousand life-term prisoners that go before the California parole board each year, only three percent are found suitable for parole); Liotta, *supra* note 60, 266 (“(T)he Board grants parole at a rate of less than 10 percent.”)(citing *In re Criscione*, No. 71614 at 8 (Cal. Super. Ct., Aug. 30, 2007) (unpublished)).

topics related to their position within the first several months of becoming a judge, followed by a mandatory 30 hours of continuing education every three years.⁹⁷ Rule 10.464(a) further clarifies the content of this education by requiring that:

Each judge or subordinate judicial officer who hears criminal, family, juvenile delinquency, juvenile dependency, or probate matters must participate in appropriate education on domestic violence issues as part of his or her requirements and expectations under rule 10.462. Each judge or subordinate judicial officer whose primary assignment is in one of these areas also must participate in a periodic update on domestic violence as part of these requirements and expectations.

It appears that judicial education on domestic violence is occurring, and that it may be having a real impact on battered women defendants' experiences in trial and appellate courts.⁹⁸

The California Penal Code similarly mandates that parole board members should receive training on domestic violence and intimate partner battering and its effects.⁹⁹ However, in contrast to judicial education requirements, the Penal Code calls only for "initial training" on these topics, rather than ongoing education.¹⁰⁰ Further, a review of the Board's 2012 schedule of meetings and trainings revealed no trainings explicitly on the topic of domestic violence; while some trainings were denoted simply as "New Commissioner Training," where training topics were listed, none included domestic violence or intimate partner battering and its effects.¹⁰¹ In fact, in a three-day training held from May 15-18, 2012 covering a broad range of topics, no time was devoted to training on domestic violence.¹⁰² The lack of attention to education on these topics for parole board members understandably may contribute to commissioners' seeming unawareness as to how intimate partner battering and its effects impacts domestic violence survivors at the time of the crimes for which they are convicted.

⁹⁷ Cal. Rules of Court 10.462 (2013), available at http://www.courts.ca.gov/cms/rules/index.cfm?title=ten&linkid=rule10_462 (last visited Feb. 24, 2013).

⁹⁸ In addition, numerous opportunities exist for judges to voluntarily receive education on domestic violence issues at conferences specifically aimed at judges and judicial officers. No similar voluntary conferences appear to exist for parole board members.

⁹⁹ CAL. PENAL CODE § 5075.5 (West 2006).

¹⁰⁰ *Id.* (emphasis added).

¹⁰¹ See 2012 Agendas, BOARD OF PAROLE HEARINGS, http://www.cdcr.ca.gov/BOPH/2012_meeting_agenda.html (last visited Feb. 24, 2013).

¹⁰² See May Meeting Agenda 2012, BOARD OF PAROLE HEARINGS, <http://www.cdcr.ca.gov/BOPH/docs/MayMeetingAgenda2012.pdf> (last visited Feb. 24, 2013).

4. Administrative Law. A final factor that may contribute to parole board members' apparent inability to take into context survivors' experiences of victimization might be the differences inherent in administrative law, as opposed to civil or criminal law. Parole hearings are administrative forums, generally presided over by non-judges and often even non-attorneys, where traditional rules of evidence frequently do not apply.¹⁰³ Battered women's advocates and feminist legal scholars have tended to focus on civil and criminal law remedies for battered women, ignoring the huge arena of administrative law. Further research would need to be conducted to explain how the differences between these types of law might contribute to survivors' low chances of success in front of the parole board, and the parole authority's apparent animosity towards victimization claims.

Battered women like Jennifer, who never had the opportunity to have judges and jurors consider their actions within the context of the abuse they experienced, are often serving prison sentences that are much longer than those they might receive today.¹⁰⁴ In many cases, their only hope of release is parole. Justice demands that parole boards take into account the abuse these women experienced and its impact on their actions during the commitment offense. Yet Jennifer's example demonstrates that legislation alone may not be enough to secure just parole outcomes for domestic violence survivors. California's penal code and administrative regulations already require parole commissioners to consider prisoners' history of abuse as a mitigating factor in favor of parole, but a continuing focus on personal responsibility often prevents commissioners from understanding the significance of women's stories of victimization.¹⁰⁵ A deeper change in the underlying culture of the parole authority, a shift away from the fetishization of personal responsibility currently evident in the parole authority's decision making, is necessary if battered women are finally to achieve justice.

¹⁰³ For example, California law allows victims and their next of kin to speak at life-term prisoners' parole hearings. Any victim of the prisoner's crimes, including both the life offense and any previous or subsequent crimes, may appear either in person, or by letter, video, or teleconference. The law provides that victims' statements will be heard last and that prisoners will not be allowed to respond. There are no hearsay rules in these proceedings; victims may say anything they choose and prisoners are denied any opportunity to confront inaccurate statements. See CAL. PENAL CODE §§ 3041.5, 3043.

¹⁰⁴ See Raeder, *supra* note 73, 694 (describing the possible success of introducing evidence about domestic violence in federal self-defense cases).

¹⁰⁵ In 2012, California passed Assembly Bill 1593, which amends Penal Code section 4801 to direct the parole board to "give great weight" to evidence that the prisoner experienced intimate partner battering at the time of the crime, and further specifies that presenting evidence of abuse may not be used to support a finding that the prisoner lacks insight into the crime. CAL. PENAL CODE § 4801 (West 2013). It remains to be seen whether one more legislative fix will actually provide the relief battered women deserve or whether the Board's culture of personal responsibility will find a way to continue to deny them parole.

